

(2015) 12 AHC CK 0132
In the Allahabad High Court
Case No : Matters No. 6690 of 2015

Director Health Services & Family Welfare	APPELLANT
Vs	
U.P. State Micro and Small Enterprises E.F. Council and Others	RESPONDENT

Date of Decision : 21-12-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 31, 34, 34(3), 36, 37
Constitution of India, 1950 — Article 227
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 7
Micro, Small and Medium Enterprises Development Act, 2006 — Section 15, 16, 17, 18, 18(3)

Citation : (2016) 2 ADJ 808 : (2016) 115 ALR 56

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Ashok Kumar Lal, for the Appellant; Kartikeya Saran, for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J.—Heard learned counsel for the parties.

2. The petition is being decided without calling for counter affidavit, on the request of the learned counsel for the parties, as per the Rules of the Court.

3. The Director Health Services & Family Welfare, Punjab, applicant herein, floated tender inviting offers for supply of Diesel Generators, the second respondent, a Small Scale Industrial Unit, registered with the Directorate of Industries, U.P., engaged in the business of manufacturing Diesel Engine and Generator sets applied pursuant to the tender and was successful, consequently, a contract was entered between the applicant and the second respondent, pursuant thereof, the second respondent supplied Generators to the applicant in 2008 for which 90% payment was released but remaining 10% was withheld. According to the applicant, the supplied goods and their performance was not

satisfactory, the second respondent upon non-payment sought a reference before the U.P. State Micro and Small Enterprises Facilitation Council, Kanpur¹ to initiate proceedings under Section 18 of the Micro, Small Medium Enterprises Development Act, 2006.² The Council, consequently initiated conciliation proceedings which came up in the claim petition No. 3 of 2010, however, upon failure due to the non appearance of the applicant, Council initiated Arbitration in term of Section 18(3) of Micro, Small Enterprises Act.

4. The applicant failed to appear despite notice, consequently, Council proceeded ex-parte and passed an Award on 11 June 2013 directing the applicant to pay Rs. 63,77,302/- to the second respondent, despite award no payment was received by the second respondent, thereafter, upon expiry of the statutory period, execution proceeding was initiated; upon notice being received from the executing court, applicant filed an application under Section 34 of the Arbitration and Conciliation Act 1996³ on 12 August 2014. Along with the said application, the applicant sought exemption of the statutory deposit of 75% of the award under Section 19 of Micro, Small Enterprises Act.

5. The learned District Judge rejected the application being Arbitration Case No. 91/70 of 2014 on two grounds (1) delay under Section 34(3) of the Arbitration Act (ii) under Section 19 of Micro, Small Enterprises Act for not making statutory deposit of 75%.

6. The order passed by the District Judge is being assailed.

7. The submission of the learned counsel for the applicant is that the court below committed an error in rejecting the arbitration case both on the ground of maintainability in view of section 19 of Micro, Small Enterprises Act and for delay/laches, under Section 34(3) of Arbitration Act. It is therefore, sought to be urged that since the court declined to entertain the application for non compliance of the terms of Section 19 of the Micro, Small Enterprises Act, the court could not have proceeded further in deciding the question of limitation; further, it is contended that the award challenged was an award under Section 18 of Micro, Small Enterprises Act and not an award under Section 31 of Arbitration Act, therefore, remedy available to the applicant is before this Court under Article 227 of the Constitution of India.

8. In rebuttal, learned Senior Counsel appearing for the second respondent would submit that the petition is not maintainable under Article 227 of the Constitution against an order passed under Section 34 , the remedy available to the applicant is by way of an appeal under Section 37 of Arbitration Act.

9. Rival submissions call for consideration.

10. The point for determination is as to whether this petition would lie against an order passed under Section 34 of Arbitration Act.

11. The facts are not in dispute between the parties, it is not being disputed by the applicant that 90% of the amount was paid to the second respondent for

supply and installation of Generator sets, the dispute remained for 10% balance payment which was not released as per terms and conditions of the contract.

12. The second respondent consequently initiated proceedings under Section 18 of Micro, Small Enterprises Act by approaching the Council, regular notices were served upon the applicant to appear before the Council, to which, the applicant replied through a letter assailing the jurisdiction of the Council but no appearance was put in. By the letters dated 27 December 2010 and 15 January 2013, which is part of the record, the jurisdiction of the Council was questioned.

13. The Council, on non appearance of the applicant, proceeded ex-parte and rendered the award on 11 June 2013 returning specific finding on jurisdiction and on maintainability of the claim. The notice of the award was sent to the applicant by speed post on 13 June 2013 which was received by the applicant on 17 June 2013 as has been noted in the impugned order, but despite notice, applicant preferred a highly belated application on 12 August 2014 for setting aside the arbitral award in terms of section 34 of Arbitration Act; by the impugned order dated 7 August 2015, the District Judge rejected the arbitration case both on the ground of delay and for non deposit of mandatory statutory amount as required under Section 19 of Micro, Small Enterprises Act.

14. The plea of the learned counsel for the applicant that the provision of Section 19 providing mandatory deposit cannot be made applicable to the proceedings under Section 34 of Arbitration Act, in my opinion, the argument is untenable in law.

15. The Micro, Small Enterprises Act was enacted to provide for facilitating the promotion and development and enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto, it is a parliamentary enactment which came into force on 18 July 2006. Chapter V provides for the consequences and remedies for delayed payments to Micro and Small Enterprises, Section 15 provides for the liability of the buyer to make payment to the supplier within the stipulated period, Section 16 enables the supplier to claim compound interest from the buyer on delayed payment notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, Section 17 provides for recovery of the amount due for any good supplied or services rendered by the supplier along with interest thereon as provided under Section 16 . Section 18 enables the party to the dispute with regard to any amount due under Section 17 to approach the Council in reference, the Council upon such reference shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services, upon conciliation initiated not being 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. The Arbitration Act 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement

referred to in sub-section (1) of section 7 of Micro, Small Enterprises Act.

16. Sub-section 4 of Section 18 confers jurisdiction on the Council, notwithstanding anything contained in any other law for the time being in force 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.

17. The second respondent being a supplier within the meaning of Micro, Small Enterprises Act is located within the jurisdiction of the Council is not being disputed by the applicant, Section 19 would provide for moving an application for setting aside the decree, award or order which reads as follows:

"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 supplied, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

18. Section 19 would clearly state that no application for setting aside an award made by the Council or by any institution or centre providing alternate dispute resolution services to which reference was 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.

19. It is pertinent to notice that section 24 of Micro, Small Enterprises Act provides that provisions of section 15 to 23 of Micro, Small Enterprises Act shall have overriding effect over any other law:

"24. Overriding effect-The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

20. Upon examining the provisions of the Micro, Small Enterprises Act, it becomes evident that the Micro, Small Enterprises Act, does not provide for any mechanism for enforcement of the award, therefore, the award has to be enforced under the provision of Arbitration Act as per Section 18 of Micro, Small Enterprises Act.

21. Section 36 of Arbitration Act makes the award enforceable upon expiry of time provided for making an application to set aside arbitral award under Section 34 or upon such application having been made, it has been refused, the award

shall be enforced under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the Court.

22. This Court in *Uttar Pradesh Rajya Karmchari Kalyan Nigam Vs. District Judge, Kanpur Nagar and Others*, while considering Section 7 of Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Act 1993, which would provide for a mandatory deposit of 75%, it was held that Section 34 of Arbitration Act would have to be read along with Section 7 of Act 1993, therefore, the requirement of mandatory deposit of 75% of the awarded amount is a condition precedent for entertaining the application for setting aside the award.

23. The Supreme Court in *Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development Corporation Limited*, , held that deposit of 75% of the award amount in terms of Section 7 is a condition precedent for hearing an application under Section 34 of Arbitration Act, the word "appeal" occurring in section 7 of Act 1993 is referable to an "application" occurring in section 34 of Arbitration Act and the word "award" occurring in section 7 of Act 1993 would include arbitral award. The Court declined to accept any other interpretation as that would render the term "award" redundant and the requirement of pre-deposit a total nullity with respect to all cases where a small-scale undertaking preferred arbitral proceedings. It was further held that the Act governing small-scale industry is a special enactment in order to protect the industry and would have overriding effect. It may be pointed out that Act 1993 has since been repealed by Section 32 of Micro, Small Enterprises Act.

24. *B.H.P. Engineers Pvt. Ltd. Vs. Director, Industries, U.P. (Facilitation Council) and Others*, , was relied upon by the learned counsel for the applicant where this Court entertained the writ petition against an award rendered by the Council for the reason that the Council had not gone into the question or examined the plea of counter claim set up by the petitioner therein, however, the Court was of the opinion that the remedy available to the applicant against the award is under Section 34 of Arbitration Act.

25. Finally the parties have placed reliance on *Goodyear India Limited Vs. Norton Intech Rubbers (P) Ltd. and Another*, in which the court relying upon *Snehadeep Structures (supra)* set aside the order of High Court and held that the pre-deposit of 75% under Arbitration Act is a condition precedent for maintaining an application to set aside the award.

26. The impugned order would reflect that the applicant received the award on 17 June 2013, the application under Section 34 of Arbitration Act was preferred on 12 August 2014 after a lapse of more than one year, as such the application would not be maintainable in view of the statutory period provided under Section 34 of Arbitration Act, further, the condition precedent for maintaining an application under Section 34 as required under Section 19 of Micro, Small Enterprises Act was not complied, therefore, the court below rejected the

application on both counts.

27. The plea that the court below proceeded to decide the question of limitation, which being a question of fact and law, after holding that the application would not be maintainable in view of Section 19 of Micro, Small Enterprises Act was erroneous. Since the court held that the application under Section 34 of Arbitration Act was not competent for want of pre-deposit, then the Court necessarily could not have proceeded to hear the application on the plea of limitation. In my opinion, the argument that is being advanced has no legs to stand upon. A court having jurisdiction on the subject matter would be within its competence to decide any questions raised before it, including the question pertaining to limitation and maintainability of the petition for not fulfilling the statutory conditions precedent for entertaining the application. In my opinion, the court was justified in deciding the issues raised by the respondents. It is not disputed that the application was preferred under Section 34 , therefore, upon dismissal of the application, inter alia, on the ground of limitation would be appealable before the competent court.

28. This Court, for the reasons and law stated above would decline to entertain the petition in exercise of supervisory jurisdiction under Article 227 of the Constitution of India.

29. The petition is accordingly dismissed. However, dismissal of the petition shall not preclude the applicant from availing any remedy available under law.

30. No order as to costs

1Council.

2Micro, Small Enterprises Act

3Arbitration Act.

4Act 1993