WHEN LAWS COLLIDE: RESOLVING MSME ACT - ARBITRATION ACT DISPUTES IN INDIA

—*Radhika Bishwajit Dubey*[*] *& Karan Khetani*[**]

ABSTRACT

The Micro, Small and Medium Enterprises Development Act, 2006 was introduced with a view to make legal procedures less cumbersome for enterprises that would be registered under the Act. In order to achieve this, the Act provided for the establishment of a Micro and Small Enterprise Facilitation Council, and a separate dispute resolution mechanism is also stipulated under section 18 of the same Act. This resolution mechanism provides firstly, for mediation (earlier, this was conciliation) and in the event that mediation fails, the parties are to undergo arbitration. These provisions, while introduced for an appreciable reason have given rise to a host of issues, both in their legal implications, and in their practical implementation. The provisions have created and vested many powers with the Micro and Small Enterprise Facilitation Council. The council is instrumental in the resolution of disputes, and any issues that arise with the functioning of the council is directly felt on the parties. Additionally, in situations where parties have entered into an agreement with a pre-existing arbitration agreement, the provisions of this Act collide with those of the Arbitration and Conciliation Act, 1996, giving rise to legal ambiguities. This article explores various such issues that have arisen as a result of the law, the interpretation of the law and the implementation of the same.

1. INTRODUCTION

The Allahabad High Court, in a judgement issued earlier this year,[1] has stated that a party, in order to challenge an arbitral award made by way of proceedings under the Micro, Small and Medium Enterprises Development

[*] Ms Radhika Bishwajit Dubey is the Standing Counsel for the High Court of Delhi and Additional Standing Counsel for MCD. The author may be reached at office@bishwajitdubey.com.

[**] Mr Karan Khetani is an Advocate at the High Court of Delhi.

1. *Sahbhav Engg Ltd v MSEFC, U.P.* 2024 SCC OnLine All 2384.

Act, 2006 (hereinafter, '***the MSMED Act***'),[2] must approach the Court under section 19 of the Act, read with section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, '***the AC Act***').[3] The question that this decision of the High Court appears to be an answer to, is just one of the many that have arisen as a result of the conflict between the provisions of the MSMED Act and the AC Act. Both the acts have laid out different procedures for dispute resolution by arbitration, and naturally, there have arisen questions as to the reconciliation between the two. In a series of judgements, as will be discussed, the Courts have stated that the provisions of the MSMED Act would override the AC Act, however, there remain many legal and practical considerations regarding this stance, and the same have been addressed in this paper.

To briefly outline the paper, the authors will, in the *first* section, in an attempt to trace the evolution of the dispute, first examine the two acts, namely, the MSMED Act, and the AC Act, and focus on the relevant provisions of both that have given rise to the current difficulties. This section will then explore the law as it stands today, by referring to the above-mentioned series of judgements. In the *second* and *third* sections, the authors will critique the current legal position, on two grounds respectively – the legal implications of the interpretation of the Courts, and the practical difficulties in implementing the same. In the fourth section, the authors will provide a potential way forward, keeping in mind both the intention of the legislature behind enacting the MSMED Act, as well as the practical difficulties arising out of some of the provisions therein. *Finally*, the authors will conclude.

2. UNTANGLING THE WEB: MSMED ACT AND THE AC ACT

The MSMED Act, which came into effect in the year 2006, was aimed at "facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto."[4] A bare reading of the provisions of this Act makes clear, the intention behind the MSMED Act, to provide protection and support for the Micro, Small and Medium Enterprises (hereinafter, '***MSMEs***').

2. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006).
3. Arbitration and Conciliation Act 1996 (26 of 1996).
4. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), Long Title.

Prior to the enactment of this legislation, there was no comprehensive framework that dealt exclusively with the MSMEs. There was the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993,[5] (the 1993 Act) but even this was found to be inadequate as it did not, for example define a medium scale enterprise. Thus came the MSMED Act in 2006, which by virtue of section 32, repealed the 1993 Act.

The MSMED Act is a special, beneficial legislation, which brought about some changes in the MSME framework. For example, the Act provides for the establishment of a National Board, which has as one of its primary functions, to advise the Central Government on any matter that is related to facilitating the promotion and development of the MSMEs.[6] It also defined clearly, 'small', 'medium' and 'micro' enterprises. Another change it brought in, which is the subject matter of the conflict between this Act and the AC Act, is the dispute resolution mechanism as envisioned under it.

Chapter V of the MSMED Act, deals with situations where the payments due to the Micro and Small Enterprises are delayed, and imposes strict liability on the buyers.[7] The specific dispute resolution mechanism is culled out in section 18 of the MSMED Act. By way of this provision, the MSMED Act stipulates Alternate Dispute Resolution as the mechanism for resolution of any disputes that arise from a contract between a micro or small enterprise, being the supplier, and any buyer thereof.

The MSMED Act recognised the limitations of the usual route of cumbersome legislation, and the related advantages of the alternate methods of dispute resolution, such as arbitration. The intention of the legislation is commendable, in that it seeks to prevent a situation wherein a micro or small enterprise, already burdened by non-payment on part of the buyer, is also forced to go through the lengthy and expensive process of litigation. In furtherance of the same intention, the MSMED Act has provided for a Micro and Small Enterprise Facilitation Council (hereinafter, the '***Facilitation Council***'),[8] which would have the authority to hear the disputes referred to it by any party, under section 18(1) of the MSMED Act. Section 18(2) of the MSMED Act provides that on receipt of any reference of a dispute under 18(1), the Facilitation Council would have the authority to either conduct

5. Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act 1993 (32 of 1993).
6. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 6.
7. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401, para 37.
8. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 20.

mediation proceedings, governed by the Mediation Act, 2023,[9] or refer it to a mediation service provider for the same. Section 18(4) further states that where this method fails, the Council would have the authority to conduct arbitration proceedings by itself, or refer the dispute to an institution for the same, both required to be governed as per the provisions of the AC Act. Thus, this provision seeks to impose mandatory mediation on the parties to the dispute, and where that fails, arbitration, in the manner provided by the MSMED Act.

This provision has given rise to many questions, not the least amongst them being with respect to the enforceability of a contract between the disputing parties, which already provides for arbitration between them, in case of a dispute. The arbitration agreements enclosed within a contract also include stipulations as to the appointment of the arbitrator, and the procedure that would be followed in case the arbitration clause is invoked. In light of the provisions of the MSMED Act, there is a possibility of a clash between the two sets of provisions for arbitration, one provided in the Act itself, and one enshrined in an arbitration clause in the contract between the parties involved, governed by the AC Act. Indeed, this clash, as to which of the two would override the other, has been the subject matter of various writ petitions filed before the courts, and a decisive answer was given in a judgement last year.[10]

This judgement, hereafter referred to as '*Gujarat State Civil*', delivered as a result of seven appeals involving common questions of law, essentially sought to answer three questions. *Firstly*, whether the provisions of Chapter V of the MSMED Act would override the provisions of the AC Act. *Secondly*, whether parties to a contract which also provides for an arbitration agreement between them would be allowed to approach the Facilitation Council under the MSMED Act, and *lastly*, whether in light of section 80 of the AC Act, the Facilitation Council under the MSMED Act could potentially act as both the Conciliator and the Arbitrator.

In answering the first question, the Court looked into the scope of the two acts, in an attempt to identify their objectives, and found that the MSMED Act is a special legislation, aimed at specifically benefitting the MSMEs.[11] On the other hand, the AC Act was considered to be a more consolidatory legislation, which aimed to provide for a fair procedure for domestic and international arbitration, as well as other forms of dispute resolution such

9. Micro, Small and Medium Enterprises Development Act 2006 (27 of 2006), s 18(3).
10. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401.
11. ibid at para 42.

as conciliation. Thus, seeing as the MSMED Act is a special act and the AC Act is a general one, the court, relying on the principle of *generalia specialibus non derogant*, held that the provisions of the MSMED Act would override those of the AC Act.[12] Further, section 24 of the MSMED Act is a non-obstante provision, stating that the MSMED Act would have overriding effect on provisions of the other Acts to the contrary.[13] Regarding the second question, the Court, once again looking at the objectives of the MSMED Act stated that a mere private agreement between two parties could not override the provisions of a statute, and a special one at that. Thus, the arbitration agreement between the parties would also be overridden by the MSMED Act.[14] The final question was also answered in a similar fashion, that is, by giving effect to the provisions of the MSMED Act, and placing reliance on section 24 of the same, once again. Thus, section 24 of the MSMED Act would override section 80 of the AC Act, and there would be no bar on the Facilitation Council to act as both the conciliator as well as the Arbitrator.

Thus, the settled position of the law gives effect to the MSMED provisions over all other provisions to the contrary. In arriving at this decision, the court in this case placed reliance on the decisions given in earlier cases, and specially relied on *Silpi Industries v Kerala SRTC* (hereinafter '*Silpi Industries*') case,[15] where also the Apex court concluded that the MSMED Act, being a special act, would have an overriding effect over the AC Act, a general act.

However, these decisions of the courts, in an attempt to settle the law, may have had the opposite effect, in that they have now given rise to certain ambiguities with respect to the enforcement of the law. These ambiguities have been divided into legal ambiguities and practical difficulties, and are respectively addressed in the next two sections of the paper.

3. THE LEGAL AMBIGUITIES SURROUNDING THE CURRENT POSITION OF LAW

A. 'Any Party' Under Section 18 of the MSMED Act

Section 18 of the MSMED Act stipulates that 'any party' to a dispute arising under section 17 may make a reference to the Facilitation Council.

12. ibid at para 34.
13. ibid at para 40.8.
14. ibid at para 46.
15. *Silpi Industries v Kerala SRTC* (2021) 18 SCC 790.

A significant question that emerges from a textual reading of this provision is, whether a buyer, under the MSMED Act, possesses the right to refer a dispute to the Facilitation Council. The text of section 18 appears to suggest that a reference is primarily envisaged in scenarios where the buyer is liable to pay an amount to the supplier. This creates ambiguity regarding the legal standing of buyers who may seek recourse through the Facilitation Council. This precise question of legal interpretation came before the Hon'ble Supreme Court of India in the case of *Silpi Industries*.

The issue under consideration was whether a counterclaim by the buyer could be entertained before the Facilitation Council. The Supreme Court clarified that a counterclaim by the buyer is maintainable. The Court reasoned that denying such a right would result in procedural inefficiencies and multiplicity of proceedings before various forums or courts, thereby frustrating the objective of swift and effective dispute resolution envisaged under the MSMED Act.

The judgment in *Silpi Industries* holds significant importance as it harmonises the procedural aspects of dispute resolution under the MSMED Act. By permitting counterclaims, the Court ensured that all related disputes between the supplier and buyer can be adjudicated in a single forum, avoiding fragmented litigation. It highlighted judiciary's intent to uphold the spirit of the MSMED Act, which aims to provide a robust mechanism for the resolution of disputes involving MSMEs. Nevertheless, while *Silpi Industries* case clarifies the maintainability of counterclaims, certain ambiguities persist regarding the scope and extent of buyers' rights under section 18. These ambiguities warrant further legislative or judicial clarification to ensure a balanced and unambiguous framework for both suppliers and buyers under the MSMED Act.

Furthermore, the court, in passing reference, stated that a buyer may also subject its claim to the jurisdiction of the Facilitation Council,[16] but since such a claim can only be made under section 18 of the MSMED Act, which requires it to be a situation where the buyer has defaulted in payment. Thus, conceiving of a situation where a buyer would approach the Facilitation Council is difficult. Additionally, a related question which has arisen before the courts is with respect to the disputes in connection to which the dispute resolution mechanism under the MSMED Act may be invoked. In a case where the dispute between the MSME and the buyer emerged out of services that were being rendered separate to that which the MSME

16. ibid at para 37.

had registered itself for, the Allahabad HC has held that in such cases, the Facilitation Council would be divested of its jurisdiction to deal with the matter.[17] The implication of this decision is that it creates room for a situation where between the same parties, two separate forms of dispute resolution would be required in order to resolve an issue which could very well arise out of the same service provider agreement, which would go against the objectives of the MSMED Act.

B. The Interplay Between Contractual Dispute Resolution And Statutory Mechanisms Under The Msmed Act

One of the significant and unresolved questions that has yet to be addressed by the Hon'ble Supreme Court is the legal consequence of a situation wherein a buyer initiates dispute resolution proceedings due to non-delivery of goods by the supplier. If the buyer, pursuant to a pre-existing agreement between the parties, approaches a court or tribunal for redressal, and the supplier subsequently refers the matter to the Facilitation Council under the MSMED Act, the legal issue that emerges is whether such reference to the Facilitation Council would have the effect of overriding the pre-existing judicial or arbitral proceedings.

The jurisprudence that has emerged from various judicial pronouncements suggests that once the dispute resolution process under section 18 of the MSMED Act is invoked, the parties are effectively bound by its statutory mechanism, thereby rendering any pre-existing contractual agreement for dispute resolution inoperative. However, the acceptance of such a proposition raises serious concerns regarding its implications on judicial and arbitral autonomy. If a dispute has already been brought before a court or a tribunal in accordance with the contractual dispute resolution clause between the parties, allowing one party to subsequently invoke the statutory mechanism under the MSMED Act to the exclusion of the ongoing proceedings would amount to an undue interference with the judicial process. The conclusion that the Court, in the cases above, has arrived at is that once the dispute resolution mechanism is kickstarted, upon invocation of section 18 of the MSMED Act, the parties are, in essence, trapped in the particular dispute resolution mechanism laid out in section 18 of the MSMED Act, and any other agreement which is independently entered into between the parties is overridden.[18] Such an interpretation

17. *Neeraj Potato Presarvation & Food Products (P) Ltd v MSEFC, U.P.* 2024 SCC OnLine All 427, para 32.
18. *Silpi Industries v Kerala SRTC* (2021) 18 SCC 790.

may not only lead to forum shopping but could also result in a disregard for the autonomy of courts and tribunals, thereby creating an anomalous situation where statutory override effectively nullifies legally sanctioned dispute resolution mechanisms. This raises important questions about the harmonious construction of contractual obligations and statutory remedies, necessitating a more nuanced judicial examination of the issue, especially, having regard to the principle of 'party autonomy'.

Fortunately, an alternative view has been provided in a Calcutta High Court decision,[19] and this differing view that the arbitration agreement between the parties is only eclipsed during the procedure under the MSMED Act, and not overridden altogether, although, more practicable than the previous one, is still not devoid of its problems. It is still unsure as to at what point the proceedings would be 'eclipsed' and then later open to be taken up again. Thus, this is one major ambiguity that continues to surround this law, and its existence is further evidenced when the status of the agreement between the supplier and the buyer post registration as an MSME is considered. In a situation where the buyer has entered into an agreement with the supplier prior to its registration as an MSME under the MSMED Act, would the subsequent registration then bind the buyer to the dispute resolution mechanism, even if such buyer is given no notice of this registration? This question becomes even more pertinent in light of the provision under the MSMED Act for registration, and the wide discretion afforded to a potential MSME therein.

The life of an MSME begins from its registration under section 8 of the MSMED Act. The section provides wide discretion to entity – by the extensive use of the word 'may' in the section. This wide discretion has led the Delhi High Court to suggest that there are three existing scenarios under section 8.[20] *Firstly*, where an entity has not yet come into existence, section 8(1) requires the memorandum to be filed according to the manner prescribed by the appropriate Government. *Secondly*, where the entity was already in existence before the commencement of the MSMED Act, the proviso to section 8(1) requires it to file the appropriate memorandum within 180 days of the commencement of the MSMED Act. These scenarios are evident from the working of the section; however, the court went on to state that there is a third possibility, wherein an entity that is established after the commencement of the MSMED Act may also seek registration as

19. *Odisha Power Generation Corpn Ltd v Techniche Consulting Service* 2024 SCC OnLine Cal 10386.
20. *GE T&D India Ltd v Reliable Engg Projects and Mktg* 2017 SCC OnLine Del 6978.

an MSME. The MSMED Act does not conceive of any such situation, and the lack of regulation adds to the disadvantage of a buyer who enters into a contract with an entity, which subsequently registers itself as an MSME.

A related problem that arises is with respect to the *effect* of an enterprise's registration under the MSMED Act during the subsistence of a contract with a buyer. The Apex Court in this regard has stated that the effect of registration would only be prospective, and only those transactions which take place after such registration would fall under the jurisdiction of the Facilitation Council.[21] Despite the appearance of finality regarding this position of the law, there are different stances. In one case of the Delhi High Court,[22] a single bench comprising of S Muralidhar, J, as he then was, held that even if the registration of an enterprise has taken place after the contract between the parties for supply of goods and services has been entered into, the whole of the supplies made under the contract would be considered, as the supplies would have been made in continuation of the same contract. The reason this second view gives rise to ambiguity, even in the face of Apex Court decisions to the contrary, is because in *Silpi Industries*, the court only distinguished this judgement on the basis of facts, and did not go into the merits of this case. In fact, no case has gone before the Apex Court as of yet, upon merits. In *Gujarat State Civil*, the court certainly stated that if the registration is acquired after the commencement of the contract, the MSMED Act would only apply prospectively, on those transactions which occurred after the registration, but did not overrule the Delhi High Court's case to the contrary. That said, there exist multiple High Court judgements that have followed the law as stated in *Gujarat State Civil*, and have held that the MSMED Act's provisions would only apply prospectively.[23]

Thus, although mostly settled in its legal aspect,[24] this particular legal question, i.e., as to when would the provisions of the MSMED Act enure to the benefit of the supplier if the registration is obtained during the subsistence of the contract, can only be conclusively put to a close through a case decided by the Apex Court on this point on merits. The practical issues of splitting the claim, however, are many in number and will be dealt with in the next section of the paper.

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21. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401.
22. *GE T&D India Ltd v Reliable Engg Projects and Mktg* 2017 SCC OnLine Del 6978.
23. *Malani Construction Co v Delhi International Arbitration Centre* 2023 SCC OnLine Del 1665; *MTNL v Delhi International Arbitration Centre* 2024 SCC OnLine Del 687.
24. *Neeraj Potato Presarvation & Food Products (P) Ltd v MSEFC, U.P.* 2024 SCC OnLine All 427.

4. THE PRACTICAL DIFFICULTIES

The complex nature of the law, particularly, in cases involving multiple statutes, often leads to unforeseen challenges in its practical application, even where the legal position appears settled. A pertinent issue that emerges in this context relates to the process of segregating claims before the Facilitation Council, limiting them only to transactions occurring after the enterprise's registration under the MSMED Act. This raises a fundamental question: where should such an exercise be conducted, and who is entrusted with the responsibility of carrying it out? These practical concerns, while seemingly procedural, underscore deeper uncertainties that can complicate the efficient implementation of the MSMED Act. Nevertheless, while the *Silpi Industries* case clarifies the maintainability of counterclaims, certain ambiguities persist regarding the scope and extent of buyers' rights under section 18. These ambiguities warrant further legislative or judicial clarification to ensure a balanced and unambiguous framework for both suppliers and buyers under the MSMED Act. The Apex Court, in *Gujarat State Civil*, has stated that the Facilitation Council or any other centre/ institute that is acting as the Arbitral Tribunal would have the authority to decide a matter such as this, since it is jurisdictional in nature.[25]

At this juncture is where the practical difficulties arise. The members of the Facilitation Council are expected to know the law, and apply the law, to determine the dispute between the parties by way of arbitration. However, section 21 of the MSMED Act, while laying down certain categories of officers from which the Facilitation Council may be comprised of, has not made knowledge of the law a requirement, thus leaving open the possibility that there would be members of the Council who are not familiar with the law, or arbitration, and are despite this expected to act as arbitrators or mediators. This has also led to a situation where the Facilitation Councils often forward cases to a centre for mediation or arbitration, and sometimes to arbitration directly, without conducting the mandatory mediation. Furthermore, a pertinent question arises regarding the competence of the Facilitation Council to handle such disputes effectively, particularly in relation to the distinction between substantive legal knowledge and procedural knowledge. The Facilitation Council, while vested with adjudicatory powers, operates as an administrative authority rather than a traditional judicial body. A crucial distinction must be drawn between 'knowledge of law'—which pertains to substantive legal

25. *Gujarat State Civil Supplies Corpn Ltd v Mahakali Foods (P) Ltd* (2023) 6 SCC 401, para 51.

principles governing commercial disputes—and 'knowledge of procedure,' which concerns the proper conduct of adjudication. The discrepancy in implementation arises when the administrative authority, tasked with facilitating dispute resolution, lacks the procedural expertise necessary to ensure that justice is administered in accordance with established legal norms. This potential lacuna in procedural adherence may result in arbitrariness, inconsistencies, and challenges to the enforceability of decisions rendered by the Facilitation Council, thereby raising serious concerns regarding due process and natural justice. This trend, of directly forwarding the matters to arbitration centres, is likely to go against the objective of this Act, and instead of making the process speedy as it aims to, it would create a situation wherein the Arbitration Centres are referred most of the MSMED cases, which competent arbitrators themselves should have handled.

Further, another practical implication, connected to the one above inasmuch as it also arises out of the inaction of the Facilitation Council, is a situation wherein the Facilitation Council simply does not refer the matter that has come before it for arbitration, on the invocation of section 18 of the MSMED Act. In this regard, reference may be made to a case,[26] wherein, a petition was filed before the Bombay High Court under section 11(6) of the AC Act in a desperate attempt by the petitioner, a registered MSME, after an inordinate delay by the Facilitation Council in referring the dispute to arbitration, even after the conciliation proceedings failed. The petition sought to invoke the powers of the Court under section 11(6) and have an arbitrator appointed to resolve the dispute. The High Court, however, held that section 11(6) of the AC Act requires a pre-existing arbitration agreement between the parties, as the section uses the words "under that procedure". The High Court interpreted this phrase to mean the procedure that would have been laid out in a pre-existing arbitration agreement between the parties, and thus since in that case the parties did not have such an agreement, it was held that a petition under section 11(6) of the AC Act may not be filed. In holding so, however, the HC seems to have missed section 18(4) of the MSMED Act, which states in quite clear terms that the mechanism provided in that section would be treated as an agreement under section 7 of the AC Act. Naturally, a question arises as to the effect of this equation, in that, if it does not allow the invoking of section 11(6) of the AC Act, why then is a challenge to the arbitral award of the Facilitation

26. *Bafna Udyog v Micro & Small Enterprises* 2024 SCC OnLine Bom 110.

Council allowed only under section 34 of the same act? This same question forms the basis for the next practical problem that exists.

The Courts have held that the awards may only be challenged by approaching the court under section 34 of the AC Act, read with section 19 of the MSMED Act, and in fact, High Courts have been held to be devoid of the power to entertain a writ petition against an award of the Facilitation Council,[27] for two reasons, *first* that there is an alternative mechanism provided under section 34 of the AC Act, and *second* that the deposit mandated under section 19 must be given effect. Section 19 of the MSMED Act provides that a challenge may be made by the buyer, but only after having deposited 75% of the award amount with the courts. A series of judgements of the courts have held that this amount to be deposited is mandatory and may not be waived off, by virtue of the use of the word 'shall' in the section.[28] However, it is unclear as to whether the same amount is required to be deposited even while challenging the jurisdiction of the Arbitral Tribunal under the MSMED Act, as recently, the Madras High Court,[29] while allowing an appeal challenging the Award of a Tribunal under the MSMED Act on the grounds that it lacked jurisdiction in the very first place, also waived the requirement of 75% pre-deposit. Although this particular judgement is a welcome novelty in the interpretation of section 19 of the MSMED Act, it is still reflective of the ambiguity surrounding it.

Interestingly, the Hon'ble Supreme Court has, recently, in *T.N. Cements Corpn Ltd v MSEFC*,[30] while highlighting critical legal questions surrounding the maintainability of writ petitions under Article 226 of the Constitution against orders passed by the Facilitation Council in the exercise of powers under section 18 of the MSMED Act, deemed it necessary to refer the matter to a 5-Judge Bench, recognising the need for authoritative clarity on the intersection of writ jurisdiction, alternative remedy, and arbitration under the MSMED Act. The Court identified three key issues requiring determination. *Firstly*, it questioned whether the ratio in *India Glycols Ltd v MSEFC*, *Medchal — Malkajgiri*,[31] which categorically held that a writ petition could never be entertained against

27. *India Glycols Ltd v MSEFC, Medchal — Malkajgiri* 2023 SCC OnLine SC 1852.
28. *Tirupati Steels v Shubh Industrial Component* (2022) 7 SCC 429; *Gujarat State Disaster Management Authority v Aska Equipments Ltd* (2022) 1 SCC 61.
29. *Swiss Garniers Genexiaa Sciences (P) Ltd v Avant Garde Cleanroom & Engg Solutions (P) Ltd* (2024) Nos. 2059 & 2060 of 2024 Mad HC.
30. 2025 SCC OnLine SC 127.
31. 2023 SCC OnLine SC 1852.

an order or award of the Facilitation Council, amounts to a complete bar or prohibition on the maintainability of writ petitions before the High Court. *Secondly*, if the prohibition is not absolute, the Court sought to define the circumstances in which the principle of an adequate alternative remedy would not apply, thus allowing the exercise of writ jurisdiction. *Thirdly*, the Bench raised a significant concern regarding the procedural fairness of the Felicitation Council's role, particularly whether its members, who initially undertake conciliation proceedings, can subsequently act as arbitrators under section 18 of the MSMED Act, in light of the restrictions under section 80 of the AC Act. The Court clarified that the first and second issues would inherently address the broader question of when and under what conditions a writ petition may be entertained against an order or award passed by the Facilitation Council, whether acting as an arbitral tribunal or conciliator. This reference underscores the need to strike a balance between the expeditious dispute resolution mechanism envisaged under the MSMED Act and the constitutional guarantee of judicial review, particularly in cases where procedural impropriety or jurisdictional errors may arise. The outcome of this deliberation by the larger Bench is poised to have significant implications for the scope of judicial intervention in Facilitation Council proceedings and the broader framework of alternative dispute resolution in commercial disputes.

5. THE WAY FORWARD

The objective behind the MSMED Act is highly commendable, as it seeks to establish a comprehensive framework to address the challenges faced by MSMEs. However, as previously highlighted, certain practical issues have surfaced in its implementation. The Facilitation Council established under the MSMED Act holds the potential to significantly alleviate the burden on both the Courts and Arbitration Centres. One of the central points of contention in this regard is the principle of party autonomy, which often conflicts with the statutory arbitration process under the MSMED Act. The Supreme Court has opined that once the MSMED Act is invoked for dispute resolution, any prior arbitration agreement between the parties ceases to hold relevance. This effectively sets aside party autonomy in favour of the statutory framework, ensuring that the legislative intent of the MSMED Act is prioritised.

Enacted with the purpose of addressing critical challenges faced by this sector, including delayed payments, limited access to finance, and lack of formal recognition, the MSMED Act reflects a forward-looking policy

framework designed to enhance the competitiveness of these enterprises. Central to its objective is the establishment of efficient dispute resolution mechanisms under section 18, enabling timely and cost-effective redressal of grievances, particularly regarding delayed payments. While this interpretation aligns with the statutory mandate, the authors contend that it may not always be necessary to disregard party autonomy entirely. A balanced approach could allow for the coexistence of party autonomy and statutory processes. For instance, in cases where the Facilitation Council is approached under the MSMED Act, the Council could, after a failed mediation, refer the dispute to arbitration as per the terms of the pre-existing agreement between the parties. Such an approach would honor the spirit of party autonomy while remaining consistent with the MSMED Act's dispute resolution objectives.

It is imperative to recognise that the role of the Facilitation Council extends beyond merely acting as a conduit for disputes. The Council is vested with the responsibility to exercise its judgment and either adjudicate the dispute itself or refer it to a competent institution capable of doing so. Simply forwarding disputes without applying its mind would undermine the Council's intended purpose and reduce its efficacy. In light of the concerns highlighted above, it is imperative to introduce statutory provisions that align with the principle of party autonomy while ensuring that the objectives of the MSMED Act are not undermined. One possible reform could involve amending the Act to provide greater flexibility to parties who have already opted for an alternate dispute resolution mechanism through a contractual agreement, ensuring that the statutory mechanism does not automatically override pre-existing dispute resolution processes.

Moreover, there is a pressing need to enhance the credibility and efficiency of the Facilitation Council by mandating the appointment of qualified arbitrators and conciliators with expertise in commercial and contractual disputes. Strengthening procedural safeguards, including clearer guidelines on the intersection of contractual and statutory dispute resolution, would further ensure that the MSMED Act does not inadvertently erode established principles of fairness and procedural integrity in commercial adjudication.

Such an approach would give effect to both the MSMED Act's dispute resolution mechanism and the fundamental principle of arbitration – party autonomy. It is imperative to recognise that the role of the Facilitation Council extends beyond merely acting as a conduit for disputes. The

Council is vested with the responsibility to exercise its judgment and either adjudicate the dispute itself or refer it to a competent institution capable of doing so. Simply forwarding disputes without applying its mind would undermine the Council's intended purpose and reduce its efficacy.

Further, the law regarding the registration of entities as MSMEs under the MSMED Act remains vague. It is unclear whether the legislature intends to allow entities established after the commencement of the MSMED Act to register as MSMEs and subsequently avail the benefits of the statute. This uncertainty has placed buyers in a disadvantageous and precarious position.

The authors believe that greater clarity is necessary in this area, either through rules, regulations, or legislative amendments. In conclusion, while the MSMED Act provides an effective framework for dispute resolution, its practical application necessitates a careful and nuanced approach. A measured balance between statutory provisions and party autonomy can enhance the efficiency of the Facilitation Council and ensure that disputes are resolved in a manner that serves the interests of justice and aligns with the objectives of the MSMED Act. Additionally, addressing ambiguities in the registration process will provide much-needed certainty and fairness to all stakeholders involved.

6. CONCLUSION

It is necessary for the effectiveness of law, that it must not be impracticable, or create more problems than it seeks to resolve. The authors believe that the answer to the questions and difficulties pointed out above is not to replace the whole system altogether, as the intention behind it is admittedly commendable, but rather, to fine tune the system as envisioned and fix the cracks in the wall. The Facilitation Councils set up under the MSMED Act require clear guidelines to function, and the same must be introduced. Further, the requirements under section 21 of the MSMED Act could be tuned in order to ensure persons with some experience in dispute resolution may be appointed to the Facilitation Council. With some changes in this regard, the procedure could be made smoother, and the true stakeholders – the suppliers and the buyers – would not be adversely affected.

After penning down of the present paper was concluded, the Hon'ble Supreme Court has, in *NBCC (India) Ltd v State of W.B.*,[32] addressed

32. 2025 SCC OnLine SC 73 : 2025 INSC 54.

whether registration under section 8 of the Micro, Small, and Medium Enterprises Development Act, 2006 (MSMED Act) is a prerequisite for referring disputes to the Facilitation Council under section 18. The Court clarified that section 18's language, which states "any party to a dispute," is inclusive and not limited to registered suppliers. It emphasised that the registration requirement under section 8 is discretionary for micro and small enterprises. The Court also analysed prior rulings, including *Silpi Industries* case and *Gujarat State Civil* case, concluding that neither case explicitly decided the issue of mandatory registration before invoking remedies under section 18. The judgment rejected the appellant's argument, which sought to restrict dispute resolution access, reaffirming the MSMED Act's remedial purpose and its role in facilitating justice for MSMEs. Consequently, the matter was referred to a larger bench for authoritative resolution due to its broader implications.

The Supreme Court's referral to a larger bench offers a pivotal opportunity to address several unresolved and contested issues under the MSMED Act. Among the key clarifications needed is the scope and application of section 18, particularly, concerning whether enterprises unregistered at the time of contract execution can invoke the statutory dispute resolution mechanisms. This is significant given the discretionary nature of section 8 registration and the Act's overarching goal to empower MSMEs, many of which operate informally and lack formal registration. The referral allows the Court to harmonise conflicting judicial interpretations, such as those in *Silpi Industries* case and *Gujarat State Civil* case, which seemingly restricted the rights of unregistered entities but did so without a comprehensive examination of the MSMED Act's text and purpose. Additionally, it provides an avenue to resolve inconsistencies surrounding the retrospective application of benefits under the Act, the interplay between the MSMED Act and general contract law principles, and the Act's precedence over other legislations, such as the Arbitration and Conciliation Act, 1996.

A larger bench will also have the opportunity to refine the understanding of the term 'supplier' under section 2(n), explore whether registration under section 8 is merely procedural or substantive, and reinforce the principle of access to justice for MSMEs. This moment is crucial for establishing a robust jurisprudential framework that balances statutory rights, equitable remedies, and the legislative intent of bolstering the MSME sector's growth and resilience. The outcome will not only clarify ambiguities but also shape future litigation and dispute resolution strategies involving MSMEs.