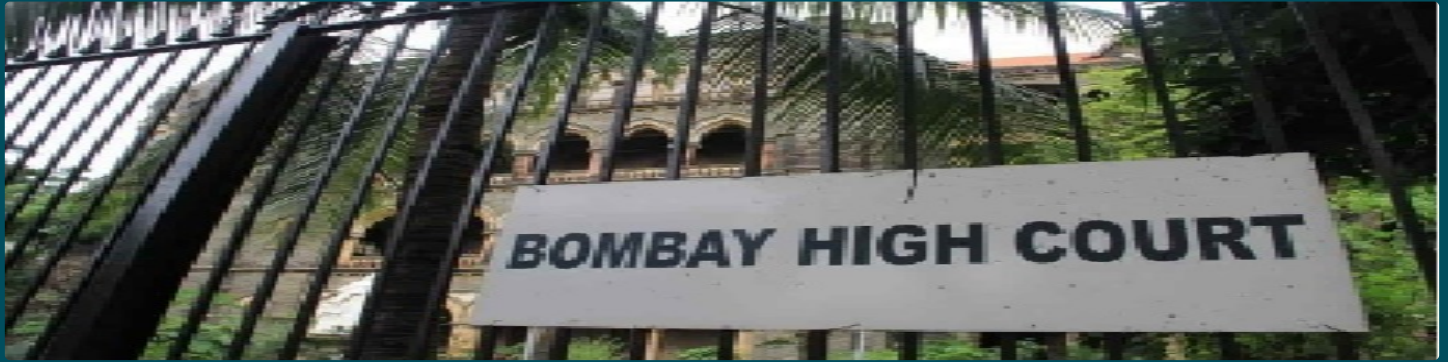




ARBITRATION AND CONCILIATION

Once the reference under MSMED Act is filed, it would override invocation of arbitration by other party: Bombay High court

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The Hon'ble [Bombay High Court](#) in a recent order passed on 24th January 2023 has ruled that the ongoing dispute filed under the provision of Micro, Small, and Medium Enterprises Development Act, 2006 ("MSMED Act, 2006") shall supersede over the private agreement between the parties for arbitration and thereby refused to grant the relief of appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act").

The moot question before the bench was that whether the arbitration clause invoked under [Arbitration Act](#) before the reference was made to conciliation and arbitration under Sections 18(2) and 18(3) of the MSMED Act invalidates the reference made to the Council of MSMED.

The Applicant in the present case had issued notice under Section 21 of the Arbitration Act prior to the date the Defendants filed the reference to MSMED Act. Thereafter an application under Section 11 of the Arbitration Act seeking appointment of sole arbitrator for the purpose of adjudication of disputes and differences prevailing between the applicant and the respondent therein. The arbitration was invoked on 28/12/2020 by the Applicant and the proceedings had commenced in the context of Section 21 of the Arbitration Act prior to the reference under Section 18(1) of the MSMED Act filed by the Respondents on 07/01/2021 before the Council.

The argument advanced by the Applicant was that, once the arbitration has been invoked, the subsequent reference for conciliation and arbitration under Sections 18(2) and 18(3) of the MSMED Act cannot invalidate the application filed under Section 11(5) of the Arbitration Act. Further argued that though Section 18(4) of the MSMED Act provides for a 'notwithstanding' provision in context of any other law, it does not nullify bilateral contract.

In the meantime MSME Council had initiated the Conciliation proceedings and terminated the same since the Applicant failed to appear in the conciliation proceedings. The Applicant had not participated in the conciliation proceedings before the MSME Council, as according to Applicant once the arbitration has been invoked, it will gain supremacy over any proceedings, before any forum, including the MSME Council.

Lastly it was argued by the Applicant that MSMED Act has no provision which take away the jurisdiction of Courts to exercise their power upon an application filed prior to the reference made before the MSME Council.

The bench in view of the Hon'ble Supreme Court's decision in *Gujarat State Civil Supplies Corporation Ltd. Vs. Mahakali Foods Pvt. Ltd. (Unit 2) & Anr* observed that as soon as the statutory mechanism under section 18 (1) of MSMED Act is activated, it will supersede the arbitration agreement between the parties. In the said decision of the Hon'ble Supreme Court, it was ruled that a private agreement between the parties cannot obliterate the statutory provisions contained in the MSMED Act.

Thus now, it is a settled position of law that any entity registered under MSME can approach MSME council for its claim despite there is arbitration agreement. The opposite party (Non MSME) if desires to avail arbitration remedy as per the Agreement, should consider to file section 11 application before reference is filed by registered MSME. Mere invocation under section 21 of Arbitration Act may not amount to initiation of arbitration.

Judgment: Bajaj Electricals Ltd. v. Chanda S. Khetawat, (Bharati Dangre, J.), 2023 SCC OnLine Bom 183