Before Rakesh Kumar Jain, J.

M/S NITESH ESTATES LTD.— *Petitioner*

versus

MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL OF HARYANA AND OTHERS—*Respondents*

CWP No. 21088 of 2018

September 07, 2018

(A) Micro, Small And Medium Enterprises Development Act, 2006—Ss.2(n) and 8(1) filing of memorandum under section 8(1) is not a condition precedent for a micro or small enterprises which otherwise satisfies such description under the act to be included with in the ambit of a supplier as defined under section 2(n)—Indur district Cooperative Marketing Society Ltd. V. M/s Microplex (India), Hyderabad and m/s Ramky Infrastructure Private Limited v. Micro And Small Enterprises Facilitation Council, relied upon.

Held, that I would humbly go by the reasoning given in the cases of The Indur District Cooperative Marketing Society Ltd. (Supra) and M/s Ramky Infrastructure Private Limited (Supra) Infrastructure Private Limited (Supra), recorded while interpreting Section 2(n) of the Act to hold that the complaint filed by respondent No.2 to respondent No.1 is maintainable. The first question is thus decided accordingly.

(Para 16)

(B) Micro, Small and Medium Enterprises Development Act, 2006—S.18(3)—Proceedings under Section 18(3) of the act can take place even if there is an arbitration clause in the agreement—Findings of Welspun Corp. Ltd. v. The Micro and Small, Medium Enterprises Facilitation Council, relied upon.

Held, that lastly as regards the issue of limitation, learned counsel for the respondents has rightly pointed out that major amount is of the year 2017 which is evident from the invoice appended with the petition and secondly, the question of limitation in this case is a mixed question of law and fact which can be adjudicated upon by the arbitrator appointed by the council.

(Para 20)

Abir Phukan, Advocate, for Kanwardeep Singh, Advocate,*for the petitioner.*

Ashish Chopra, Advocate,for the respondents.

RAKESH KUMAR JAIN, J.

(1) The prayers made in this petition are for the issuance of a writ in the nature of certiorari for quashing the notice dated 13.3.2018 and the order dated 7.6.2018 of the Micro and Small Enterprises Facilitation Councilof Haryana/respondent No.1 [hereinafter referred to as 'the Council] and the notice dated 24.7.2018 issued by the Arbitrator (Respondent No.3)appointed by the Council.

(2) In brief, the petitioner is a limited company engaged in the business of real estate whereas respondent No.2 is a real estate broker based in Gurugram. The petitioner and respondent No.2 entered into an agreement called "Channel Partner Agreement" on 23.7.2014 for a period of 8 months as per which respondent No.2 was entitled to a brokerage for arranging and negotiating the sale of flats in the projects of the petitioner in Bengaluru. The said agreement was terminated on 11.12.2014. Respondents No.2 sent a letter dated 3.01.2015 asking the petitioner to pay Rs.12,74,847/- towardsbrokerage andRs.6,00,00,000/- towards damages. Respondent No.2 applied for registration on 17.3.2016 as a micro enterprise under Section 8 of the Micro, Small and Medium Enterprises Development Act, 2006 [hereinafter referred to as 'the Act'] and was accordingly registered. Respondent No.2 filed a petition under Section 433(2) & (f) of the Companies Act, 1956 [for short 'the Act'] before the National Company Law Tribunal, Bengaluru [for short 'the NCLT'] in September, 2017 against the petitioner for winding up, which is pending. Respondent No.2 also raised a claim with registration No. SEBIP/MH17/0005372/1 on 28.12.2017 with the Securities and Exchange Board of India [SEBI] against the petitioner-company which has been dismissed. Respondent No.2 filed a petition bearing Claim Application No.460 of 2018 under the Act before respondent No.1 in which impugned notice was issued on 13.3.2018 to the petitioner to which reply was filed on 2.4.2018 but on 06.06.2018, respondent No.1 passed the impugned order andreferred the claim of respondent No.2 to respondent No.3, empanelled Arbitrator notified by the Government. The petitioner received a notice dated 24.7.2018 for appearance before respondent No.3 on 7.8.2018.

(3) This petition is filed on 13.8.2018 to challenge the impugned notice dated 13.3.2018 and order dated 7.6.2018

issued/passed by respondent No.1 and notice dated 24.7.2018 issued by respondent No.3, *interalia*, on the ground that respondent No.2 was got registered vide registration certificate on 17.3.2016 as a micro enterprise and as such the benefits of the provisions of the Act cannot be availed by respondent No.2 for the services rendered prior to its registration under the Act, respondent No.1 was not entitled to proceed in terms of the provisions of Section 18(3) of the Act in view of the Arbitration clause in the agreement, the claim is otherwise time barred because the agreement was terminated on 11.12.2014 and the claim petition No.460 of 2018 was filed on 11.01.2018.

(4) Learned counsel for the petitioner has referred to a decision rendered by this Court in the case of ***Gats Financial Reconstructions Ltd.*** *versus* ***Director of Industries-cum-Chairman, Industrial Facilitation Council and others***[1] and a decision rendered by the Bombay High Court in the case of ***M/s Faridabad Metal Udyog Pvt. Ltd.*** *versus* ***Mr. Anurag Deepak and M/s Bharat Petroleum Corporation Ltd.***[2].

(5) In support of his second submission about the arbitration clause in the agreement, reference is made to a decision of the Bombay High Court in the case of ***M/s. Steel Authority of India Ltd. and another*** *versus* ***Micro, Small Enterprise Facilitation Council, through Joint Director***[3] and another decision rendered by the Bombay High Court in the case of ***M/s Hindustan Wires Limited*** *versus* ***Mr. R.Suresh and others***[4].

(6) It is also submitted that respondent No.2 has set up the claim of admitted liability of Rs.11,54,678/- in the petition filed under Section 433(e) & (f) of the Act before the NCLT whereas, the claim before respondent No.1 has been set up for an amount of Rs.1,32,44,191/- with interest.

(7) Learned counsel for respondent No.2, while contesting this petition on the facts given by the petitioner, has submitted that even according to the petitioner, respondent No.2 has been registered as a micro enterprise vide registration certificate dated 17.3.2016 and has made the claim of the amount accrued before its registration but according to him registration is only a qualification and is not a *sine qua non* for maintaining the application before respondent No.1 and

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[1] (2016) 183 PLR 776
[2] 2013 (7) Bom CR 631
[3] AIR 2012 Bom 178
[4] 2013 SCC Online Bom 547

has relied upon a decision rendered by the Telangana and Andhra Pradesh High Court in Writ Petition No.35872 of 2012 titled as ***The Indur District Cooperative Marketing Society Ltd.*** *versus* ***M/s Microplex (India), Hyderabad and another*** decided on 27.10.2015 and a decision rendered by the Delhi High Court in W.P. (C) 5004 of 2017 titled as ***M/s Ramky Infrastructure Private Limited*** *versus* ***Micro and Small Enterprises Facilitation Council and another*** decided on 04.07.2018. He has also relied upon the decisions rendered by this Court in the case of ***Welspun Corp. Ltd.*** *versus* ***The Micro and Small, Medium Enterprises Facilitation Council, Punjab and others***[5] and ***The Chief Administrative Officer, COFMOW*** *versus* ***The Micro & Small Enterprises Facilitation Council of Haryana and others***[6].

(8) As regards limitation, it is submitted that even the petitioner has not come to the Court with clean hands because it had filed an application before the NCLT in CP No.248 of 2015 filed by respondent No.2 to dismiss the same on the ground that respondent No.2 is pursuing his complaint for the alleged same amount under the Act before respondent No.1 and aboutthe difference in amount mentioned in the company petition and the complaint. It is also submitted that the company petition was filed in the year 2015 in respect of four invoices of the months of October and November, 2014 whereas the complaint includes the amount of the 5th invoice of the month of May, 2017 of an amount of Rs.94,05,173/. It is further submitted that the question of limitation would be thus the mixed question oflaw and fact which could be decided by the Arbitrator.

(9) I have heard learned counsel for the parties and perused the record with their able assistance.

(10) Before I advert to the merits of the case, it would be appropriate to refer to some relevant provisions of the Act such as Section 2(n), 8, 18and 24 which read as under: -

> "**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 Development Corporation, being a company, registered under the Companies Act,

[5] 2012(2) PLR 195
[6] 2015(2) PLR 692

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 renderedservices which are provided bysuch enterprises."

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

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, 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 undersub-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, 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 Entrepreneur's Memorandum shall within one hundred and eighty days from the commencement of this Act, file the

memorandum, in accordancewith the provisions of this Act.

2. The form of the memorandum, the procedure of its filing and other matters incidentalthereto 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 memorandumshall be filed by a medium enterprise shall be such as may be specified by notification, bythe 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 purposes of this section, the procedure notified by the Central Government under sub-section (2)."

"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 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 upthe 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 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 inIndia.

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

"24. Overriding effect.-

The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(11) As regards the first question, as to whether the complaint filed by respondent No.2 before respondent No.1 in respect of amount due before the registration of respondent No.2 under Section 8 of the Act, this Court in the case of ***Gats Financial Reconstructions Ltd. (Supra)*** has observed that *"the perusal of record reveals that reference relates to October 2005 when the MSMED Act was not in force so question of applicability of the provisions of the MSMED Act retrospectively does not arise as the Act came into force i.e. 18.07.2006 so question of answering the reference does not arise. Furthermore the provisions of the MSMED Act cannot be made applicable for the services done prior to the registration of the petitioner with the respondents No.1 and 2".* In the case of ***M/s Faridabad Metal Udyog Pvt. Ltd. (Supra),*** it was held that *"it is clear that dispute between the parties to these proceedings arose much prior to the said Act having came into force. In my view, remedy under Section 18 to refer the dispute to Micro and Small Scale Enterprises Facilitation Council would not apply to the dispute arising out of existing arbitration agreement between the parties".* It was also held that *"admittedly these first four petitioners were registered as micro small enterprises much after the dispute had arisen between the parties. In my view, the said provisions would not apply with retrospective effect to the past transaction and thus provisions of the said MSME Act have no applicability to the facts of this case".*

(12) However, in the judgment relied upon by the respondents in

the case of ***The Indur District Cooperative Marketing Society Ltd. (Supra),*** the Telangana and Andhra Pradesh High Court has made the following observations: -

> "26. It is relevant to note that the Act of 2006 was enacted for the benefit of micro, small and medium enterprises, but Chapter V thereof relates to delayed payments to micro and small enterprises only. Similarly, supplier is defined under Section 2(n) in the context of only micro or small enterprises and not a medium enterprise. It is in this context that Section 8(1) of the Act of 2006 becomes relevant. This provision reads as under:
>
> '8. Memorandum of micro, small and medium enterprises. -
>
> (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
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> (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, or 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):
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> Provided that ……..
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> 27. It is therefore clear that a micro or small enterprise is not mandatory required to file a memorandum with the authority specified by the State Government or the Central Government, as the case may be, and discretion is given to it in this regard. However, Section 2(n), in so far as it defines a supplier to mean a micro or small enterprise is followed with the qualification that it should have filed a memorandum with the authority referred to in sub-section (1) of Section 8. However, the inclusive part of the definition under Section 2(n)(iii) states that any company, co-operative society, trust or body, by whatever name called, and engaged in selling goods produced by micro or small enterprises and

rendering services which are provided by such enterprises, would also qualify as a supplier. In the context of this inclusive part of the definition, there is no requirement that the micro or small enterprise, whose goods are being sold or whose services are being rendered by the company, co-operative society, trust or body, should have filed a memorandum under Section 8(1) of the Act of 2006.

28. It would be anomalous to interpret thedefinition to mean that for a micro or small enterprise to be a supplier, it must mandatory file a memorandum under Section 8(1), but any company, co-operative society, trust or body, which either sells goods or renders services of a micro or small enterprise, would automatically qualify as a supplier, irrespective of whether or not such micro orsmall enterprise has itself filed a memorandum under Section 8(1)! Given the totality of the definition and the scheme and import of the enactment, this Court is inclined to accept the submission of Sri Ashok Anand Kumar, learned counsel, that the phrase which has filed a memorandum with the authority in Section 2(n) is only qualifying and does not curtail the scope ofthe definition.

29. Therefore, filing of a memorandumunder Section 8(1) of the Act of 2006 is not acondition precedent for a micro or small enterprise, which otherwise satisfies such description under the Act of 2006, to beincluded within the ambit of a supplier as defined under Section 2(n). The first respondent company in each of these cases would therefore qualify as a supplier under the said definition and their claims before the Council did not stand invalidated on this ground.

30. Registration of the first respondent company in these cases in the erstwhile State of Andhra Pradesh in the year 2011 would not have the effect of giving retrospective operation to the Act of 2006, as the supplies in question were made after the year 2006 and not prior thereto. As long as these companies were suppliers within the meaning of Section 2(n) of the Act of 2006 and were located within the jurisdiction of the Council, as required by Section 18(4), the Council had jurisdiction to deal with their claims. In this regard it is relevant to note that what is required is only that they are located within the jurisdiction

of the Counciland not that they should be registered or have their registered office within such jurisdiction. It is not in dispute that the first respondent company in each of these cases did have its administrative office located within the jurisdiction of the Council and therefore fulfilled the requirement of Section18(4) of the Act of 2006."

(13) In the case of ***M/s Ramky Infrastructure Private Limited (Supra),*** the Delhi High Court has made the following observations:-

"24. An examination of Section 2(n) of the Act indicates that it is in two parts. The first limb defines a supplier to mean a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 of the Act andthe second limb refers to (i) National Small Industries Corporation; (ii) the Small Industries Development Corporation of aState or a Union territory; and (iii) a company, co-operative society, trust or a body engaged in selling goods produced bymicro or small enterprises and rendering services which are provided by such enterprises. The two limbs are joined by the word "and". Usually, this would mean that the conditions as specified in both the limbs must be satisfied. However, it is obvious thatthe same is not the apposite way to read Section 2(n) of the Act.

This is so because, admittedly, neither the National Small Industries Corporation - which is a Government of India Enterprise - nor the Small Industries Development Corporation of a State or a Union territory is required to file a memorandum as referred to under Section 8(1) of the Act. Thus, the twolimbs of Section 2(n) of the Act are requiredto be read to exhaust all categories. The second limb, which specifies three categories to fall within the definition of the term supplier', is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. Thus, the term supplier' as defined under Section 2(n) of the Act must be read to comprise of four categories: (i) micro or *small enterprises that have filed the Memorandum under Section 8(1) of the Act;*

(ii) National Small Industries Corporation;

(iii) Small Industries Development Corporation of a State or a Union territory; and (iv) a company co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises.

26. As noticed above, there is no dispute that GCIL would fall within the definition of micro/small enterprise even at the material time when it had executed the contract with RIL. GCIL is a company and the services provided by GCIL are clearly services rendered by a micro/small enterprise and, therefore, GCIL - being engaged in supply of services rendered by a micro/small enterprise - would fall within the fourth category of entities that are included as a supplier': that is, a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises. It is not necessary for such entities to have filed *the Memorandum under Section 8(1) of the Act.*

(14) Interestingly, in the case of ***Gats Financial Reconstructors Ltd. (Supra)***, the writ petition was filed for seeking a writ in the nature of certiorari for quashing the order of the Council by which the reference regarding interest on delayed payment filed by the petitioner therein under the provisions of the Act was declined. In the said case, the reference was ofOctober, 2005, the petitioner was got registered on 28.5.2010, theapplications for reference was moved on 11.7.2011 and 16.8.2011 and the Act came into force w.e.f. 18.7.2006. On these facts, the learned Court below framed the question as to whether the provisions of the Act would apply for the acts done prior to the coming into force of the act and whether the benefit of the provisions of Act can be given to the petitioner therein for the services rendered prior to its registration? In this background, the observation was made that the act cannot apply retrospectively and theprovisions of the Act cannot apply for the services rendered prior to the registration.

(15) In the case of ***M/s Faridabad Metal Udyog Pvt. Ltd. (Supra)***, the petition was filed under Section 14 of the Arbitration and Conciliation Act, 1996 [for short 'the Act of 1996'] seeking a declaration that the mandate of Arbitrator stood terminated in terms of Section 14 of the Act of 1996 and thepetitioner is entitled to approach the Council constituted under the Act as thesaid Council is entitled to adjudicate the dispute. In the said case also the transactions were much

prior to the day on which the Act itself came into force and the registration of the petitioner under the provisions of the Act was much after the said transaction. In this background, it was held that since the dispute between the parties is prior to the enactment of the Act, therefore, remedy under Section 18 of the Act to refer the dispute to the Council would not apply to the dispute arising out of the existing arbitration agreement between the parties. However, in the case of ***The Indur District Cooperative Marketing Society Ltd. (Supra),*** the stand of the petitioner therein was that the respondent-company would not fall within the definitionof "supplier" in terms of the provisions of the Act as it was got registered at the time when the supplies were made whereas the registration was obligatory for invoking the provisions of the Act. In the said case, the Court interpreted Section 2(n) of the Act which define "supplier" and the discussion is contained in para No.27 to 30 of the said case (already reproduced above) holding that Section 2(n) of the Act is only qualifyingand does not curtail the scope of the definition. Similar view has been taken by the Delhi High Court in the case of ***M/s Ramky Infrastructure Private Limited (Supra)*** while defining Section 2(n) of the Act and discussed the same in para No.24 (already reproduced above).

(16) I would humbly go by the reasoning given in the cases of ***The Indur District Cooperative Marketing Society Ltd. (Supra)*** and ***M/s Ramky Infrastructure Private Limited (Supra)***, recorded while interpreting Section 2(n) of the Act to hold that the complaint filed by respondent No.2 torespondent No.1 is maintainable. The first question is thus decided accordingly.

(17) As regards the second issue that the proceedings under Section 18(3) of the Act cannot proceed in view of an arbitration clause in the agreement between the parties, learned counsel for the petitioner has relied upon a decision rendered in the case of ***M/s. Steel Authority of India Ltd. and another*** *(Supra)* in which question was raised about the jurisdiction of the Council to entertain a reference under Section 18 of the Act. In the said case, the supplier issued notice to the petitioners therein of invoking clause of arbitration and proposed to appoint an Arbitraror to settle the dispute through arbitration but the petitioners therein appointed somebody else as an Arbitrator on which the dispute was raised by the supplier that either the matter would go to the arbitrator chosen by it or it would go before the Council. The petitioners therein declined to enter into another mode of settlement of dispute before the Council since it had already appointed the Arbitrator

but the supplier went ahead and filed the reference before the Council. The petitioners therein filed an objection before the Council contending that the matter cannot be entertained by it in view of the Arbitration and Conciliation Act, 1996 and since the Council decided to proceed with the matter, the writ petition was filed to restrain the Council from entertaining the reference. In the said case, the relevant observations were made in para Nos.11 & 14, which are reproduced as under: -

> "11. Having considered the matter, we find that Section 18 (1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Addl. Government Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allows any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Section 15 to 23 including section 18, which provides for forum for resolution of the dispute under the Act-would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Section 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and

> Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said thatbecause Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitrationagreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed bythe provision of the Arbitration Act, 1996.
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> 14. In the circumstances, we hold that respondent No.1 Council is not entitled to proceed under the provisions of Section 18 (3) of the Act in view of independent arbitration agreement dated 23.09.2005 between the parties. The petitioners and respondent no.2 shall, however, participate in the conciliation, which shall be conducted by respondent No.1-Council under theprovisions of Section 18 (1) and (2) of the Act. Respondent no.1-Council shall complete the process of conciliation within aperiod of two weeks from the date the parties appear before it. The parties are directed to appear before respondent no.1-Council on 25.10.2010. Rule made absolute in the above terms. No order as to costs."

(18) The other decision relied upon by the petitioner was in the case of ***M/s Hindustan Wires Limited (Supra)*** in which the petition was filed under Section 14 of the Arbitration and Conciliation Act, 1996 by the petitioner therein to seek a declaration that the mandate of the Arbitrator stood terminated and the petitioner therein is entitle to approach the Council under the Act. In this case, the relevant observations have been made in para 42 of the judgment, which are reproduced as under:-

> "As far as reliance placed by Mr. Mehta, learned Counsel on the provisions of Micro, Small, Medium Enterprises Development Act, 2006 and on the judgment of Punjab & Haryana High Court in the case of Welspun Corporation Ltd.(supra) in support of the plea that the petitioner having registered under the provisions of the said Act and

thus dispute, if any, between the parties is required to be resolved by the Council appointed under the provisions of the said Act is concerned, reference to the judgment of the Division bench of this court in case of M/s Steel Authority of India Ltd. (supra) would be useful. The division bench of this court in that matter has held that it cannot be said that because Section 18 which provides for a forum of arbitration, an independent arbitration agreement entered into between the parties will cease to have effect. It is held that there is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996. It is held that there is no provision in that Act which negates or renders an arbitration agreement entered into between the parties ineffective. In my view, there is no substance in the submissions made by Mr. Mehta, learned Counsel appearing on behalf of the petitioner that after petitioner having registered itself under the provisions of the said Act of 2006, the present proceedings could not be proceeded with under the arbitration agreement entered into between the parties or that dispute could be resolved only by Council appointed under the provisions of the said Act of 2006. In my view, the proceedings under the existing arbitration agreement between the parties would not be affected by enactment of the said Act and would continued to be governed by the provisions of the existing agreement between the parties and would be governed by the provisions of the Arbitration and Conciliation Act, 1996. In my view, there is no merit in the submissions made by Mr. Mehta, learned Counsel appearing for the petitioner."

(19) On the other hand, learned counsel for the respondents has relied upon a decision of this case of ***Welspun Corp. Ltd. (Supra)*** in which the Council had rejected the plea of the petitioner therein that the agreement provided for a reference to arbitration under the Arbitration and Conciliation Act, 1996 and that the dispute shall not be adjudicated before the Council. The Court has discussed Sections 18 and 24 of the Act and held that the Council can act as an arbitrator or appoint

the same despite an arbitration clause in the agreement. The relevant discussion and findings in the said judgment are in para Nos.5, 6 & 7, which read as under:-

> "5. Learned counsel would contend that the reading of Section 18 of the Act, 2006makes it clear that insofar as it CWP No.23016 of 2011 (O&M) and connected cases [6] makes provision for conciliation,the provisions of Sections 65 to 81 of the Act, 1996 as applicable, it should be so read that even the provision under Section 80 ofthe Act, 1996 that bars a Conciliator for acting as an Arbitrator must be applied. According to the learned counsel, Section 18(2) itself allows for a full applicability ofSections 65 to 81 and therefore, the non- obstante clause in Section 18(1) ought notto be used to eclipse Section 80 itself. In my view, this is not a correct reading of Section 18. The Act, 2006 itself contains provisions, which are at once consistent with the Act, 1996. It must be rememberedthat the Act, 2006 is also an Act of Parliament and it is a special enactment meant for a particular class of persons only namely the Micro, Small and Medium Enterprises and for facilitating the promotion, development and enhancing their inter se competitiveness. The Act insofar as it contains a specific provision for conciliation and arbitration is alive to the issue that it could come into conflict with some of the provisions of the Act, 1996. There could also be certain other conflicts relating to recovery modes provided under other Central enactments. Consequently, there is an express provisionunder Section 24, which spells out an overriding effect of the Act. If there was noconflict or likely to be a conflict, it will be even futile to introduce such a provision. We must read into every section of an enactment of Parliament, a wisdom, whichthe Courts are bound to apply as having been exercised by the Legislature.
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> Section 18(3) provides that where a conciliation initiated under Section 18(2) is not successful and stands terminated without any settlement between parties, the Council shall itself take up the dispute for arbitration. Therefore, when there is an express provision under Section 18(3) providing for conciliator to act as an Arbitrator, it will be untenable to contend that Section 18 will still apply. The restrive

application to Section 18(3) is sought to be made by the counsel by contending that this clause will apply only in cases where thereis no agreement between the parties for an arbitration in their own contract. According to the learned counsel, since the contract specifies that the parties shall be at libertyto seek for an arbitration under the Act, 1996, the said contract must prevail. If the statute does not save the sanctity of specific terms of contracts by making express provision that it shall be subject to any contract to the contrary, it must be so readthat the legislation must prevail over the individual volition of parties.

6. In this case, if there was a contractbetween the parties to have an arbitration made under the Act, 1996 and the Conciliator had proposed to terminate its conciliatory postures, it was competent forit to treat itself as an Arbitrator and proceedthe arbitral process in the manner contemplated under Section 18(3). I cannotread Section 18(3) in the manner canvassed by the learned counsel that Section 18(3) will apply only if there is no contract between the parties for a reference to arbitration under the Act, 1996. On the contrary, the latter part of Section 18(3) thatthe provisions of the Act, 1996 would applyto a dispute as if the arbitration was in pursuance of an arbitration agreement shall be read in such a way that it is applicable only to a situation where the Council deems fit to refer to any institution for an alternate dispute resolution services for such an arbitration. Section 18(3) provides for two procedures: (i) on termination of conciliation, it can either take up the arbitration itself or (ii) refer the matter to arbitration as though there is an arbitral agreement between the parties. It is possible for a Council to make a reference to arbitration even in the absence of an arbitration agreement. If there is an arbitration agreement between the parties, it only means that the power is still availablewhen the Council, without invoking its ownpowers. It can simply observe that in termsof the agreement between the parties, the parties shall be at liberty to have an arbitration done under the Act, 1996. It does not exclude a construction that whenever there is an arbitration clause, the Council does not have a power to act as anArbitrator. Such an interpretation would render nugatory the first portion of Section 18(3) that allows it to proceed to arbitrate. I would,

therefore, uphold the specific reasoning, which the impugned ordermakes in stating that:

"If Section 18 of the Act, 2006 provides for a mode of resolution of a dispute wherein this Council is to adjudicate acting as an arbitrator in terms of the Act, 1996, it would not be open for any party to oust the said jurisdiction of this Council which has been vested in terms of Section 18(3) of the Act, 2006 merely by creating a mutual agreement. The Agreementcannot override the provisions of theAct, 2006 in view of the aforesaid fact."

7. The learned counsel states, to a specific query as to why the petitioner has a problem for obtaining an adjudication through the Council as an Arbitrator, would contend that the contract between the parties contemplates appointment of an Arbitrator by each party and a provision for appointment of an Umpire, but that remedywill be lost if the Council itself has to act asan Arbitrator where his own individualvolition comes to nought. The counsel would further contend that there are otherstringent provisions of the Act, 2006, suchas requirement of having to deposit 75% of the amount determined by the Arbitrator through an award for an application under Section 19, which an application under Section 34 of the Act, 1996 does not enjoin.This points out to the inconsistency in provisions between the Act, 2006 and the Act, 1996 but the Act, 2006 still obtains primacy of its application through the overriding effect, which we had stated above. If an arbitration made under Section 18 proceeds to an award directing the payment between the parties, the manner ofsetting aside the award cannot happen under Section 34 of the Act, 1996 but it hasto be still only in the manner contained under Section 19 of the Act, 2006. Inevitably, it has to be so and if an express provision in a statute would contain a non-obstante clause and overriding effect of the Act, a full play to the same Act must be given and it shall become possible to applythe Act, 1996 only to such matters of procedures as the Act, 2006 itself does not provide for. For instance, the Act, 2006 contains no procedure for conducting arbitral process; the Act, 2006 does not contain provisions for challenging the Arbitrator's impartiality; the Act, 2006 does not still contain any

provision for enforcement of process where an award was obtained in a foreign jurisdiction. The above are merely illustrative and not exhaustive. But in respect of provisions relating to appointment of Arbitrator or commencement of arbitral process, the binding nature of arbitral award and the manner of redressal of a person not satisfied with the award would perforce have toconform to the provisions of section contained in Sections 18 and 19 of the Act, 2006. I would, therefore, find that if the Council found that the Act, 2006 empowers it to act as an Arbitrator, I would not find any error in the said order."

(20) After going through the aforesaid decisions, relied upon by both the parties, I would adopt the reasoning giving in the case of ***Welspun Corp. Ltd. (Supra)*** to decide the second issue against the petitioner.

(21) Lastly as regards the issue of limitation, learned counsel for the respondents has rightly pointed out that major amount is of the year 2017 which is evident from the invoice appended with the petition and secondly, the question of limitation in this case is a mixed question of law and fact which can be adjudicated upon by the Arbitrator appointed by the Council.

(22) No other point has been raised.

(23) Thus, in view of the aforesaid discussion, I do not find any merit in the present petition and the same is hereby dismissed though without any order as to costs.