



2026:DHC:811



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

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Judgment reserved on: 20.01.2026
Judgment pronounced on: 02.02.2026

+ ARB.P. 2018/2025

ONGC TRIPURA POWER COMPANY LTDPetitioner

Through: Mr. Abhishek Puri, Mr. Sahil Grewal & Ms. Surbhi Gupta, Advocates.

versus

O AND M SOLUTIONS PVT LTDRespondent

Through: Mr. Priyabrat Tripathy, Mr. Rajesh Gupta, Mr. Ayush Acharjee & Mr. Nahush Khera, Advocates.

CORAM:

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGMENT

HARISH VAIDYANATHAN SHANKAR, J.

1. The present petition has been filed under Section 11(6) of the **Arbitration and Conciliation Act, 1996**¹, seeking the appointment of a sole arbitrator for the purpose of resolving disputes arising out of the Agreement dated 16.12.2020.

2. The disputes *inter se* the parties have arisen in relation to a **Contract for Operation & Maintenance dated 16.12.2020**² executed between the parties, pursuant to which the Petitioner, in terms of Clause 46 of the aforementioned contract, sought to resolve

¹ Act

² Contract/ Agreement



the matter amicably by proposing a *one-time settlement* to the Respondent.

3. Upon refusal of the Respondent to the said amicable resolution, the Petitioner, in accordance with Clause 46.4 of the Contract, issued the notice dated 26.08.2025 under Section 21 of the Act, invoking the Arbitration clause and calling upon the Respondent to concur in the appointment of the Arbitrator. Clause 46.4 of the Contract reads as under:

“46.4 Arbitration

46.4.1 All disputes or differences in respect of which the decision, if any, of the Owner has not become final or binding as aforesaid, shall be settled by arbitration, under and in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act") or any statutory modification, in the manner hereinafter provided. The venue and seat of arbitration shall be New Delhi, India.

46.4.2 The arbitration shall be conducted in accordance with the Arbitration Act by 3 (three) arbitrators, (1) one each to be nominated by the O&M Operator and the Owner and the third to be nominated by the 2 (two) arbitrators nominated by the Parties at the commencement of arbitration proceedings. The 3rd (third) arbitrator so appointed shall act as the presiding arbitrator.

46.4.3 If one Party fails to appoint its arbitrator within 30 (thirty) days after the other Party has named its arbitrator, the Party which has named an arbitrator may request the President of the Institution of Engineers to appoint the second arbitrator on behalf of such Party. If the two arbitrators appointed by both Parties do not succeed in appointing a third arbitrator within 30 (thirty) days after the latter of the two arbitrators has been appointed, the third arbitrator shall, at the request of either Party, be appointed by the Chairman of ONGC.

46.4.4 The decision of the majority of the arbitrators ("Arbitral Award") shall be final and binding upon the Parties. The expense of the arbitration shall be paid as may be determined by the arbitrators. The arbitrators may, from time to time, with the consent of both the Parties increase the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the Party concerned to nominate another arbitrator in place of the outgoing arbitrator.

46.4.5 The arbitrators shall have full powers to review and/or revise any decision, opinion, directions, certification or valuation



of the Owner in consonance with this Contract, and neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments put before the Owner for the purpose of obtaining the said decision.

46.4.6 No decision given by the Owner in accordance with the foregoing provisions shall disqualify it from giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid.”

4. The Respondent, however, *vide* its reply dated 24.09.2025, refused to consent to the appointment of an Arbitrator, and further informed the Petitioner that it had already raised certain claims before the **Micro and Small Enterprises Facilitation Council**³, Cuttack, *vide* Reference No. LC-11-MSEFC-64/2025/9368/IND of 2025 under the provisions of the **Micro, Small and Medium Enterprises Development Act, 2006**⁴.

5. The Respondent's refusal to appoint an Arbitrator, coupled with its invocation of proceedings before the MSEFC, Cuttack, has resulted in a failure of the agreed arbitral mechanism, thereby necessitating the present petition.

SUBMISSIONS ON BEHALF OF THE PARTIES:

6. At the outset, learned counsel appearing on behalf of the Respondent would oppose the appointment of an Arbitrator and would, in that context, raise various objections, as set out in the submissions hereinafter.

7. He would submit that at the relevant point in time, when the Contract was entered into, the Respondent herein was a small-scale industry and would therefore be entitled to the protection of the provisions of the MSMED Act.

³ MSEFC

⁴ MSMED Act



8. Learned counsel for the Respondent would further submit that the Respondent, being a registered MSME, has filed a reference under Section 18(1) of the MSMED Act before the MSEFC, Cuttack. Notice dated 18.10.2025 has already been issued by the MSEFC, and the Petitioner has admittedly participated by filing its reply on 28.11.2025 before the MSEFC, Cuttack.

9. He would thus submit that in view thereof, the present matter would have to be referred to the MSEFC, Cuttack; and to support his contention he would rely upon the judgment of this Court in ***Sterlite Power Transmission Limited v. EPC Solutions LLP***⁵ which held that the applicability of the MSMED Act would be determined by the date of the contract. He would, in particular, refer to and rely upon Paragraph nos. 27, 29 & 31 of the said judgment and the same read as under:

“**27.**Thus, what is relevant is the date of contract in order to confirm as to whether the MSMED Act, 2006 would be applicable or not.

29. In view of the aforementioned judgements of ***Silpi Industries*** (Supra) and ***Gujarat Civil Supplies*** (Supra) the relevant date in order to confirm as to whether the MSMED Act, 2006 would be applicable shall be the date of agreement between the parties and the date of supply of goods/rendering of services.

31. Going by the settled legal position, as also the fact that the MSMED Act, 2006 is a beneficial legislation for Micro, Small and Medium Enterprises and ought to be construed in a manner that is beneficial to such enterprises. Thus, even if on the date when the reference application was filed before the MSEFC, the supplier i.e. Respondent No.1 had upgraded itself to the Medium Enterprises, it cannot be deprived of the benefits of the provisions of the MSME Act, 2006 and the impugned reference order would be liable to be upheld.”

⁵ 2023 SCC OnLine Del 3890



10. He would further contend that even during the subsistence of some part of the term of the Contract as well as on the date when the dispute was actually referred to the MSEFC, the Respondent-Company squarely fell within the statutory definition of a ‘Small Enterprise’ under the provisions of the MSMED Act, and resultantly, the matter would have to be referred to the MSEFC under the provisions of the MSMED Act.

11. The second objection raised by learned counsel for the Respondent would be that the contract between the parties is not a works contract, but is essentially an agreement for the operation and maintenance of an existing power plant. It would be contended that the nature of work involved in the present case does not fall within the definition of a “works contract” as provided under Section 2(119) of the Central Goods and Services Tax Act, 2017, which defines a works contract as follows:

“works contract” means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property where in transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.”

12. ***Per contra***, learned counsel appearing on behalf of the Petitioner would submit that it is not the date on which the Contract was entered into which is relevant but it is the date of supply of goods and services which would be relevant and for the said purpose, he would rely upon the judgment of the Hon’ble Supreme Court in *Silpi Industries & Ors. v. KSRDC*⁶ and, in particular Paragraph nos. 41, 42 & 44 thereof, which read as under:

“41. In CAs Nos. 1620-22 of 2021, the High Court, while negating

⁶ (2021) 18 SCC 790



the plea of the appellant, on the maintainability of counterclaim, has allowed the application filed by the respondent under Section 11(6) of the 1996 Act and appointed the second arbitrator. Though, we are of the view that counterclaim and set-off is maintainable before the statutory authorities under the MMED Act, the appellant in this set of appeals is not entitled for the relief, for the reason that on the date of supply of goods and services the appellant did not have the registration by submitting the memorandum as per Section 8 of the Act. The bids were invited on 23-2-2010, the appellant submitted its bid on 17-5-2010, the respondent awarded contract to the appellant on 24-9-2010 and the parties signed the contract documents for supply of material, installation, commissioning of the power plant on 29-7-2011. Thereafter, supplies were made and the appellant has raised first invoice on 2-11-2011 for supply contract and also raised the first invoice pursuant to contract for installation on 7-7-2012 and the appellant has raised the last invoice in furtherance of contract for supply of material, on 29-3-2014. The appellant also claims to have raised last invoice on 29-3-2015 in furtherance of contract for installation. It is to be noticed that the appellant approached the District Industrial Centre for grant of entrepreneur memorandum only on 25-3-2015.

42. Though the appellant claims the benefit of provisions under the MSMED Act, on the ground that the appellant was also supplying as on the date of making the claim, as provided under Section 8 of the MMED Act, but same is not based on any acceptable material. The appellant, in support of its case placed reliance on a judgment of the Delhi High Court in *GET&D India Ltd. v. Reliable Engg. Projects & Mktg.* •, but the said case is clearly distinguishable on facts as much as in the said case, the supplies continued even after registration of entity under Section 8 of the Act. In the present case, undisputed position is that the supplies were concluded prior to registration of supplier. The said judgment of the Delhi High Court relied on by the appellant also would not render any assistance in support of the case of the appellant. In our view, to seek the benefit of provisions under the MMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MMED Act, no benefit can be sought by such entity, as contemplated under the MMED Act.

44. The appellant cannot become micro or small enterprise or supplier, to claim the benefits within the meaning of the MMED Act, 2006, by submitting a memorandum to obtain registration subsequent to entering into the contract and supply of goods and services. If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other



interpretation of the provision would lead to absurdity and confer unwarranted benefit in favour of a party not intended by legislation.”

13. He would further submit that the present Contract as between the parties is essentially a works contract and relies upon Clauses 3.1 & 3.3 of the Contract between the parties, which sets out the scope of the Contract and which reads as under:

“3.0 SCOPE

3.1 The O&M Operator shall provide all the services required for the operation, maintenance and repair of the Plant during the Takeover Phase and Operational Phase, including but not limited to:

3.1.1 operating and maintaining the Plant along with the Existing O&M Contractor during Takeover Phase, including mobilization of staff and resources as per the Staffing Plan for Takeover Phase which is attached herewith as Annexure 1 (Staffing Plan);

3.1.2 taking over of the Plant including tools & tackles, Spare Parts, materials, drawings, documents, manuals, reports, operation & maintenance records etc. from the Existing O&M Contractor during Takeover Phase;

3.1.3 upon taking over of the Plant from the Existing O&M Contractor, operating and maintaining and repairing the Plant as per Prudent Utility Practice in conformity with this Contract, the Project Agreements and any other agreements which Owner has entered into or will enter into in relation to the Plant and in accordance with all Applicable Laws during the Operational Phase;

3.1.4 generating electricity from the Plant on behalf of Owner;

3.1.5 scheduling, coordinating and handling deliveries of Fuel and perform all duties and responsibilities (other than payment responsibilities) of the Owner;

3.1.6 operating, maintaining and repairing of all the associated facilities of the Plant and RWIS;

3.1.7 maintenance and repair of major equipment at the Plant under supervision of OEM, for which supervision of OEM shall be hired at O&M Operator's cost; In case any OEM refuses to give offer to the O&M Operator, Owner shall obtain the offer from the OEM, which shall be binding on and acceptable to the O&M Operator unconditionally.

3.1.8 preparing Operation & Maintenance Plan and Procedure, Inventory Management and Procurement Procedure and Annual Operating Plan & Budget;

3.1.9 operation of Plant Maintenance Module and Material Management Module under SAP installed by the Owner at the Plant;



3.1.10 maintenance and repair of all buildings (except house-keeping of these buildings) at the Site such as, security hostel, training centre, administrative building, training hostel, medical centre etc. and such area at the Site where these buildings are situated and as demarcated in Annexure 6 (Site), including maintenance and repair of electrical system, HVAC system, water system, sewage system of these buildings;

3.1.11 notifying the Owner promptly upon becoming aware of any warranty claim which may be asserted against the Existing O&M Contractor during the 12 (twelve) months period commencing from the Operational Phase in relation to the Services provided by such Existing O&M Contractor for the operation and maintenance of the Plant. However, this provision will not dilute in any manner the obligation of the O&M Contractor under the Contract to provide the Services required for operating and maintaining the Plant;

3.1.12 procurement and supply of chemicals, gases , consumables, oils, lubricants, filters (except gas turbine inlet air filter), electrical accessories, construction material and other materials (except Spare Parts), required from time to time for operation, maintenance, inspection, repairing and testing of the Plant, which will be consumed during operation and maintenance (including inspection, repairing and testing) of Plant and will then need to be replenished, starting from start of Operational Phase till expiry of the Term in accordance with the terms and conditions specified in this Contract and as set out in detail in the Technical Specifications (the "Consumables");

3.1.13 transportation and marine insurance of the Consumables from the Loading Point to the Site;

3.1.14 performance of all obligations required to be performed by the Owner under the LTSA including the services required to be performed by the Owner during the scheduled maintenance events as identified under the LTSA; and

3.1.15 preparing required reports documenting the operation and maintenance of the Plant, including but not limited to the Daily Reports, Monthly Reports and Annual Reports and such other reports as specified in Annexure – 13 hereto, as set out in further detail in the Technical Specifications (such services, the "Services")

3.3 As part of the scope of its obligations under this Contract, the O&M Operator shall procure and pay for, in its own name as an independent contractor and not as an agent of the Owner, all materials, equipment, supplies, manufacturing, fabrication necessary in connection with the Services in accordance with this Contract. All such items shall be new, fit for purpose and free from any improper workmanship or defects and properly warranted or guaranteed to the extent required by Clause 24.0 (Warranty and Warranty Period) and comply with all Applicable Laws.”



14. He would thus submit that since there is evidently a transfer of goods involved, the said contract would have to be construed as a works contract and would not be amenable to reference to the MSEFC under the MSMED Act. He would rely upon the judgment of this Court in **TATA Power Co. Ltd. v. Genesis Engineering Co.**⁷, and, in particular, Paragraph nos. 19, 20 & 21, thereof, which reads as under:

“19. In order to ascertain whether the scope of work as awarded to Petitioner would qualify as a ‘work contract’ or ‘composite supply’, the judgment of the Hon’ble Supreme Court of India in *Kone Elevator India Private Limited v. State of Tamil Nadu*, (2014) 7 SCC 1 is relevant to appreciate the categories of contract, i.e. (a) Contract for work to be done for remuneration and for supply of materials to be used in the execution of work for a price (b) Contract for work in which the use of the materials is necessary or incidental to the execution of the work (c) Contract for supply of goods where some work is required to be done as incidental to the sale. The Hon’ble Supreme Court has opined that category (a) as composite contract consisting of two contracts, one of which is for the sale of goods and the other which is for work and labour. It was held that the involvement of supply of goods and material as well as installation of the lift had concluded that the contracts awarded to Kone Elevators satisfy the characteristics of Works Contract and held that it cannot be considered as contract of sale.

20. Applying the judgment to the instant case, the Works Orders as executed by the parties in the instant case falls within category (a) as it comprises of two contracts which include supply of goods such as Cables, wire, connectors, street lights and poles and subsequent involvement of work and labour for its installation. Further, the element of both supply of goods and element of labour and service is involved in the Work Orders. It is also a settled principle of law that disputes/claims arising from Works Contract are not amenable to the jurisdiction of Facilitation Council constituted under the MSME Act.

21. In terms of Section 11 of the MSME Act, Central Government had to notify policies in respect of procurement of goods and services produced and provided by Micro and Small Enterprises. Accordingly, on 23.03.2012, Public Procurement Policy for Micro and Small Enterprises was notified which envisaged that Central

⁷ 2023 SCC OnLine Del 2366



Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement of products produced and services from Micro and Small Enterprises. Thereafter, on 25.03.2022, Office of Development Commissioner, Government of India issued an Office Memorandum clarifying that Public Procurement Policy is not applicable to Works Contracts. In view of the aforesaid and considering the definition of Enterprise and on a combined reading of the said Policy and subsequent clarification issued by the Ministry, it is evident that benefit of MSME Act and Policies issued thereunder can only be availed by enterprises which fall within the ambit of goods and services which are manufactured and reproduced by the enterprises.”

15. In rejoinder, learned counsel for the Respondent would contend that the issue as to whether the contract in question constitutes a works contract is, in any event, a matter that can be appropriately referred to the MSEFC itself. In support of this submission, reliance would be placed on the judgment of the learned Co-ordinate Bench of this Court in ***Idemia Syscom India Private Limited v. M/s. Conjoinix Total Solutions Private Limited***⁸, particularly Paragraph nos. 15 and 16 thereof, which read as under:

“15. The petitioner has not denied the factum of the respondent being registered as an MSME at the time of entering into the contract. It has also not denied that the respondent has approached the MSME facilitation council under Section 18 of the Act. It is the petitioner's case that the subject contract is a works contract and hence not covered under the MSMED Act. He has relied on a number of decisions to that effect. However, the respondent has denied that the contract is a works contract. Since the parties are at odds about the nature of the contract, this becomes a triable issue requiring adjudication and the same would involve detailed appreciation of evidence. The scope of enquiry vested with the Court under Section 11 of the Arbitration and Conciliation Act is no longer Res integra. The same is limited to forming a prime facie opinion as to the existence of an agreement between the parties. (Ref: ***SBI General Insurance Co. Ltd. v. Krish Spinning***⁸) Since the dispute in question would require detailed appreciation of evidence and interpretation of the terms of the contract, it would not be appropriate for this Court at the stage of a petition under Section 11 of the A&C Act to undertake the same. It may very well

⁸ 2025 SCC Online Del 1023



happen that the parties resolve their issues in the conciliation and the question becomes merely an academic one. Even if the conciliation fails, the parties would still have recourse to arbitration under the MSMED Act and the AT so constituted would be the most suited forum for the parties to put forth their respective contentions

16. Looking from another angle, even if the petitioner's contention regarding works contracts can be said to have some merit, the same essentially becomes a question regarding the jurisdiction of the AT constituted under Section 18 of the MSMED Act. It is no longer *Res integra* that the AT would be competent to rule on its own jurisdiction. The same has been reiterated by the Supreme Court in *Mahakali Foods (Supra)* in the context of an AT constituted under *MSMED* Act:-

"48. When the Facilitation Council or the institution or the centre acts as an arbitrator, it shall have all powers to decide the disputes referred to it as if such arbitration was in pursuance of the arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act, 1996 and then all the trappings of the Arbitration Act, 1996 would apply to such arbitration. It is needless to say that such Facilitation Council/institution/centre acting as an Arbitral Tribunal would also be competent to rule on its own jurisdiction like any other Arbitral Tribunal appointed under the Arbitration Act, 1996 would have, as contemplated in Section 16 thereof. ""

ANALYSIS & DECISION:

16. This Court has heard the learned counsel for the parties at length and, with their able assistance, has carefully perused the paper book as well as the judgments relied upon by them.

17. Upon a careful consideration of the pleadings, the material placed on record, and the precedents cited by the learned counsel for the parties, as cited in preceding paragraphs, this Court is of the considered view that the contract between the parties was admittedly executed on 16.12.2020. In view of the settled legal position, particularly the ratio laid down by the Hon'ble Supreme Court in *Silpi Industries (supra)* and the judgment of the learned Co-ordinate Bench of this Court in *Sterlite Power (supra)*, this Court finds no impediment



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in referring the present dispute to the MSEFC, Cuttack. Such a reference would necessarily include an examination and determination of the preliminary issue as to whether the contract in question is a “*works contract*”.

18. Insofar as the determination of whether the contract constitutes a “*works contract*” is concerned, this Court is of the view that the said issue squarely falls within the jurisdiction of the MSEFC. As held by the learned Co-ordinate Bench of this Court in *Idemia Syscom* (*supra*), such a question is not only amenable to adjudication by the MSEFC but is one which can, and indeed ought to, be examined by the Council while considering the dispute between the parties.

19. It has been brought to the notice of this Court that disputes between the parties are already the subject matter of proceedings pending before the MSEFC, Cuttack, and that the said proceedings are presently at the stage of pleadings.

20. In these circumstances, this Court is of the considered opinion that, since the parties are already before the MSEFC, Cuttack, the said forum constitutes the appropriate and competent authority for the settlement and adjudication of the disputes between the parties.

21. Accordingly, the present Petition is dismissed, in view of the facts that the proper forum for raising and adjudicating the disputes is the MSEFC, and not this Court by way of invocation of its jurisdiction under Section 11 of the Act.

22. The present Petition, along with pending application(s), if any, is disposed of in the above terms.

**HARISH VAIDYANATHAN SHANKAR, J.
FEBRUARY 02, 2026/rk/jk**