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THE OVERRIDING EFFECT: COUNTERCLAIMS AND ARBITRABILITY UNDER THE MSMED ACT

~Mokshi Lohchab

In April 2026, the Delhi High Court held in *Jubilant Marketing Pvt. Ltd. v. Robbins Tunneling and Trenchless Technology India Pvt. Ltd.* that a party who invokes Section 18 of the MSMED Act cannot abandon the process midway and seek an arbitrator through Section 11(6) of the Arbitration Act instead, because the deeming fiction that creates a statutory arbitration agreement under Section 18(3) arises only once conciliation concludes, and the mechanism must be carried to its logical end.[1] That ruling, read against the Supreme Court's decision in *Silpi Industries v. Kerala State Road Transport Corporation*, exposes a question neither court has answered. If counterclaims are maintainable within the MSMED mechanism, what is the outer limit of the subject matter a buyer can bring into it?[2]

WHAT SILPI ACTUALLY DECIDED?

Silpi held that a buyer's counterclaim is maintainable in arbitration proceedings under Section 18(3). The Court's reasoning rested on three points. Section 18(3) provides that once conciliation fails, arbitration proceeds as though conducted under an arbitration agreement recognised by Section 7 of the 1996 Act, which pulls the full procedure of the Arbitration Act into the MSMED mechanism. Section 23(2A) of the 1996 Act expressly permits a respondent to file a counterclaim or plead a set-off, provided it falls within the scope of the arbitration agreement. And critically, the Court reasoned that if counterclaims were barred before the

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[1] Jubilant Marketing Pvt. Ltd. v. Robbins Tunneling and Trenchless Technology India Pvt. Ltd., ARB.P. 2129/2025 (Del. H.C. Apr. 9, 2026) (Pushkarna, J.); 'Party Cannot Bypass MSMED Act Mechanism to Seek Arbitrator Appointment,' *LiveLaw* (Apr. 10, 2026), https://www.livelawbiz.com/arbitration/bypassing-msme-mechanism-midway-to-seek-arbitrator-appointment-before-court-not-permissible-delhi-high-court-529859 (last visited July 14, 2026).

[2] Silpi Industries v. Kerala State Road Transport Corp., (2021) 18 SCC 790.

Council, a buyer could escape the MSMED forum altogether by filing its claims separately before a contractual tribunal, thereby avoiding the compound interest liability under Section 16 and the seventy five per cent pre-deposit obligation under Section 19. These statutory protections, the Court said, could not be rendered meaningless by declaring counterclaims non-maintainable.[3] Any argument that counterclaims are bounded in subject matter has to answer all three points, not just the second one.

The third point in *Silpi*, on examination, answers a different question than the one this piece is asking. The Court's real concern was that a buyer excluded from the MSMED forum would take its counterclaim elsewhere and obtain an award without the pre-deposit condition that applies to MSMED awards. That is a concern about forum shopping, not about subject matter. It is fully met by requiring that counterclaims be filed before the Council regardless of what they concern, so that any resulting award stays subject to Section 19's pre-deposit condition. But the Council can receive a counterclaim, apply that pre-deposit protection to whatever award follows, and still decline to decide it on the merits for want of subject matter jurisdiction, referring it onward to the appropriate forum.[4] Requiring a counterclaim to be filed before the Council and requiring the Council to adjudicate it are not the same requirement. *Silpi* closes the door on forum shopping. It does not turn the Council into a general commercial court.

WHERE THE SCOPE ACTUALLY COMES FROM?

The textual limit sits in Section 23(2A) itself, the very provision *Silpi* relied on: a counterclaim must fall within the scope of the arbitration agreement. In ordinary arbitration, that scope is whatever the parties negotiated. In MSMED arbitration, *Jubilant v. Robbins* confirms that the agreement is a deeming fiction created by Section 18(3), arising only after conciliation ends, not a document either party signed.[5] The scope of a statutorily created agreement has to come from the statute that creates it, and Section 18(3) exists for one purpose: resolving a payment dispute under Section 17, a supplier's claim for amounts due on goods supplied or services rendered. A buyer's claim for consequential commercial losses arising from defective goods does not arise under Section 17 and is not a claim by a supplier, so the deemed agreement has

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[3] *Id.* ¶ 24.

[4] Micro, Small and Medium Enterprises Development Act, 2006, § 18(3), No. 27 of 2006 (India).

[5] Jubilant Marketing Pvt. Ltd. v. Robbins Tunneling and Trenchless Technology India Pvt. Ltd., ARB.P. 2129/2025 (Del. H.C. Apr. 9, 2026) (Pushkarna, J.), *quoted in* 'Party Cannot Bypass MSMED Act Mechanism to Seek Arbitrator Appointment,' *LiveLaw* (Apr. 10, 2026), https://www.livelawbiz.com/arbitration/bypassing-msme-mechanism-midway-to-seek-arbitrator-appointment-before-court-not-permissible-delhi-high-court-529859 (last visited July 14, 2026).

no textual basis for reaching it. Section 24, which gives the Act overriding effect over other laws, does not change this.[6] An override built to protect the supplier's access to the statutory forum does not simultaneously stretch that forum's jurisdiction past the Act's own subject matter, a point that gathers force now that the Supreme Court itself, in *NBCC (India) Ltd. v. State of West Bengal*, has flagged how far *Silpi* and its companion ruling in *Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd.* can be stretched, and referred the underlying question of Section 18's reach to a larger bench for authoritative resolution.[7]

The counterargument, that a deemed agreement once created covers everything arising out of or connected with the underlying contract, has surface appeal and proves too much. Taken seriously, it converts every MSMED payment dispute into a full contractual arbitration in which a supplier who came to the Council for a statutory delayed payment remedy ends up defending elaborate commercial claims it never agreed to answer there. That result runs against the Act's protective design. *Mahakali Foods* held that the Act's mechanism cannot be displaced by a pre-existing arbitration clause precisely because it is beneficial legislation built to protect suppliers.[8] The same purposive logic that stops a buyer from pulling a supplier out of the MSMED forum should stop a buyer from using a counterclaim to turn that forum into something the statute never built it to be. A buyer should not achieve through a counterclaim what it cannot achieve through an arbitration clause.

WHAT THIS MEANS FOR PARTIES IN PRACTICE?

A counterclaim tied directly to the supplier's payment claim, a deduction for short delivery, a set-off for goods rejected on quality grounds at the time of the relevant transaction, falls within Section 17's subject matter because it bears on the amount actually due under the same supply, and belongs before the Council. A counterclaim for consequential losses, business interruption, or contractual indemnification, which needs independent adjudication of a cause of action separate from the payment obligation, does not. For respondents: raise the subject matter objection at the earliest opportunity, argue Section 23(2A)'s scope limit specifically and on the record, and file the counterclaim before the appropriate forum at the same time, not because

[6] MSMED Act, 2006, § 24.
[7] NBCC (India) Ltd. v. State of West Bengal, 2025 INSC 54; 'MSME Registration Not a Prerequisite for Section 18 Dispute Resolution,' *CaseMine* (Jan. 11, 2025), https://www.casemine.com/commentary/in/msme-registration-not-a-prerequisite-for-section-18-dispute-resolution:-a-commentary-on-nbcc-(india)-ltd.-v.-the-state-of-west-bengal-(2025-insc-54)/view (last visited July 14, 2026).
[8] Gujarat State Civil Supplies Corp. Ltd. v. Mahakali Foods Pvt. Ltd., (2023) 6 SCC 401.

the Council has jurisdiction over it but because no court has yet accepted this argument and limitation will not pause for doctrine to catch up. For suppliers, the lesson is straightforward: do not accept an attempt to recast a substantial consequential loss claim as a set-off arising from the same transaction. What matters is not the label attached to the counterclaim, but its real nature.