2025 INSC 91

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025
(Arising out of S.L.P.(C) No. of 2025 @ Diary No.3776 of 2023)

M/s Tamil Nadu Cements Corporation Limited .....Appellant

Versus

Micro and Small Enterprises Facilitation Council and Another .....Respondents

J U D G M E N T

Sanjiv Khanna, CJI

Leave granted.

2. The seminal issue which arises for consideration in the present appeal is whether a writ petition under Article 226 of the Constitution would be maintainable against an order passed by the Micro and Small Enterprises Facilitation Council[1] in exercise of power under Section 18 of the Micro, Small and Medium Enterprises Development Act, 2006,[2] and if yes, under what circumstances.

1 For short, 'MSEFC'.
2 For short, 'MSMED Act'.

3. Section 18 of the MSMED Act reads as under:

> "**Reference to Micro and Smal 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.
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> (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.
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> (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.
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> (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.
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> (5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

4. A two Judges Bench of this Court in ***Jharkhand Urja Vikas Nigam Limited*** v. ***State of Rajasthan and Others***,[3] after interpreting the provisions of the MSMED Act, including the powers of the MSEFC under sub-section (2) and (3) of Section 18, had observed:

3 (2021) 19 SCC 206.

> "**14.** From a reading of Sections 18(2) and 18(3) of the Msmed Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24 and 25.
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> **15.** There is a fundamental difference between conciliation and arbitration. In conciliation, the conciliator assists the parties to arrive at an amicable settlement, in an impartial and independent manner. In arbitration, the Arbitral Tribunal/arbitrator adjudicates the disputes between the parties. The claim has to be proved before the arbitrator, if necessary, by adducing evidence, even though the rules of the Civil Procedure Code or the Evidence Act may not apply. Unless otherwise agreed, oral hearings are to be held.
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> **16.** If the appellant had not submitted its reply at the conciliation stage, and failed to appear, the Facilitation Council could, at best, have recorded the failure of conciliation and proceeded to initiate arbitration proceedings in accordance with the relevant provisions of the Arbitration and Conciliation Act, 1996, to adjudicate the dispute and make an award. Proceedings for conciliation and arbitration cannot be clubbed."

5. Thereupon, referring to the facts in the case, this Court struck down the order dated 06.08.2012 passed by the MSEFC as being nullity and contrary to the provisions of the MSMED Act and the mandatory provisions of the Arbitration and Conciliation Act, 1996.[4] This court observed that the order under challenge was not an award in the eyes of law and hence the recourse to Section 34 of the A&C Act was not required. The writ petition was held to be maintainable notwithstanding the objections on account of delay and laches.

4 For short, "A&C Act".

6. Another Division Bench of this Court in ***Gujarat State Civil Supplies Corporation Limited*** v. ***Mahakali Foods Private Limited (Unit 2) and Another***,[5] without noticing the judgment in ***Jharkhand Urja Vikas Nigam Limited*** (supra), observed that the specific non-obstante clauses in sub-sections (1) and (4) of Section 18 of the MSMED Act have the effect of overriding any other law for the time being in force, including the A&C Act, and, consequently, the MSEFC can act as a conciliator, and thereupon itself take up the dispute for arbitration or refer it to any institution or centre for such arbitration. This would be valid, despite Part III of the A&C Act comprising Sections 65 to 81 being applicable to conciliation in terms of sub-section (2) of Section 18 of the MSMED Act. In other words, there is no bar on the MSEFC acting as a conciliator and, thereupon, acting as an arbitrator even when Section 80 of the A&C Act states that unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject matter of the conciliation proceedings; and the conciliator shall not be presented by the parties as a witness in the arbitral or judicial proceedings.[6] It was also held that the provisions relating to conciliation, and thereupon, arbitration in the MSMED Act being statutory in nature, would override an arbitration agreement as contracted by the parties. The

5 (2023) 6 SCC 401.

6 **80. Role of conciliator in other proceedings**.—Unless otherwise agreed by the parties,—

(*a*) the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceeding in respect of a dispute that is the subject of the conciliation proceedings;

(*b*) the conciliator shall not be presented by the parties as a witness in any arbitral or judicial proceedings.

MSEFC/Arbitral Tribunal under Section 18(3) of the MSMED Act is competent to rule on its own jurisdiction as also the other issues in view of Section 16 of the A&C Act. This observation was made in the context of the objections raised that the party being subjected to arbitration was not a 'supplier' as per the definition in Section 2(n) of the MSMED Act or on the ground that any subsequent registration obtained under the MSMED Act would be prospective and, therefore, statutory arbitration under Section 18 of the MSMED Act could not be invoked.[7]

7. A three-Judges Bench of this Court in ***M/s India Glycols Limited and Another*** v. ***Micro and Small Enterprises Facilitation Council, Medchal - Malkajgiri and Others,***[8] referring to the judgment in ***Gujarat State Civil Supplies Corporation Limited*** (supra), held that a writ petition under Articles 226/227 of the Constitution was not maintainable as Section 18 of the MSMED Act provides for recourse to a statutory remedy for challenging an award under Section 34 of the A&C Act. A particular reference was made to Section 19 of the MSMED Act which states that no application for setting aside a decree, award or order made by the MSEFC/institution/centre providing for alternate dispute resolution services shall be entertained by a court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or order in the manner as directed by the court. Proviso to the Section 19 of the

7 A two Judges Bench of this Court Bench in *NBCC (India) Ltd.* v. *The State of West Bengal and Others,* 2025 INSC 54, has referred this issue to a larger Bench.
8 2023 SCC OnLine SC 1852.

MSMED Act states that pending disposal of the application for setting aside of the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case and on such conditions as it deems necessary to impose.[9] This judgment of three Judges Bench does not refer to the earlier judgment of two Judges Bench of this Court in ***Jharkhand Urja Vikas Nigam Limited*** (supra).

8. Section 18 of the MSMED Act provides for statutory and mandatory conciliation on the reference being made to the MSEFC by any party to a dispute with regard to an amount due under Section 17 of the MSMED Act. Section 17 states that for the goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided in Section 16. Section 16 states that where a 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 other law for the time being in force, be liable to pay compound interest with monthly rests to the supplier from the appointed date or from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.[10]

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9 **19. Application for setting aside decree, award or order.—**No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court: Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose.

10 Sections 15, 16 and 17 of the MSMED Act, read as under:

9. It would be appropriate at this stage to refer to the basic facts of the present case.

- The appellant – Tamil Nadu Cements Corporation Limited[11] is a wholly-owned undertaking of the Government of Tamil Nadu. It is registered under the Companies Act, 1956 and has two cement manufacturing units at Alangulam and Ariyalur. For the units at Ariyalur, TANCEM had called for tender on 27.01.2010 on turnkey basis for design, supply, erection and commissioning of two Electrostatic Precipitators[12] for clinker coolers at a total contract value of Rs.7.50 crores under the provisions of Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000.
- On 16 April 2010, TANCEM issued a work order in favour of M/s Unicon Engineers for design, supply, erection and commissioning of two ESPs for clinker coolers at Ariyalur Cement Works on turnkey basis for the total value of Rs.7,50,60,543/- as per drawing and specification mentioned in tender documents. It is averred that M/s

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15. Liability of buyer to make payment.—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

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

16. Date from which and rate at which interest is payable.—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 time 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.

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.

11 For short, 'TANCEM'.

12 For short, 'ESP'.

Unicon Engineers failed to deliver on its promise to build and commission the ESPs as undertaken.

- From 16.05.2012 till 08.10.2012, TANCEM issued several warning letters to M/s Unicon Engineers for delay in execution of civil works. TANCEM also sent a letter dated 16.11.2013 to M/s Unicon Engineers requesting to complete all the works before 30.11.2013. It also raised concerns regarding the substandard quality of work done for the ESPs, which on inspection were found not to be in accordance with the contractual stipulations.
- Thereafter, M/s Unicon Engineers, on 17.01.2014, filed the petition under Section 18 of the MSMED Act before the MSEFC claiming an amount of Rs.2,66,80,157 /- with interest.
- On 20.01.2014, the MSEFC wrote a letter to TANCEM stating that M/s Unicon Engineers had filed a plea before it to facilitate the realization of the pending payment of Rs.50,08,801/- and Rs.2,16,71,296 towards the cost overrun, totalling Rs.2,66,80,157/- and requested TANCEM to give its comments on the petition filed by M/s Unicon Engineers.
- On 26.01.2014, TANCEM, citing the poor performance of the ESPs commissioned by M/s Unicon Engineers, issued a work order amounting to Rs.3,07,800/- to one V. Sundararajan, contractor, to carry out modification work at those ESPs.
- Thereafter, M/s Unicon Engineers sent a demand letter dated 14.02.2014 to TANCEM seeking payment of Rs.14,15,167

immediately, extension of delivery period of ESPs up to 30.07.2014 and for issuance of amended work order with the revised price.

- On 27.03.2014, TANCEM sent a letter to its Ariyalur Unit and marked a copy to M/s Unicon Engineers. TANCEM directed its Ariyalur Unit for exploring possibility of amicable settlement with M/s Unicon Engineers to resolve the various issues raised in respect of smooth functioning of ESPs and the excess payment being claimed by them through MSEFC towards design, supply, erection and commissioning of the ESPs.
- Thereafter, on 08.04.2014, TANCEM sent a letter to M/s Unicon Engineers stating that cooler ESPs commissioned by it were not running to its full efficiency and requested it to submit an action plan for rectification.
- On 27.05.2014, 19.06.2014 and 01.10.2014, TANCEM had sent letters to M/s Unicon Engineers to attend to the problems being faced with the ESPs. It is alleged that M/s Unicon Engineers failed to rectify the issues cropping up in the ESPs and hence, TANCEM issued a work order in favour of M/s Perfect Engineers to repair ESP insulation amounting to Rs.4,02,417/-.
- On 14.10.2014, MSEFC, M/s Unicon Engineers was directed to produce documentary evidence in support of its case and to rectify the issues with the ESPs.
- MSEFC on 04.06.2016, held that this was the fourth hearing of the case, and adequate opportunities had been given to TANCEM, and the council was of the opinion that the conciliation proceedings had

failed. Accordingly, M/s Unicon Engineers was free to approach the MSEFC for arbitration. Sections 15 and 16 of the MSMED Act are simply quoted by the MSEFC to issue directions to TANCEM to pay Rs.39,66,144, along with the interest. The relevant portion of the order dated 04.06.2016 reads:

> "This is 4th hearing in this case. Since adequate opportunities were given to the respondent, the Council recorded the failure of conciliation between the petitioner and the respondent. In view of above facts and circumstances, the council ordered that the applicant is free to approach the council for arbitration as conciliation between them has failed.
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> Section 15 of the MSMED Act 2006 is extracted hereunder:
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> "Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment there for 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.
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> Section 16 of the MSMED Act 2006 is extracted hereunder:
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> "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. 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.
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> The council directs that the petitioner is entitled to recover the balance retention amount of Rs. 39,66,144/- along with interests due to piecemeal releases of the total retention money, of Rs.1,17,57,399/- with effect from 31.03.2011 (2) Rs.1,57,59,537/- along with interests, with effect from 17.01.2014 towards additional expenditures

incurred by, the petitioner due to the delay of 3 years in execution of civil works by the respondent.

Therefore, the Respondent shall be liable to pay the balance retention amount of Rs.39,66,144/- along with interests due to piece meal releases of the total retention money of Rs.1,17,57,399/-with effect from 31.03.2011 & (2) Rs.1,57,59,537/- along with interests with effect from 17.01.2014 towards additional expenditures incurred by the petitioner due to the delay of 3 years in execution of civil works by the respondent, together with compounded interest with monthly rest, at three times of the Bank rate notified by the Reserve Bank of India as stipulated in the MSMED Act 2006 from the appointed due dates respectively as above, to, the petitioner, till the date of settlement.

With this order, the petition filed before the council on 17.01.2014 by the petitioner stands disposed."

- On 30.06.2016, M/s Unicon Engineers herein sent a letter to TANCEM to release the payment as per the order dated 04.06.2016 passed by the MSEFC.
- On 19.09.2016, TANCEM filed a petition under Section 33 of the A&C Act to recall/set aside the order/award dated 04.06.2016 passed in favour of M/s Unicon Engineers.
- On 26.09.2016, M/s Unicon Engineers sent a letter to MSEFC requesting to reject the petition filed by TANCEM on the grounds that it was barred by limitation and that TANCEM had not furnished 75% of the amount as pre-deposit, as mandated by Section 19 of the MSMED Act.
- TANCEM filed a detailed reply on 06.10.2016 *qua* the objections raised by M/s Unicon Engineers. Similar objections were again raised by M/s Unicon Engineers to the response filed by TANCEM.

- Thereafter, MSEFC passed an order dated 25.10.2016 dismissing the recall petition on grounds of delay, objections raised by M/s Unicon Engineers and lack of provision to recall the award.
- On 16.12.2016, M/s Unicon Engineers filed an execution petition before the High Court of Judicature at Madras claiming an amount of Rs.5,88,88,591/- in terms of the order passed by the MSEFC.
- On 31.12.2016, TANCEM filed a petition under Section 34 of the A&C Act before the High Court of Judicature at Madras to set aside the award passed by MSEFC and to direct M/s Unicon Engineers to pay the amount due for the loss incurred towards various heads including interest and damages.
- TANCEM also filed a counter affidavit in the execution proceedings initiated by M/s Unicon Engineers.
- TANCEM filed a writ petition before the High Court of Judicature at Madras in 2017 challenging the *vires* of Sections 16 to 19 of MSMED Act.
- The objections of TANCEM in the execution proceedings before the High Court of Judicature at Madras were dismissed *vide* order dated 10.10.2017 and it was held that an executing court cannot go beyond a final and binding decree even if it is erroneous until the same is set aside in appeal or revision.
- TANCEM filed an Application for waiver of pre-deposit of 75% of the award amount as stipulated under Section 19 MSMED Act, which was disposed of *vide* order dated 20.07.2018 by the Single Judge of the High Court of Judicature at Madras directing TANCEM to pre-

deposit the amount as per the MSMED Act within eight weeks from the date of the order.

- Meanwhile, the High Court of Judicature at Madras *vide* order dated 25.02.2019 directed attachment of the movables of TANCEM in the execution proceedings. TANCEM sought a stay against the attachment order. The High Court of Judicature at Madras *vide* order dated 11.03.2019 granted an interim stay on the condition that TANCEM deposit an amount of Rs. 3 crores.
- The High Court of Judicature at Madras *vide* order dated 29.04.2019 noted that there were 7 Special Leave Petitions[13] pending before this Court challenging the *vires* of Section 16 to 19 of the MSMED Act and hence, the writ petition filed by TANCEM raising a similar challenge, be listed after the disposal of SLPs pending before this Court.
- Thereafter, on 04.07.2019, TANCEM was granted three weeks to make the pre-deposit of 75% of the decretal amount for maintaining the appeal as per Section 19 of the MSMED Act.
- TANCEM deposited the differential amount of Rs.1,41,66,443/- as against the 75% of the decretal amount since it had already remitted Rs.3 crores.
- M/s Unicon Engineers filed an application before the High Court of Judicature at Madras to withdraw Rs. 3 crores which was deposited by TANCEM. The Single Judge *vide* order dated 31.07.2019 allowed M/s Unicon Engineers to withdraw Rs.1.50 crores. On appeal by TANCEM, the Division Bench *vide* order dated

13 For short, 'SLP'.

06.08.2019 directed that M/s Unicon Engineers will furnish an undertaking that if TANCEM succeeds before the executing court it would refund the sum of Rs.1,50,00,000/- with interest @ 6% per annum from the date of receipt to the date of refund. The disbursement of Rs.1,50,00,000/- to the decree holder was subject to the final decision of the executing court. The Master of the Court *vide* order dated 16.08.2019 directed to issue a cheque of Rs. 1.5 crore in favour of M/s Unicon Engineers.

- TANCEM filed an SLP against the order dated 06.08.2019 of the Division Bench before this Court. This Court *vide* order dated 11.01.2021, after recording the statement of TANCEM that the amount deposited had not been withdrawn, directed that the order of withdrawal of Rs.1,50,00,000/- shall remain stayed.
- The SLP was subsequently disposed of by directing M/s Unicon Engineers to furnish a security for Rs. 1,50,00,000/- and the High Court was requested to expedite the hearing of the objections and decide O.P. Nos. 692/2019 and 1030/2019 expeditiously, and preferably within six months.
- TANCEM also filed a transfer petition before this Court seeking transfer of the writ petition filed by it before the High Court of Judicature at Madras challenging the *vires* of Sections 16 to 19 of the MSMED Act. The writ petition of TANCEM before the High Court was tagged with the batch of petitions pending before this Court *vide* order dated 15.10.2020.

- By the order dated 09.09.2021 of the Single Judge, objections filed by TANCEM under Section 34 of the A&C Act were held to be not maintainable on account of being barred by limitation and as being beyond the condonable period. The same were also dismissed on account of the failure of TANCEM to make mandatory deposit in terms of Section 19 of the MSMED Act.
- The appeal preferred against the same was dismissed as withdrawn *vide* order dated 28.04.2022 by the Division Bench of the High Court of Judicature at Madras. In the meanwhile, M/s Unicon Engineers filed a calculation memo claiming Rs.8,18,26,844/- as the balance amount due from TANCEM. This amount was later revised to Rs.7,88,23,549/-. Objections to the said calculation were filed by TANCEM.
- In these circumstances, TANCEM again preferred a fresh writ petition assailing the order dated 04.06.2016 of the MSEFC in which an interim order was passed in its favour. However, *vide* order dated 13.07.2022, the Single Judge dismissed the writ petition observing that the relief sought by TANCEM would be governed by the fate of the proceedings challenging the *vires* of Sections 16 to 19 of the MSMED Act, which was now pending before this Court in a batch of matters. It was held that in case TANCEM's challenge to the *vires* of the aforesaid provisions succeeded, the relief as sought by it may be granted and the amount already disbursed/released to M/s Unicon Engineers would be refunded.

- TANCEM being aggrieved by the said order preferred a writ appeal before the High Court, which came to be dismissed by the impugned judgment dated 07.12.2022 observing that TANCEM had already exhausted all remedies and that the dismissal on grounds of limitation cannot be challenged by contending that the award was null and void.
- After the said judgment was pronounced, M/s Unicon Engineers pursued the execution petition in the High Court of Judicature at Madras and the executing court *vide* order dated 14.12.2022 directed to bring the property of TANCEM for sale.

In such circumstances referred to above, TANCEM has filed the present SLP.

10. In our opinion, there is a direct confrontation between the judgment of the two Judges Bench of this Court in ***Jharkhand Urja Vikas Nigam Limited*** (supra) and **Gujarat State Civil Supplies Corporation Limited** (supra).

11. We also have reservations on the dictum in ***M/s India Glycols Limited*** (supra) which holds that a writ petition is not maintainable against any order passed by the MSEFC and the only recourse available is in terms of Section 34 of the A&C Act, and that too would require a deposit in terms of Section 19 of the A&C Act.

12. This is a case of statutory arbitration that is mandatory. It is possible to argue that it bars a party from moving the court of law under Section 9

of the Code of Civil Procedure, 1908.[14] Section 18 also overrides the principle of party autonomy when they enter into an arbitration agreement which prescribes the procedure for the appointment of an arbitrator and conduct of arbitral proceedings. The statute further prescribes an undoubtedly high rate of interest – three times the Reserve Bank rate of interest – presently 6.5 per cent i.e. 19.5 per cent. The interest is compounded with monthly rests. Lastly, an order or award can be challenged by 'the buyer'[15] only on deposit of seventy-five per cent of the awarded amount, thereby restricting the right to challenge the order/award passed except on compliance of stringent conditions, which are not prescribed when an appeal is preferred under the CPC. Pre-deposit is a condition for hearing a decision on the objections to the award. The issue therefore which arises and needs consideration is whether there would be an absolute and complete bar to invoke writ jurisdiction under Article 226 of the Constitution even in exceptional and rare cases where fairness, equity and justice may warrant the exercise of writ jurisdiction.

13. The access to High Courts by way of a writ petition under Article 226 of the Constitution of India, is not just a constitutional right but also a part of the basic structure. It is available to every citizen whenever there is a violation of their constitutional rights or even statutory rights. This is an inalienable right and the rule of availability of alternative remedy is not an omnibus rule of exclusion of the writ jurisdiction, but a principle

14 For short, 'CPC'.
15 Section 2(d) of the MSMED Act defines 'buyer' as - (*d*) "buyer" means whoever buys any goods or receives any services from a supplier for consideration.

applied by the High Courts as a form of judicial restraint and refrain in exercising the jurisdiction. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and the same is not limited by any provision of the Constitution and cannot be restricted or circumscribed by a statute.[16] It has been well settled through a legion of judicial pronouncements of this Court that the writ courts, despite the availability of alternative remedies, may exercise writ jurisdiction at least in three contingencies – i) where there is a violation of principles of natural justice or fundamental rights; ii) where an order in a proceeding is wholly without jurisdiction; or iii) where the *vires* of an Act is challenged. Noticeably, the MSEFC as a statutory authority performs a statutory role and functions within the four corners of the law.

14. Following the aforesaid dictum, this Court in ***Harbanslal Sahnia and Another*** v. ***Indian Oil Corporation and Others***[17], had taken notice of the fact that the High Court had referred to the arbitration clause which the writ petitioner could take recourse to, to hold that the rule of exclusion of writ jurisdiction is a rule of discretion and not of compulsion. In an appropriate case, in spite of availability of alternative remedy, the writ courts can exercise its jurisdiction at least in three contingencies, as referred to above. In the facts of the said case, this Court interfered observing that there were peculiar circumstances as the dealership had been terminated on an irrelevant and non-existence cause. Therefore, there was no need to drive the parties to initiate

16 *Whirlpool Corporation* v. *Registrar of Trade Marks, Mumbai and Others* (1998) 8 SCC 1. See also, *L. Chandra Kumar* v. *Union of India and Others*, (1997) 3 SCC 261; *S.N.Mukherjee* v. *Union of India*, (1990) 4 SCC 594; *Union of India and Others* v. *Parashotam Dass*, 2023 SCC OnLine SC 314.
17 (2003) 2 SCC 107.

arbitration proceedings. Following the judgments in ***Whirlpool Corporation*** v. ***Registrar of Trade Marks, Mumbai and Others***[18] and ***Harbanslal Sahnia*** (supra), this Court in ***Radha Krishan Industries*** v. ***State of Himachal Pradesh and Others***[19] laid down the following principles:

> "27. The principles of law which emerge are that:
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> 27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.
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> 27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.
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> 27.3. Exceptions to the rule of alternate remedy arise where: (*a*) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (*b*) there has been a violation of the principles of natural justice; (*c*) the order or proceedings are wholly without jurisdiction; or (*d*) the vires of a legislation is challenged.
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> 27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.
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> 27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.
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> 27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the

18 (1998) 8 SCC 1.
19 (2021) 6 SCC 771.

exercise of its writ jurisdiction, such a view would not readily be interfered with."

15. Thus, it would be true to say that the existence of the statutory remedy does not affect the jurisdiction of the High Court to issue a writ. Nevertheless, the writ jurisdiction being discretionary by policy, the writ courts generally insist that the parties adhere to alternative statutory remedies, as this reinforces the rule of law. However, in exceptional cases, writ jurisdiction can still be exercised as a power to access the court for justice and relief. It is in this context, that a Constitution Bench of five Judges way back in 1954 in ***Himmatlal Harilal Mehta*** v. ***State of Madhya Pradesh and Others***[20] had observed that the principle that the High Court should not issue a prerogative writ when an alternative remedy is available may not apply when the remedy under the statutes is onerous and burdensome in character, such as when the party has to deposit the whole amount of the tax before filing an appeal. An alternative remedy must be equally efficacious and adequate. While examining the scope of the right to file a writ petition when the statute requires a pre-deposit of tax—an obligation argued as imposing an onerous condition on the right to appeal—this Court in ***Shyam Kishore and Others*** v. ***Municipal Corporation of Delhi and Another***,[21] after relying upon several other decisions, observed that the validity of rigid provisions banning entertainment of appeal when taxes are not paid have been upheld so long as the conditions are not so onerous as to amount to unreasonable restriction. In the alternative, the right is

20 (1954) 1 SCC 405.
21 (1993) 1 SCC 22.

almost illusory. Diluting the requirement to pay the disputed tax, this Court observed:

> "44. (…)Sometimes, to compel the assessee to pay up the demanded tax for several years in succession might very well cripple him altogether. This apart, an assessee may not be able to deposit the tax while filing the appeal but may be able to pay it up within a short time, or at any rate, before the appeal comes on for hearing in the normal course. There is no reason to construe the provision so rigidly as to disable him from doing this. Again, when an appeal comes on for hearing, the appellate judge, in appropriate cases, where he feels there is some great hardship or injustice involved, may be inclined to adjourn the appeal for some time to enable the assessee to pay up the tax. Though it will not be expedient or proper to encourage adjournment of an appeal, where it is ripe for hearing otherwise, only on this ground and as a matter of course, an interpretation which leaves some room for the exercise of a judicial discretion in this regard, where the equities of the case deserve it, may not be inappropriate. The appellate judge's incidental and ancillary powers should not be curtailed except to the extent specifically precluded by the statute. We see nothing wrong in interpreting the provision as permitting the appellate authority to adjourn the hearing of the appeal thus giving time to the assessee to pay the tax or even specifically granting time or instalments to enable the assessee to deposit the disputed tax where the case merits it, so long as it does not unduly interfere with the appellate court's calendar of hearings. His powers, however, should stop short of staying the recovery of the tax till the disposal of the appeal. We say this because it is one thing for the judge to adjourn the hearing leaving it to the assessee to pay up the tax before the adjourned date or permitting the assessee to pay up the tax, if he can, in accordance with his directions before the appeal is heard. In doing so, he does not and cannot injunct the department from recovering the tax, if they wish to do so. He is only giving a chance to the assessee to pay up the tax if he wants the appeal to be heard. It is, however, a totally different thing for the judge to stay the recovery till the disposal of the appeal; that would result in modifying the language of the proviso to read: "no appeal shall be disposed of *until* the tax is paid". Short of this, however, there is no reason to restrict the powers unduly; all he has to do is to ensure that the entire tax in dispute is paid up by the time the appeal is actually heard on its merits. We would, therefore, read clause (*b*) of Section 170 only

> as a bar to the hearing of the appeal and its disposal on merits and not as a bar to the entertainment of the appeal itself."

16. Equally important are the observations with reference to the right to file a writ petition under Articles 226 and 227 of the Constitution in certain situations. In this regard, this Court in ***Shyam Kishore*** (supra) has observed:

> "45. If the provision is interpreted in the manner above suggested, one can steer clear of all problems of constitutional validity. The contention on behalf of the Corporation to read the provision rigidly and seek to soften the rigour by reference to the availability of recourse to the High Courts by way of a petition under Articles 226 and 227 in certain situations and the departmental instructions referred to earlier does not appear to be a satisfactory solution. The departmental instructions may not always be followed and the resort to Articles 226 and 227 should be discouraged when there is an alternative remedy. A more satisfactory solution is available on the terms of the statute itself. The construction of the section approved by us above vests in the appellate authority a power to deal with the appeal otherwise than by way of final disposal even if the disputed tax is not paid. It enables the authority to exercise a judicial discretion to allow the payment of the disputed tax even after the appeal is filed but, no doubt, before the appeal is taken up for actual hearing. The interpretation will greatly ameliorate the genuine grievances of, and hardships faced by, the assessee in the payment of the tax as determined. Though an assessee may not be able to acquire an absolute stay of the recovery of the tax until the dispute is resolved, he will certainly be able to get breathing time to pay up the same where his case deserves it. If this interpretation is placed on the provision, no question of unconstitutionality can at all arise."

17. In ***Govind Parameswar Nair and Others*** v. ***Municipal Corporation of Greater Bombay and Others***,[22] a Constitution Bench of five Judges

22 (2001) 9 SCC 166

agreed with the interpretation given by the three-Judges Bench in ***Shyam Kishore*** (supra).

18. Recently, in ***Tecnimont Private Limited (Formerly known as Tecnimont ICB Private Limited)*** v. ***State of Punjab and Others***,[23] in regard to the question relating to alternative remedy where the disputed amount is required to be deposited to avail the statutory remedy, this Court observed that there is some divergence of opinion, albeit several cases like ***Shyam Kishore*** (supra) have attempted to find a solution to provide some support in cases involving extreme hardship where the writ petition would not be dismissed on the ground of equally efficacious alternative remedy.

19. In the light of the aforesaid decisions, we deem it appropriate to refer the following questions raised in the present appeal to a larger Bench of five Judges, namely:

(i) Whether the ratio in ***M/s India Glycols Limited*** (supra) that a writ petition could never be entertained against any order/award of the MSEFC, completely bars or prohibits maintainability of the writ petition before the High Court?

(ii) If the bar/prohibition is not absolute, when and under what circumstances will the principle/restriction of adequate alternative remedy not apply?

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23 (2021) 12 SCC 477.

(iii) Whether the members of MSEFC who undertake conciliation proceedings, upon failure, can themselves act as arbitrators of the arbitral tribunal in terms of Section 18 of the MSMED Act read with Section 80 of the A&C Act?

The first and second question will subsume the question of when and in what situation a writ petition can be entertained against an order/award passed by MSEFC acting as an arbitral tribunal or conciliator.

20. The Registry is directed to place the papers before the Chief Justice so that an appropriate decision can be taken on the administrative side for the constitution of a larger Bench in the present case.

.....CJI.
[Sanjiv Khanna]

.....J.
[Sanjay Kumar]

.....J.
[Manmohan]

New Delhi;
January 22, 2025.