(2014) 04 CHH CK 0007

In the Chhattisgarh High Court

Case No : Second Appeal No. 88 of 2007

Andhra Pradesh Heavy Machinery and Engineering Limited — APPELLANT

Vs

Industry Facilitation Council — RESPONDENT

Date of Decision : 26-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 2, 2(1)(d), 2(e), 34
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 100, 96
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 4, 5, 6, 6(1), 6(2)

Citation : AIR 2014 Chh 128

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : N.K. Shukla, Sr. Advocate and Naini Jha, Advocate for the Appellant

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal, J.

1. The substantial questions of law formulated and to be answered in plaintiff''s second appeal are as under:-- "Whether in view of judgment of Supreme Court in case of AIR 2002 SC 2421 , both the courts below were justified to try the suit challenging the order/award passed by the Industrial Facilitation Council, Raipur?

(For sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court)"

Sans unnecessary details, the facts which are essential to be stated for the purpose of disposal of the present second appeal are as under. 1.1. The defendant No. 2 being a small scale undertaking supplied various components to the plaintiff company as per purchase order along with terms and conditions issued by the plaintiff and upon failure to make payment of the dues by the plaintiff, the defendant No. 2 filed an application u/s 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (hereinafter called as "Interest Act, 1993") and thereby made a reference to the defendant No. 1 Industry Facilitation Council established u/s 7(A) of the Act claiming Rs. 13,74,112=00 including interest. The defendant No. 1 Council after hearing came to the conclusion by its award dated 28-5-2003, that defendant No. 2 is entitled for Rs. 9,71,356=-00 from the plaintiff towards supply made.

1.2. Thereafter, the plaintiff filed a suit for declaration and permanent injunction stating inter alia that the award passed by defendant No. 1 is beyond the jurisdiction of the subject matter of the claim and it has been obtained by defendant No. 2 fraudulently and without disclosing the terms and conditions of the purchase order as in the said terms and conditions of the purchase order placed to the defendant No. 2 there is no clause of arbitration which is in violation of sub-section (1) of Section 7 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "Act 1996") and therefore, the award passed by defendant No. 1 dated 17-6-2003 be declared null and void and further prayed it be declared as without jurisdiction and inexecutable in law.

1.3. The defendant No. 2 upon his appearance filed an application under Order 7, Rule 11 of the CPC stating inter alia suit as framed and filed is not maintainable in law in view of Section 2(e) of the AC Act of 1996 and as such liable to be dismissed.

1.4. The trial Court considered the application under Order 7, Rule 11 of the CPC filed by defendant No. 2 and by its order dated 8-3-2004 allowed the application and dismissed the suit holding that it is barred by Section 6(2) of the Interest Act of 1993 read with Section 2(1)(d) of the AC Act of 1996.

1.5. Feeling dissatisfied against the judgment and decree passed by trial Court, the plaintiff preferred first appeal u/s 96 of the Code of Civil Procedure. The First Appellate Court declined to interfere with findings of the trial Court and dismissed the appeal.

1.6. Questioning the legal acceptability and sustainability of the impugned judgment and decree dated 31-8-2006 passed by 8th Additional District Judge, Raipur in Civil Appeal No. 2-A/2006, the plaintiffs filed this second appeal u/s 100 of the CPC, in which, substantial questions of law has been formulated as mentioned in opening paragraph of this judgment.

2. Dr. N.K. Shukla, learned senior counsel appearing for the appellant/plaintiff would submit that both the Courts below have committed a palpable error of jurisdiction in dismissing the suit to be barred by law and placed reliance upon decision of the Supreme Court in case of AIR 2002 SC 2421 .

3. No one has entered into appearance on behalf of respondent No. 2/defendant No. 2 to support the judgment and decree in spite of service of notice of appeal.

4. I have heard the learned counsel for the appellant elaborately and considered his submissions and perused the records of the two courts below with circumspection.

5. The Interest Act of 1993 has been enacted to provide for and regulate the payment of interest on delayed payments to small scale and ancillary industrial undertakings as it is a beneficial piece of legislation, tended to expedite timely payment of money owed to Small Scale Industries. Section 6(1) provides for recovery of 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.

6. Sub-section (2) of Section 6 has been inserted in the Act by Act No. 23 of 1998 w.e.f. 10-8-1998 in which any party to dispute may make reference to the Industry Facilitation Council for acting as an arbitrator and in which provisions of Act of 1996 shall apply. Sub-section (2) of Section 6 of the Act, states as under:--

"(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 disputes as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of Section 7 of that Act."

A close reading of the sub-section (2) of Section 6 of the Act following proposition would emerge:--

"1. Sub-section (2) of Section 6 expressly incorporates the provisions of Arbitration and Conciliation Act (AC Act, 1996) in a proceeding before the Industry Facilitation Council constituted under S. 7-(A) of the Act and to whom reference is to be made for acting as arbitrator.

2. The dispute referred u/s 6(2) are deemed to have been made pursuant to arbitration agreement as defined in subsection (1) of Section 7 of the Act of 1996."

7. From the aforesaid analysis of Section 6(2) of the Interest Act of 1993 it is transparently clear that the provisions of AC Act of 1996 including Section 34 of the Act that is provision for setting aside award would be applicable to set aside the award passed by Industry Facilitation Council, the question that needs determination by this Court would be whether the Act of 1996 bars judicial intervention by any other judicial authority including civil Court in respect of matters governed by Part-I of the AC Act of 1996.

8. The Arbitration and Conciliation Act, 1996 is a complete Code by itself it lays down machinery for arbitral award enforceable Section 34 of the Act provides for setting aside the arbitral award. In terms of Section 36 of the AC Act of 1996, the award becomes enforceable as if it were a decree, where the time for making the application for setting aside u/s 34 has expired, or such application having been made, has been refused.

9. At this stage it would be profitable to notice sub-section (4) and sub-section

(5) of Section 2 of the AC Act of 1996 which provides as under:--

"(4). This Part except sub-section (1) of Section 40, Sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this part are inconsistent with that other enactment or with any rules made thereunder.

"(5). Subject to the provisions of sub-section (4), and save in so far as is otherwise provided by any law for the time being in force or in any agreement in force between India and any other country or countries, this Part shall apply to all arbitrations and to all proceedings relating thereto."

The "Part" referred to in this sub-section is Part I of the AC Act of 1996, which deals with domestic arbitrations clearly stipulates that Part-I of AC Act shall apply to every arbitration under any other law for enactment for being in force, that includes Interest Act, 1993, therefore, the proceedings before the Council are proceedings under the A.C. Act, 1996, pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the AC Act of 1996 in all its force, the extent of judicial intervention in arbitrations is limited by the non obstante provisions of Section 5 of the AC Act, 1996, which stipulate:

"5. Extent of judicial intervention.--Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

Thus Section 5 of the AC Act of 1996 imposes a absolute ban on the judicial intervention of any type in the arbitral process except so provided by the Part-I of the Act, clearly indicating the legislative intent to minimize supervisory role to ensure that the intervention of judicial authority should be minimal.

10. Now the short question to be considered is whether the two courts below have rightly declined to interfere by refusing to entertain a suit for declaring the award passed by council as null and void being contrary to law including the plea that the purchase order did not have written arbitration agreement?

11. Since, the proceeding before the council would be governed by AC Act of 1996. By virtue of Section 16 the Arbitral Tribunal as in the instant case Industry Facilitation Council had the jurisdiction to rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement (Kindly See : Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, ; Union of India (UOI) Vs. M/s. Pam Development Pvt. Ltd., and thereafter a party aggrieved by such an award may make an application for setting aside such an arbitral award in accordance with Section 34 of the Act. In the instant case the Industry Facilitation Council has passed an award on 28-5-2003, directing the plaintiff buyer to make payment of sum of Rs. 9,71,356=00 to the defendant No. 2. Since the proceedings before the council

are proceedings before the AC Act 1996, the validity of the award could have been challenged in the manner provided under the AC Act of 1996 by filing an application u/s 34 of the Act for setting aside the award as if arbitration is pursuant to arbitration agreement under the Act 1996, and the suit filed for declaring the award dated 28-5-2003 as a null and void is not matters expressly provided in AC Act, 1996 to be cognizable by civil Court and by virtue of imperative provisions contained in Section 5 of the AC Act 1996, which has overriding effect over any other law for the time in force, the civil Court should not judicially intervene in the award passed by defendant No. 1 Industry Facilitation Council.

12. In a decision reported in case of Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another , the Supreme Court has held that in a arbitration proceeding initiated u/s 6(2) of the Interest Act of 1993 by Industrial Facilitation Council, the provisions of AC Act, 1996 would apply and by virtue of Section 5 of AC Act, 1996 in a matter provided by Part-I of that Act of 1996, the judicial authority had no jurisdiction to intervene and held as under:--

"11. The "Part" referred to in this sub-section is Part I of the 1996 Act which deals with domestic arbitrations. The proceedings before the Council, therefore, are proceedings under the 1996 Act, pursuant to a deemed agreement between the parties to the dispute. With the applicability of Part I of the 1996 Act in all its force, the extent of judicial intervention in arbitrations is limited by the non obstante provisions of Section 5 of the 1996 Act, which stipulate:

"5. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

The City Civil Court was right in its approach when it said that the Court could only intervene in respect of matters expressly provided for in the 1996 Act. The validity of the proceedings before the arbitral tribunal is an issue which the Council, and not the court, could decide u/s 16 of the 1996 Act. Sub-section (1) of Section 16 opens with the words "the arbitral tribunal may rule on its jurisdiction.....". It has been held by this Court that the arbitral tribunal''s authority u/s 16 is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction. Therefore, the Council can go into the question whether its authority had been wrongly invoked by the appellant and it is open to it to hold that it had no jurisdiction to proceed with the matter.

15. To sum up: the High Court erred in staying proceedings before the Council. It had no jurisdiction to do so."

13. Thereafter, in a decision reported in case of Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development Corporation Limited, , the Supreme Court while considering Section 7 of the Interest Act, 1993 has held that the word appeal occurring therein, would include the application u/s 34 of the AC Act, 1996 and held as under:--

"62. The Interest Act is a beneficial piece of legislation intended to expedite timely payment of money owed to small-scale industries. Most of the contracts of supply or sale that small-scale industries enter into contain arbitration clauses. These arbitration proceedings result in an "award". If the term "appeal" is interpreted in the limited context of a "decree or order" and as excluding an application to set aside or remit such awards, the very purpose behind the enactment of the Interest Act will be defeated. We are in agreement with the learned counsel for the appellant company in this respect.

65. Keeping in mind the language of Section 7, object of the legislation and the contextual meaning of the term appeal, we are, therefore, of the view that the term "appeal" appearing in Section 7 of the Interest Act should include an application u/s 34 as well. The judgment and order of the High Court shall, therefore, stand set aside and the appeal is allowed to the extent indicated above. The respondent Corporation shall make a deposit of 75% of the amount awarded by the learned arbitrator by his award dated 30-6-2003 in Court where the application for setting aside the award is now pending decision. Such deposit shall be made within three months from this date. In the event, such deposit is made the Court shall decide the application for setting aside the award filed u/s 34 of the Arbitration Act as expeditiously as possible preferably within six months from the date of deposit by the Corporation."

14. The principle laid down by the Supreme Court in Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development Corporation Limited, has been followed by their lordships in decision rendered in case of Sri Paravathi Parmeshwar Cables and Others Vs. A.P. Transmission Corporation Ltd. and Another, .

15. At this stage it would be proper to consider the decision cited by AIR 2002 SC 2421 . In that case the writ petition filed by the supplier under the Interest Act, 1993 for price of goods along with interest came to be dismissed finding that the disputed question of fact are involved and u/s 6 of the Act the petitioner is required to file the Civil Suit and it has been held as under:

"2. We have heard counsel for the parties and we are in agreement with the view taken by the High Court that the remedy available to the appellant is to file a suit in the Civil Court. Admittedly, the appellant is claiming interest under the Act and, therefore, remedy open to the appellant is to file a suit in the Civil Court or take such proceedings which may be permissible under law."

16. Aforesaid decision cited by Dr. Shukla is clearly distinguishable. u/s 6(1) of the Interest Act, 1993 supplier can file suit for recovery or may resort to other proceeding under any other law for the time being in force. Section 6(2) of the Interest Act, 1993 brought in to statute book w.e.f. 10-8-1998 conferred an additional/alternative remedy to the supplier to make reference to the Industry Facilitation Council for arbitration under the AC Act, 1996. Thus, the supplier/ defendant No. 2 having resorted to Section 6(2) of the Act by making reference

for arbitration, Industry Facilitation Council on award being passed, the remedy would be to file the application u/s 34 of the Act and the jurisdiction of the civil Court would be excluded and thus the aforesaid decision would not be applicable to the facts of the present case.

17. Thus, in the considered opinion of this Court the trial Court has rightly dismissed the suit of the plaintiff holding to be barred by law and First Appellate Court has committed no illegality in affirming the same the substantial question of law is answered is negative against the appellant/plaintiff and in consequence thereof the plaintiff''s suit stands dismissed.

18. Resultantly, the appeal fails and is hereby dismissed.

19. There shall be no order as to costs. A decree be drawn up accordingly.