

Delhi High Court

Avr Enterprises vs Union Of India on 8 May, 2020

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 11th March 2020

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Judgment delivered on: 08th May, 2020

+ CM(M) 769/2018 with CM APPL. 27219/2018

AVR ENTERPRISES..... Petitioner

versus

UNION OF INDIA..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. A.K. Behera and Mr. B.S. Mathur, Advocates.

For the Respondent : Mr. Praveen Kumar Jain, Ms. Akanksha Agrawal, Mr.

Sajal Manchanda and Mr. Lokendra Chundawat, Advocates.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

CM(M) 769/2018 with CM APPL. 27219/2018

1. Petitioner impugns order dated 18.04.2018 whereby the Trial Court has rejected the preliminary objection raised by the Petitioner that the petition filed by the Respondent under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called the Arbitration Act) impugning award dated 14.07.2016 was liable to be dismissed because Respondent had not deposited 75% of the awarded amount as stipulated in Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSMED Act).

2. Respondents had issued a Tender Enquiry for procuring Cover Water Proof 9.1 M x 9.1 M. The bid of the Petitioner was accepted by the Respondents and contract dated 05.04.2005 was entered between the parties.

3. Dispute arose between the parties with regard to supplies. Liquidated damages were imposed by the Respondent and balance payment was also adjusted. Petitioner vide their letter dated 23.7.2010 invoked Arbitration and requested that matter may be referred to Arbitration. Respondents thereafter appointed a Sole Arbitrator to adjudicate upon the disputes

4. The Arbitrator published his award dated 14.07.2016 inter alia reducing the quantum of Liquidated Damages, directed payment of the balance amount with compound interest.

5. The award was challenged by the Respondents by filing the subject petition under Section 34 of the Arbitration Act before the Trial Court.

6. Petitioner in its reply took up a preliminary objection that the petition filed by the Respondent under Section 34 of the Arbitration Act were not maintainable because the Respondent had failed to deposit 75% of the awarded amount in terms of Section 19 of the MSMED Act. Petitioner relied upon the decision of the Supreme court of India in M/s Snehadeep Structures Private Ltd vs Maharashtra Small Scale Industries Development Corporation Ltd 2010 (3) SCC

34.

7. By the Impugned Judgment, the Trial Court has held that the provisions of MSMED Act are not applicable and has thus rejected the preliminary objection raised by the Petitioner.

8. Learned counsel for the Petitioner relies upon the Judgment of the Supreme Court in Snehadeep Structures Private Ltd (supra); Judgment of the High Court of Gauhati in Union of India Versus Hindustan Metal Refining Works (P) Ltd. MANO/GH/0577/2014 and the Division Bench of the Gujarat High Court in Saryu Plastics Private Limited & Ors. Versus Gujarat Water Supply and Sewerage Board MANU/GJ/1526/2017.

9. Learned counsel for the Respondent contends that the MSMED Act is not applicable to the facts of the present case as it was not a case of a statutory reference under the MSMED Act and Arbitrator had been appointed by the parties. He relies upon the judgment of a coordinate bench of this court dated 18.09.2017 in W.P.(C) 10886/2016 titled Bharat Heavy Electrical Limited Versus the Micro and Small Enterprises Facilitation Centre & Anr.

10. Section 18 of the MSMED Act stipulates as under:

"18. Reference to Micro and Small 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.

(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.

(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 disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of that Act. (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.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

11. In terms of Section 18 of the MSMED Act, any party to a dispute with regard to any amount due under Section 17 of the MSMED Act make a reference to the Micro and Small Enterprises Facilitation Council. On receipt of the reference 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 Act shall apply.

12. Where conciliation initiated under sub-section (2) of Section 18 of the MSMED Act 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 Act shall then apply to the disputes as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of Section 7 of the Arbitration Act.

13. Section 19 of the MSMED Act lays down as under:

"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."

14. In terms of Section 19 of the MSMED Act, 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 75% 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. On deposit of the 75% of the awarded amount, the court shall order that such percentage of the amount

deposited, as it considers reasonable, be paid to the supplier, subject to such conditions as it deems necessary to impose.

15. The question that arises for consideration is as to whether Sections 18 and 19 of the MSMED Act are applicable to the facts of the present case.

16. Petitioner, in the present case, had invoked arbitration under the Arbitration Act and requested respondent to appoint an arbitrator. Respondent appointed an arbitrator.

17. Admittedly there was no reference made to the Micro and Small Enterprises Facilitation Council for any amount due to the Petitioner under Section 17 of the MSMED Act.

18. Since there was no reference made to Micro and small Enterprises Facilitation Council by the petitioner, no proceedings were conducted by the Council under Section 18 of the MSMED act. There was also no reference made by the Council to any Institution or Centre for conducting conciliation. There was no conciliation either by the Council or by any Institution or Centre providing alternate dispute resolution services. The Council also did not take up any dispute for arbitration nor did it referring any dispute to any Institution or Centre providing alternate dispute resolution services for such arbitration.

19. Arbitration in the present case was not an Institutional Arbitration as contemplated under section 18 of the MSMED Act but was conducted under the Arbitration Act by an Arbitrator privately appointed by the Respondent.

20. Reading of Section 19 of the MSMED Act shows that same is applicable to a decree, award or other order made either by the Council or by any Institution or Centre providing alternate dispute resolution services to which a reference is made by the Council.

21. Since there was no arbitration conducted under the MSMED Act so there is no question of any decree, award or other order being made either by the Council or by any Institution or Centre providing alternate dispute resolution services to which a reference is made by the Council thus Section 19 of the MSMED Act is not applicable to the present case.

22. Even though the petitioner may be covered under the MSMED Act, as Petitioner did not invoke its claim under section 18 of the MSMED Act or seek reference thereunder, there is no question of section 19 of the MSMED Act being applicable to the present case.

23. Similar interpretation has been rendered by the coordinate Bench of this Court in Bharat Heavy Electrical Limited (supra). It has been held that "the scheme (of the Act) is to provide a statutory framework for Micro and Small Enterprises to expeditiously recover the amounts due for supplies made by them. It is understood that the Small and Medium Enterprises do not command a significant bargaining power and as indicated in the statement of object and reasons of the Act - the object of the Act is, inter alia, to extend the policy support and provide appropriate legal framework for the sector to facilitate its growth and development. It is, apparently, for this reason that Section

18 (3) does not contemplate an arbitration to be conducted by an arbitrator which is to be appointed by either party, but expressly provides that the same would be conducted by MSEFC or by any institution or a centre providing alternate dispute resolution SERVICES.¹ Section 19 of the Act also ensures a more expedient recovery by making pre-deposit of 75% of the awarded amount a pre-condition for assailing the award. The benefit of this provision is not available in case of arbitrations in terms of agreements between the parties (and not by a statutory reference under Section 18 (3) of the ACT).²Further, in terms of Section 19 of the Act, the award rendered pursuant to an arbitration under Section 18(3) of the Act cannot be assailed by the party (other than the supplier), without depositing seventy-five percent of the amount awarded. Concededly, Section 19 would be inapplicable to an award, which is rendered pursuant to an arbitration that is not conducted in terms of Section 18(3) of the Act.³

24. I am in complete agreement with the view expressed by the coordinate bench in Bharat Heavy Electrical Limited (supra).

25. The judgement of the Gauhati High Court in Hindustan Metal Refining Works (P) Limited (supra) relied upon by learned counsel for the petitioner is also not applicable to the facts of the present case.

Para 21 of the Judgment Para 22 of the Judgment Para 28 of the Judgment

26. In the said case the question that Section 19 of the MSMED Act was not applicable because the reference had not been made under Section 19 of the MSMED Act was not specifically raised before the court. Furthermore, the objections under section 34 of the Arbitration Act, were rejected on merits.

27. In Saryu Plastics Pvt. Limited (supra), the Division Bench of the Gujarat High Court has specifically considered the question as to whether Section 19 of the MSMED Act would be applicable to a case where arbitrator was appointed by the parties and there was no reference to the Council under Section 18 of the MSMED Act.

28. The Gujarat High Court held that Section 19 of the MSMED Act would still apply. The Division Bench has held that if Section 19 of the MSMED Act were to apply only in cases of award passed by the Council or any Institute or Centre to which a reference is made by the Council, such an interpretation would render the term 'decree' in Section 19 redundant since neither the Council nor any Institution or Centre to which reference would be made by the Council would be passing a decree.

29. The Division Bench though has relied upon Snehadeep Structures Pvt Ltd (Supra) but has specifically noticed that the Supreme Court in Snehadeep Structures Pvt Ltd (Supra) was not directly dealing with Section 19 of the MSMED Act and the case was arising only under Section 7 of the Interest Act.

30. The rationale given by the division bench is that the plain language of Section 19 would not permit restriction of its applicability only in case of award envisaged under Section 18 of the MSMED Act.

31. I am in respectful disagreement with the view expressed by the Division Bench of the Gujarat High Court.

32. The judgement of the Supreme Court in Snehadeep Structures Private Limited (supra) relied upon by learned counsel for the petitioner and also referred to in Saryu Plastics Pvt. Limited (supra) is not applicable to the facts of the present case. In the said case the question under consideration before the Supreme Court was whether the expression 'appeal' used in Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary undertakings Act 1993 (hereinafter referred to as the Interest Act) includes an application, to set aside the arbitral award, filed under Section 34 of the Arbitration Act.

33. Section 6 and 7 of the Interest Act read as under:

"6. Recovery of amount due .- (1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.

(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

7. Appeal .-No appeal against any decree, award or other order shall be entertained by any Court or other authority 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, other order in the manner directed by such Court or, as the case may be, such authority."

34. Section 6 of the Interest Act contemplates two kind of proceedings; (i) a Suit or other proceeding under any law for the time being in force and (ii) reference to the Industry Facilitation Council for acting as an arbitrator or conciliator. In the context of Section 6 of the said Act, Section 7 provides that no appeal against any decree, award or other order shall be entertained unless the appellant (not being a supplier) deposits 75% of the amount in terms of the decree, award or other order.

35. In contrast to Section 6 of the Interest Act, Section 18 of the MSMED Act does not contemplate filing of a Suit. It only contemplates a reference to the Micro and small Enterprises facilitation Council. Since Section 18 of the MSMED Act only contemplates a reference to the Council, Section

19 also refers to a 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.

36. If the contention of learned counsel for the Petitioner were to be accepted, then it would imply that even in a case where there is Civil Suit for recovery filed and a decree obtained by a supplier, Section 19 of the MSMED Act would apply and the buyer would be mandated to deposit 75% of the decreed amount as a precondition for consideration of his appeal. This would be contrary to Order 41 Rule (1)(3) Civil Procedure Code. Under Order 41(1)(3) CPC, the Appellate Court can waive the pre-deposit subject to conditions and failure to deposit entitles the appellate court to dismiss only the stay application but not the appeal.⁴

37. Further, in Section 7 of the Interest Act, there is no qualification as in Section 19 of the MSMED Act i.e. "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". Clearly the judgement of the Supreme Court in Snehadeep Structures Private Limited (supra) is not applicable to the facts of the present case.

4 Malwa Strips (P) Ltd. Versus Jyoti Ltd. (2009) 2 SCC 426;

Devi Theatre Versus Vishwanath Raju (2004) 7 SCC 377; Kayamuddin Shamsuddin Khan Versus SBI (1998) 8 SCC 676

38. If one were to examine the scheme of Section 19 of the MSMED Act, it shows that Section 19 specifically stipulates that "No application for setting aside any decree, award or any other order made either by the Council or by any institution or centre providing alternate dispute resolution services to which reference has been made by the Council, shall be entertained unless. "

39. Section 19 of the MSMED Act qualifies the expression "decree award or other order" with the expression "made either by Council or by any institution or centre providing alternate dispute resolution services to which reference has been made by the Council".

40. If Section 19 of the MSMED Act, were to apply to every decree award or other order irrespective of whether it was made by the Council, or an Institution or Centre to which reference has been made by the Council or by any other Court, forum or tribunal, there was no necessity for the legislators to provide for the expression "made either by Council or by any institution or centre providing alternate dispute resolution services to which reference has been made by the Council".

41. It may also be noticed that the MSMED Act was enacted in place of the Interest Act and by Section 32, the MSMED Act repealed the Interest Act. Thus, it can safely be held that the legislators consciously deleted the provision with regard to filing of a Suit or other proceeding under any law for the time being in force as contemplated in Section 6 of the Interest Act and restricted the application of section 19 of the MSMED Act to decree, award or any other order made either by the Council or by any institution or centre providing alternate dispute resolution services to which

reference has been made by the Council.

42. The interpretation given by the Division Bench of Gujarat High Court, in my respectful view, renders the expression "made either by Council or by any institution or centre providing alternate dispute resolution services to which reference has been made by the Council" otiose and surplusage.

43. It is settled principle of interpretation that all the provisions should be harmoniously interpreted and construed giving life, force and effect to every part of the rule or clause or word so that no provision or part would be rendered redundant, ineffectual, nugatory, surplusage or otiose.⁵

44. In my view, Section 19 of the MSMED Act would apply only to proceedings initiated under section 18 of the MSMED Act and would not apply to an award published by an Arbitrator appointed by the parties otherwise than in accordance with section 18 of the MSMED Act.

Rajendra Prasad Yadav v. State of M.P., (1997) 6 SCC 678; A.N. Sehgal v. Raje Ram Sheoran, 1992 Supp (1) SCC 304

45. In view of the above, I find no infirmity in the view taken by the Trial Court, in the impugned order, that the provisions of the MSMED Act for deposit of 75% of the awarded amount are not applicable.

46. I find no merit in the Petition. The Petition is accordingly dismissed.

47. Copy of the Judgment be uploaded on the High Court website and be also forwarded to learned counsel for the parties by email.

SANJEEV SACHDEVA, J MAY 08, 2019 rk