

(2015) 03 GUJ CK 0084

In the Gujarat High Court

Case No : Special Civil Application No. 17344 of 2012

Devi Enterprise Limited

APPELLANT

Vs

State Level Industry Facilitation Council and Others

RESPONDENT

Date of Decision : 27-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
Micro, Small and Medium Enterprises Development Act, 2006 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 17

Citation : AIR 2015 Guj 114

Hon'ble Judges : V.M. Sahai, A.C.J;R.P. Dholaria, J

Bench : Division Bench

**Advocate : Devang J. Joshi, for the Appellant; Utkarsh Sharma, AGP, M.D.
Rahevar, Chirag B. Patel and Saurabh G. Amin, Advocates for the Respondent**

Final Decision : Dismissed

Judgement

V.M. Sahai, Acting C.J—We have heard the learned advocates appearing for the respective parties. By way of this petition, the petitioner has prayed for the following reliefs:

"i. Your Lordships may be pleased to issue a writ, order or direction in the nature of certiorari quashing the impugned award dated 17.09.2012 passed by respondent No. 1;

ii. Your Lordships may be pleased to declare the condition imposed in Section 19 of the Act, 2006 of depositing 75% of the amount of the award as a condition precedent for entertaining the objection/application to set aside the award as ultra vires the Constitution;

iii. Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay the implementation of the impugned award dated 17.9.2012 passed by respondent No. 1;

iv. Issue any other writ, order or direction which the Hon''ble Court may deem fit and proper in the circumstances of the present case;

v. Award costs to the petitioner from the contesting respondents."

2. The relief prayed by the learned counsel for the petitioner in the above writ petition is that the conditions imposed in Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short the "Act") are ultra vires to Articles 14 and 19(1)(g) of the Constitution of India. Section 19 of the Act is extracted below:--

"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."

3. The constitutional validity of Section 19 of the Act was challenged before the High Court of Madras in the case of Eden Exports Company Vs. Union of India and Others, (2013) 1 MLJ 445 , 2475 and others of 2011 and Writ Petition Nos. 27319, 27888 and others of 2011, which was decided on 20.11.2012] wherein in paragraph 14, the Court has considered the validity of condition of 75% pre-deposit as contemplated in Section 19 of the Act. Paragraph-14 of the aforesaid decision is extracted below:--

"14. Coming to the challenge in respect of 75% pre-deposit contemplated under Section 19 of the MSMED Act, we have no hesitation in confirming the conclusion arrived at by the learned single Judge in this regard, in view of the decisions of the Supreme Court and this Court. The Hon''ble Supreme Court in Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development Corporation Limited, AIR 2010 SC 1497 : (2010) 1 JT 70 : (2010) 1 SCALE 108 : (2010) 3 SCC 34 : (2010) 2 SCR 76 : (2010) 2 UJ 688 has categorically held that the introduction of pre-deposit clause is a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award. The aforesaid decision has been followed by the Kerala High Court in K.S.R.T.C. Vs. Union of India (UOI), (2010) 1 KLT 65 and this Court in Goodyear India Limited Vs. Nortan Intech Rubbers (P) Ltd. and The Chairman MSE Facilitation Council and Industries Commissioner and Director of Industries and Commerce . Therefore, the appellants/writ petitioners no more cannot contend that the condition of pre-deposit imposed in Section 19 of the MSMED Act is arbitrary."

The Division Bench of the Madras High Court has relied on the decision of the Apex Court, wherein the Court has held that the introduction of pre-deposit clause is a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award.

4. Having gone through the provision of the law, we are of the opinion that the condition of pre-deposit of 75% introduced by Section 19 of the Act is valid and does not suffer from the vice of unconstitutionality. The reasonable restrictions can always be imposed by the legislation by putting conditions. While enhancing condition of pre-deposit with the main section, the object sought to be achieved was that there shall be no dilatory tactics. Such an object of the legislature cannot be said to be arbitrary, unconstitutional or ultra vires. Therefore, we are of the considered opinion that the provisions of Section 19 of the Act are not ultra vires to any constitutional provision either Article 14 or Article 19(1)(g) of the Constitution of India.

5. Mr. Saurabh G. Amin, learned advocate for respondent No. 3-Union of India has placed reliance on the decision of the Karnataka High Court in the case of Karnataka Power Transmission Corporation Limited and another v. Union of India and others, reported in (2013)1 Karnataka LJ 497 : (2012) Supreme (Karnataka) 500 : (AIR 2013 Kar 333) [Writ Petition Nos. 22370-371/2010, C/W. 22374-375/2010, 22377-378/2010, 40138, 40140 & 40141/2011 (GM-Res), decided on 13th September, 2012] and he has also submitted that paragraphs 24 to 27 be treated as a part of his argument. Paragraphs 24 to 27 of the said decision of the Karnataka High Court is reproduced below:

"24. This takes us to the vires of Section 19 of the Act. Mr. Naganand, learned Senior counsel appearing for the respondent submits that having regard to the decision rendered by the Apex Court in Mardia Chemical's case, the appeal or the remedy should not be illusory. He submitted that the condition imposed under Section 19 of the Micro Act is onerous.

25. Indeed provisions of the Securitization Act fell for consideration before the Apex Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 . The condition of pre-deposit under the Act was held to be illusory on the grounds that:--

- (i) It is imposed while approaching the adjudicating authority for the first instance, not in appeal;
- (ii) There is no determination of the amount due as yet;
- (iii) The secured assets or its management with transferable interest is already taken over and under control of the secured creditor;

(iv) no special reason for double security in respect of an amount yet to be determined and settled.

(v) 75% of the amount claimed by no means would be a meagre amount;

(vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand.

The Apex Court has further observed that such conditions are not only onerous and oppressive but also unreasonable and arbitrary. Therefore, sub-section (2) of Section 17 of the Securitization Act was found to be unreasonable, arbitrary and violative of Article 14 of the Constitution.

26. The observations made by the Apex Court in Mardia Chemical's case are with reference to a situation, where there is no adjudication of the amount payable and that the secured assets or its management with transferred interest are already taken over under the control of the secured creditor. The Apex Court has observed that there is no determination of the amount due as yet. In those circumstances, the Apex Court was of the view that said condition regarding pre-deposit of 75% without any prior determination by competent authority is unreasonable, arbitrary and violative of Article 14 of the Constitution.

27. In the case on hand, it is not so. There is already adjudication of the quantum by the Competent Authority, which is designated under the Act, which is the Facilitation Council. The Facilitation Council had issued notice to the respondents and an enquiry was conducted and an award is passed. The provisions of Arbitration Act so far as it relates to holding of an enquiry have been followed. Thus, there is an adjudication of quantum. Thus, it is not a case where without an adjudication, the amount is determined. In fact it is a full-fledged trial and on an enquiry the amount is determined. Thus, I am of the view that the provisions relating to deposit of 75% of the amount cannot be said to be unreasonable, arbitrary and violative of Article 14 of the Constitution. It is not a case where the property or the asset of respondent No. 2 is taken over without adjudication which would make it difficult or impossible for them to comply with the provisions of Section 19 of the Act.

6. The award has already been pronounced by the Facilitation Council, who acts in arbitration under the Act. Therefore, there was an adjudication on the quantum of amount. The amount has been finally determined by the Facilitation Council after a full-fledged trial and upon enquiry. It is not the case of the petitioner that the award has been rendered without any adjudication in the matter by the Facilitation Council. Therefore, the provision of Section 19 of the Act, which contains condition of pre-deposit of 75% of amount, cannot be said to be unreasonable, arbitrary or violative of Article 14 of the Constitution. For the aforesaid reasons, we uphold the constitutional validity of Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006. So far as the relief prayed by the learned counsel for the petitioner is concerned, the relief cannot be granted by this Court as the petitioner has an adequate statutory remedy

under Section 19 of the Act for challenging the order dated 17.09.2012 by making a pre-deposit of 75% amount and getting condonation of delay if the law permits. The writ petition, accordingly stands dismissed. Notice stands discharged. No costs.