
(2020) 07 DEL CK 0225

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 144 Of 2019,
Miscellaneous Application No. 5291 Of 2020, 5918 Of 2020 & 5919 Of 2020

Indian Oil Corporation Limited

APPELLANT

Vs

Fepl Engineering (P) Limited & Anr

RESPONDENT

Date of Decision : 30-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 14
Micro, Small And Medium Enterprises Development Act, 2006 — Section 15, 16, 17, 18, 18(2), 18(3), 19
Arbitration And Conciliation Act, 1996 — Section 34, 36(2), 80
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 17, 17(2)
Interest On Delayed Payments To Small Scale And Ancillary Industrial Undertakings Act, 1993 — Section 7

Citation : (2020) 07 DEL CK 0225

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Madhavi Divan, Amit Meharia, Tannishtha Singh, Mahesh Jethmalani, Mugdha Pande

Judgement

V. KAMESWAR RAO, J

I.A. 5291/2020

1. The present application has been filed by the applicant/respondent with the following prayers:

"i) Direct the Petitioner to deposit 75% of the interest amount in addition to the Principal amount already deposited

ii) Direct the release of the pre-deposit to the Respondent as per Proviso to Section 19 of the MSME Act on furnishing Indemnity Bond

iii) Pass any other order which this Hon'ble Court deems fit and proper in the

facts and circumstances of the present case."

2. Before delving into the issues raised in this application, an overview of factual matrix that surrounds the filing of the present application by the respondent/applicant needs to be stated.

3. An Arbitral Award dated December 14, 2018 ('Award', for short) was passed by the Micro and Small Enterprises Facilitation Council, Konkan Region, Thane, Maharashtra ('Council', for short) under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 ('MSME Act', for short). Aggrieved by Award, the petitioner/non-applicant has challenged the Award in the main petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act of 1996', for shot). Subsequent thereto on October 21, 2019, this Court directed the petitioner to deposit 75% of the awarded amount as pre-deposit in terms of Section 19 of the MSME Act, for entertaining the main petition filed under Section 34 of the Act.

4. However, the petitioner/non-applicant deposited with the Court only 75 % of the principal amount in terms of the Award without the interest component. Aggrieved by the non-deposit of the 75% interest amount, the present application has been filed by the applicant/respondent seeking release of the entire pre-deposit made by the petitioner/non-applicant along with directions against the petitioner to deposit the remainder 75% of the interest amount as awarded to the applicant/respondent by the Council in terms of the Award.

5. It is the case of the applicant/respondent that the MSME Act is unambiguously clear in terms of Section 19 of the MSME Act which mandates a pre-deposit of 75 % of the amount in terms of the decree/award/order for entertaining an application for setting aside the Award and provides for the release of the deposited amount in favour of the supplier (applicant herein), as Court considers reasonable, pending the disposal of the said application.

6. It is stated by the applicant/respondent that the MSME Act being a beneficial/special legislation, the intent of the legislature in envisaging a proviso to Section 19 for withdrawal of the pre-deposit amount is to keep the small supplier, protected under the MSME Act, viable during litigation and that the non-deposit of the entire quantum as per the said Section defeats the vital objective of the MSME Act.

7. It is stated by the applicant/respondent that the petitioner/non-applicant, with malafide intent has been trying to stall the execution of the Award by resorting to different kinds of litigation before other forums.

8. It is stated by the applicant, vide order dated October 21, 2019, this Court had held that though the petition was maintainable under Section 34 of the Act without pre-deposit, the petition will not be entertained unless the 75 % of the awarded amount is deposited in terms of Section 19 of the Act and granted six weeks' time for making the deposit. Pursuant to the said order, the petitioner/

non-applicant only deposited 75 % of the principal amount and when the matter came for hearing on February 26, 2020, on the objection of the applicant/respondent to the non-deposit of entire amount as per Section 19/non-compliance of order dated October 21, 2019, counsel for the petitioner/non-applicant mislead the court in believing that it is willing to deposit the interest amount as well, however only needed clarification vis-à-vis the rate of interest. This Court had also recorded in the above-mentioned order that the petitioner submitted that it would deposit the interest amount as payable before the next date of hearing and that it was only on the basis of this submission that this Court issued date of hearing in the main petition.

9. It is further stated by the applicant/respondent that the malafide intent of the petitioner/non-applicant is clear from the attempt by the petitioner by bringing on record 'Affidavit To Bring On Record The Calculation Of The Amount To Be Deposited' filed on June 29, 2020, after misleading the Court for more than seven months of its intention to deposit the interest amount did a volte-face claiming that it had already complied with the Order of this court dated 21.10.2019 by depositing 75% of just the principal amount awarded, as interest did not form a part of the Awarded amount.

10. It is also the case of the applicant/respondent that the Sections 16-19 of the MSME Act are connected in terms of delivering the object of the legislation, as the interest calculated while passing an award pursuant to section 18(3) of the MSME Act is always as per Section 16 of the Act, which prescribes date from which and rate at which interest is payable. Section 16 also mandates that in the event of default in clearing the amount payable to small enterprises as warranted by Section 15, the buyer is made liable to pay compound interest with monthly rests. The interest is to be calculated from appointed day at three times the Bank rate notified by Reserve Bank of India. This mandate operates in supersession of any agreement between the parties or in law in-force. Thus, in Section 16, the legislature introduced a strong factor to compel the buyers to be extra prompt in clearing the dues of such a Unit or Enterprise and Section 19 furthers this legislative objective by ensuring finality to the Arbitral award. It creates a prerequisite for buyers such as the petitioners to deposit 75% of the awarded amount before their application challenging the arbitral award can be entertained.

11. It is averred, in terms of stay of the Award under Section 36(2) of the Act, that law is well settled that unless a pre-deposit of 75% of the award amount, which as enumerated above includes the principal as well as the interest, is made in the Court, the Court cannot even entertain any application against the Arbitral Award.

12. It is further stated by applicant/respondent that owing to the lockdown and the non- payment of dues by petitioner/non-applicant since 2016, which culminated in the Award, applicant's account is on the verge of being declared as NPA. Moreover, the dilatory tactics of non-deposit of entire amount even after 15 months after filing the Section 34 petition defeats the object of the MSME Act.

13. Reply has been duly filed by the petitioner/non-applicant. Vehemently objecting to the withdrawal of the principal amount deposited with the Court, it is stated by the petitioner/non-applicant that the withdrawal of the pre-deposit is strictly governed by the proviso to Section 19, which mandates that the court shall order such percentage of the amount to be paid to the supplier as it considers reasonable under the circumstances of the case and that in the present application preferred by the applicant/respondent no case is made out for granting such an order for withdrawal from the principle amount deposited by the petitioner/non-applicant. Moreover, it is stated by the petitioner that the admission of the applicant to its precarious financial situation is all the more reason for the Court to not release any amount in its favour, as it might eventually become irrecoverable, if applicant's account is declared NPA.

14. It is also averred by the petitioner/non-applicant that it has been more than 5 months since the principal amount was deposited with this Court, and an application for withdrawal after such a lapse of time is nothing but an afterthought to take advantage of the pandemic situation.

15. On merits, it is stated that the petitioner awarded a Purchase Order in favour of the applicant/respondent on March 16, 2016 for Supply and Installation of 1000 KWP Solar Power Plant at petitioner's Gujarat Refinery. The Third Party Certificates (TPI) obtained for checking the quality of the materials obtained by applicant/respondent were found to be fake and due to the usage of sub-standard materials two major incidents of fire happened at the plant of the petitioner. Petitioner states to have revived the plant after the mis-happenings and as soon as the petitioner issued a 'Holiday List' show-cause notice, the respondent filed a petition before the MSME Council for adjudication of various disputes and the Council set-up a panel of conciliators for Conciliation of the disputes. It is stated that after supplying various crucial documents behind petitioner's back, the conciliation process was suddenly closed and the same panel went on to arbitrate the dispute culminating in the impugned Award. It is stated by the petitioner/non-applicant that the adjudication of the disputes by the Council was in absolute disregard of the provisions of MSME Act read with the provisions of the Act of 1996.

16. Without prejudice, it is stated by the petitioner/non-applicant, even if interest is payable, pre-deposit of the same should not be insisted, considering the fact that the Council has passed the Award, without any jurisdiction since the Council acted both as the Conciliator and Arbitrator and the same is an error on face of record and is also an admitted fact, in light of Section 18 (2) and (3) of the MSME Act and further the Award is a non-reasoned one. It is also stated that Petitioner has never stopped payment to the applicant/respondent. In fact, during the proceedings before the Council, the Petitioner made payment of Rs. 44,50,000/- (Rupees Forty-Four Lakhs Fifty Thousand Only), with the bonafide object to facilitate the Respondent to complete the incomplete/left over job.

17. It is stated that this Court, vide Order dated October 21, 2019 had directed

to make the pre-deposit of 75% of the 'awarded amount' only, and it did not direct to pre-deposit 'principal + interest'. It is submitted that the petitioner in compliance of the Order dated October 21, 2019, has rightly and within time, as directed, deposited 75% of the 'awarded amount' before this Court on December 02, 2019. Section 19 of the MSME Act requires a deposit of 75% of the 'amount' in terms of the decree, award or, as the case may be, or other order in the manner directed by such court". It is stated, from a plain reading of the provision in conjunction with other provisions of the Act that the word, 'amount' does not include interest. Even otherwise it is the case of the petitioner that the MSME Act does not indicate, the rate of interest payable and for which period and as such is not quantifiable. That the Award is restricted to a principal amount with the liability to pay interest. The provision is vague and unenforceable.

18. It is also submitted that Order of this Court dated February 26, 2020 states that 'whatever amount is payable, will be deposited in Court' and therefore, upon due consideration of the provisions of the MSME Act and upon being advised, the petitioner brought on record the rational and basis of the amount already deposited in Court in its Affidavit dated June 29, 2020. Therefore, the contention of the applicant/respondent that the petitioner is misleading this Court on the amount to be deposited is absolutely false and incorrect.

19. Rejoinder to the reply has been filed by the applicant. In addition to contesting the averments made by the petitioner/non-applicant on merits, it is stated by applicant/respondent that it is a settled position of law that no discretion can be exercised by the Court to reduce the amount of pre-deposit and that the interest is part of the Awarded amount under Section 19 of the MSME Act.

20. Mr. Mahesh Jethmalani, learned Senior Counsel appearing on behalf of the applicant/respondent, primarily submitted that 'amount in terms of the decree, award' under Section 19 of the MSME Act has been used to refer to both principal amount as well as interest. While strongly refuting the stand taken by the petitioner/non-applicant, that the amount in terms of Section 19 corresponds only to principal amount, Mr. Jethmalani has drawn the attention of this Court to the genesis of the term 'amount' as envisaged in Chapter V of the MSME Act by referring to the same. He submitted that Section 15 states, a buyer shall make payment to a supplier on supply of goods/services within a period not exceeding 45 days. Section 16 contemplates a situation where the buyer fails to make payments of the amount as envisaged under Section 15 and legislature imposed a stringent interest rate on default on such failure. Section 17 titled as 'Recovery of amount due' proceeds to state the buyer shall be liable for the amount due under Section 15 with interest thereon as per Section 16. On reaching Section 18 which deals with Reference to Micro and Small Enterprises Facilitation Council, the 'amount' is envisaged as whatever is as per Section 17 i.e. both the principal and interest due. Therefore, it is submitted by the Mr. Jethmalani, the 'amount' as envisaged by the legislature under Section 19 surely comprises of both the

principal and interest component and that in no way 75% of amount as pre-deposit in terms of decree/award/order can be meant to mean 75 % deposit of principal amount alone.

21. It is also submitted by Mr. Jethmalani that the Award also has indeed categorically stipulated that the petitioner/non-applicant shall pay the principal along with interest within a period of one month and that if the interpretation of the petitioner/non-applicant in terms of the term amount under Section 19 of the MSME Act is accepted then no dispute can ever be raised regarding interest payable on the price, is clearly fallacious.

22. On the construction of Section 19, Mr. Jethmalani, in support of to his contention that the amount in the said section includes both principal and interest due, has relied upon the following judgments:

1. *Snehadeep Structures v. Maharashtra Small-Scale Industries Development Corpn.*, (2010) 3 SCC 34.
2. *Goodyear India Ltd v Norton Intech Rubbers*, 2011 SCC OnLine Mad 712
3. *Eden Exports v. Union of India*, 2012 SCC OnLine Mad 4570.
4. *Goodyear India Ltd v Norton Intech Rubbers*, 2012 6 SCC 345.
5. *GE T&D Ltd v Reliable Engineering Projects & Marketing*, 2017 SCCOnLine Del 6978
6. *United Electrical Industries v. Eppleton Engineers Pvt Ltd* 2018 SCC OnLine Del 9983

23. Mr. Jethmalani, referring to the order dated October 21, 2019 stated that the Court had indeed held that the challenge to the Award under Section 34 of the Act was with a caveat that the petition was maintainable, on the petitioner making the pre-deposit and more over it is well-settled law that this court will not entertain on merits, a Section 34 petition under the Act challenging an award passed under the MSMED Act unless 75% of the awarded amount is deposited with it.

24. It was also pointed out by Mr. Jethmalani that the petitioner/non-applicants, till the applicant/respondent pointed out on February 26, 2020 after the entering appearance after reissuance of notice, had stated before the Court that it has complied with the October 21, 2019 of 75% pre-deposit of amount by depositing only 75 % of the principal. When the issue surfaced before the Court, assurance was made again that whatever amount was due would be deposited in the Court before the next date of hearing and that initial non-deposit of the entire amount was owing to lack of clarity with regard to rates on interest. Again, the stand has reverted by the petitioners/non-applicants which is clearly indicative of its dilatory tactics.

25. By relying upon *Goodyear India Ltd v. Norton Intech Rubbers Pvt Ltd & Anr*

2012 6 SCC 345, it is submitted that in terms of Section 19 no discretion vests with the Court either to waive or reduce the amount of 75 % pre-deposit, however has discretion for allowing the pre-deposit of 75% to be paid in instalments if required, which has not been pleaded or sought by the petitioner/non-applicant. In other words, it is his submission that Court should direct the remaining 75% of interest amount as calculated in terms of Section 16 (Document B annexed to the present application) to be deposited within a week's time before entertaining the petitioner's challenge to the Award under Section 34 of the Act.

26. He also vehemently contested that the going by the proviso to Section 19 of the MSME Act and comparing it with the provision of law in predecessor statute, Interest on Delayed Payments Small Scale and Ancillary Industrial Undertakings Act, 1993 ('Interest on Delayed Payments Act', for short), dealing with release of pre-deposit to an MSME, it can be very well seen, proviso to Section 19 is mandatory in nature. He submitted that going by the provision of law, it is clear that the Court has discretion to decide on the percentage of amount of pre-deposit to be released based on circumstances, but it does not have discretion to disallow release of pre-deposit.

27. Ms. Madhavi Divan, learned ASG, appearing for the petitioner/non-applicant submitted that, the petitioner has already deposited Rs. 1,15,03,459/- amounting to 75% of the principal amount of Rs. 1,53,37,945/- awarded by the Arbitral Tribunal. It is submitted by Ms. Divan that from a reading of the Sections 16,17 and 18 of the MSME Act, it is clear that the 'amount' as referred to in the said Sections is de hors the interest component, owing to specific mention of 'interest' in the said provision along with 'amount'. And what logically follows is that the 'amount' as referred to in Section 19 also does not include interest.

28. Ms. Divan relied upon *Mardia Chemicals v. Union of India*, (2004) 4 SCC 311, wherein Section 17 of the SARFAESI Act, 2002, which mandated a pre-deposit of 75 % of the amount by the party approaching under the said Section, was struck down by the Supreme Court, even though there existed discretion for waiver or reduction of amount the Court, inter-alia giving reason that it was an unreasonable condition on the basis of a one-sided claim. Drawing inference from said judgment it was submitted by Ms. Divan that since the constitutional validity of Section 19 was upheld (Ref- *Kerala SRTC vs. Union of India*, 2009 SCC OnLine Ker 6621), the same needs to be interpreted in reasonable manner as against the interpretation canvassed on behalf of the applicant/respondent that 'amount' under Section 19 of the MSME Act includes 'interest', as the same is extremely one-sided and causes enormous injustice, hardship and prejudice on the petitioner which is a public sector undertaking.

29. Ms. Divan also relied upon Kerala High Court judgment in *Kerala SRTC* (supra), to contend that although the constitutional validity of Section 19 MSME Act was upheld by the Court while dismissing an argument made by one of the parties relying upon *Mardia Chemicals*(supra) drawing similarity between the

struck down Section 17 of the SARFAESI Act, 2002 with Section 19 of the MSME Act, the question of the interest component was never gone into.

30. It is admitted by Ms. Divan that rate of interest applicable has been prescribed in the MSME, Act, but it is her submission that the same is not applicable for pre-deposit at the stage of challenge to the Award.

31. Ms. Divan further submitted that the principle of *noscitur a sociis*, an expression must take colour from the company it keeps must be pressed into the service to support the interpretation that the expression 'amount' is different from and stands separately from the expression 'interest' (Ref- *Excel Corp Care vs. CCI*, (2017) 8 SCC). She also submitted that if the words in the statute are plain and unambiguous it becomes necessary to expound those words in their natural and ordinary sense (Ref-*Commissioner of Customs vs. Dilip Kumar & Co.*, (2018) 9 SCC).

32. Without prejudice to her contention of literal interpretation of Section 19 of the MSME Act, it was submitted by Ms. Divan, discretion ought to be exercised by the Court under Section 19 on the merits of the matter.

33. On merits, it is contended by Ms. Divan that on the failure of the conciliation process under Section 18(2) of the MSME Act, the Council could not have initiated arbitration under Section 18 (3) nor could have acted as an Arbitrator, which strikes at the teeth of Section 80 of the Act of 1996 and the basic norms of confidentiality regarding the proceedings. Ms. Divan also pointed out to various infirmities in the proceedings, although disputed by the Mr. Jethmalani. In other words, it is her submission that there has been no independent adjudication at all in the arbitration proceedings. Reliance has been placed on the Apex Court judgment in *Govind Prasad Sharma vs. Doon Valley Officers Cooperative Housing Society Limited*, (2018) 11 SCC 501.

34. It is also contended by Ms. Divan that the withdrawal by the applicant/respondent from the 75% pre-deposit of the principal amount should not be allowed since the applicant/respondent has itself admitted to its precarious financial state, chances of recovery at a further stage by the petitioner would be very bleak.

35. Ms. Divan also distinguished the judgments relied upon by Mr. Jethmalani. It is contended by Ms. Divan that in the judgment of the Supreme Court in *Snehadeep* (supra), the statute under consideration was Interest on Delayed Payments Act which solely dealt with interest on delayed payments and that the Award under challenge in the case was confined to claims of interest alone and it was owing to these reasons that the terms 'amount' and 'interest' were interchangeably used. It is further submitted by Ms. Divan that, even though Interest on Delayed Payments Act was replaced by the MSME Act, there was no deliberation or interpretation on Section 19 of the MSME Act in the said judgment, making it clearly inapplicable to the present issue under consideration.

36. Further, on *Goodyear India Ltd v. Norton Intech Rubbers*, 2011 SCC OnLine Mad 712, also it is submitted by Ms. Divan that there was no deliberation on Section 19 of the MSME Act and the Court by relying upon *Snehadeep* (supra) arrived at the conclusion that interest must also be deposited along with the principal amount, which according to her is not the ratio of the judgment in *Snehadeep* (supra). She also submitted that even though Supreme Court in *Goodyear India Ltd. vs. Norton Intech Rubbers (P) Ltd.* (2012) 6 SCC 345, affirmed *Goodyear India Ltd v Norton Intech Rubbers*, 2011 SCC OnLine Mad 712, the Supreme Court did not delve into the interpretation of Section 19 of the MSME Act but merely referred to the judgment of Kerala High Court in the *Kerala SRTC*(supra), where the constitutional validity of section 19 was upheld. Placing reliance upon an observation, 'in the manner directed by such Court' made by the Apex Court in *Goodyear India Ltd. vs. Norton Intech Rubbers (P) Ltd.* (2012) 6 SCC 345, it was vehemently argued, without prejudice to her argument that the 'interest' is not included in the expression 'amount' in Section 19 and in terms of the proviso to Section 19 of the MSME Act, there is discretion vested in the court to allow pre-deposit of interest to be made and that discretion is not confined to the facility of instalments in depositing but can amount to a waiver of deposit in a given case.

37. Ms. Divan, also submitted that reliance placed on *United Electrical Industries Ltd.* (supra) by Mr. Jethmalani is misplaced, as this Court did not consider Section 19 of the MSME Act independently and rather allowed interim-stay on Award upon deposit 75% of the amount including interest on the merits of the matter. Similarly, on applicant/respondent deriving support from *GE T&D India Limited* (supra), Ms. Divan submitted that this Court did not consider Section 19 of the MSME Act independently and nor was the question of whether interest must be deposited in addition to the amount was delved into, wherein, while dismissing an application seeking waiver on deposit of amount this Court held that the question of waiver of deposit does not arise under Section 19 of the MSME Act.

38. Having heard the Id. counsels for the parties, I may state here that two issues arise for consideration in this present application, the primary one being whether the 75 % of decretal/awarded amount mandated for pre-deposit under Section 19 of the MSME Act includes within its scope the component of interest payable and secondly, in what manner can the Court exercise its discretion for release of pre-deposit under proviso to Section 19.

39. It is an admitted position of the petitioner/non-applicant as well as a settled position of law that the party challenging an Award passed in terms of the MSME Act, is mandated to make a pre-deposit for the Court to entertain a challenge against an arbitral award. In fact, the petitioner/non-applicant has made deposit of 75 % of the principal amount.

40. On the primary issue, Mr. Jethmalani contended Section 19 of MSME Act, envisages the 'amount' to include both the principal amount as well as the

interest component. He has drawn the attention of the Court to various Sections (15-19) of Chapter V of the MSME Act, to point out that the object of legislature was to include interest component also in the term of 'amount' under Section 19. I deem it appropriate to reproduce Sections 15- 19 of the MSME Act, which read as under:

"15. Liability of buyer to make payment.-Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. Date from which and rate at which interest is payable.- Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. Recovery of amount due.-For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16.

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 dispute 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

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."

41. In support of his contention he has relied on *Goodyear India Ltd v Norton Intech Rubbers*, 2011 SCC OnLine Mad 712, wherein a Division Bench of Madras High Court, while dealing with the same issue of whether pre-deposit under Section 19 includes interest or not, has held as under:

"17. All these principles laid down would categorically go to show that the award amount as mentioned in Section 19 comprises both principal as well as interest and not the principal alone. Further, it was ordered at the time of admitting the O.P. No. 888 of 2010 that the 75% of the principal amount was directed to be deposited as condition precedent in accordance with Section 19 of the Act. As rightly argued by the First Respondent/party-in-person that the legislative intention to impose certain conditions for preferring the Appeal cannot be waived by the Court by showing concession. This has been very strictly laid down in the judgment of the Hon'ble Apex Court reported in 1999 SC 2213 cited supra and various plenthero of judgments reported in *Anant Mills Co. Ltd. v. State of Gujarat*, AIR 1975 SC 1234; *Shyam Kishore v. Municipal Corporation of Delhi*, AIR 1992 SC 2279. The aforesaid judgments of Hon'ble Apex Court would clearly and categorically show that the right of Appeal if put to certain conditions, such conditions must be strictly adhered to."

42. He has also relied upon the Apex Court judgment in *Snehadeep* (supra), on the concept of pre-deposit under the Interest on Delay Payments Act, wherein the Court inter-alia held that pre-deposit was a rep-requisite for entertaining an appeal against award/decreed/order as per the said Act. He vehemently submitted that the Interest on Delayed Payments Act was the predecessor statute to the MSME Act and that the provision under Section 19 of the MSME Act was similar

to Section 7 of the Interest on Delayed Payments Act, with an additional proviso. The relevant paragraph of the judgment reads as under:

"47. The requirement of pre-deposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind Section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small-scale industry undertaking, institute challenges against the award/decreed/order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires predeposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

43. Ms. Divan as on the other hand contented that since the Sections of Chapter V, from Sections 15-18, mentions the amount de hors the interest component, the logical conclusion in Section 19 would be a pre-deposit without the interest component. Drawing inference from *Mardia Chemicals (supra)*, wherein the Court struck down the pre-deposit of 75 % of the amount by a party preferring an application Section 17 of the SARFAESI Act, 2002, wherein the Court held the deposit mandated as per said Section was in fact arbitrary and one-sided, Ms. Divan contended that even though the constitutional validity of Section 19 of the MSME Act has been upheld by the Kerala High Court in *Kerala SRTC (supra)*, a reasonable interpretation should be given to the term 'amount' under Section 19 limiting it to the principal component alone as the said deposit is one-sided and causes enormous pre-judice and hardship to the petitioner, which is a public sector undertaking. On reliance placed by Mr. Jethmalani on *Snehadeep (supra)*, it was contended by Ms. Divan that the said judgment was given under a statute which solely dealt with interest and did not deal with Section 19 of the MSME Act.

44. On the said submissions, it is important to note that a Division Bench of Madras High Court in the judgment of *Goodyear India Ltd v Norton Intech Rubbers*, 2011 SCC OnLine Mad 712, in paragraph 17 (as reproduced above), has clearly concluded that the awarded amount in terms Section 19 of the MSME Act included both principal and interest components. The said conclusion was in fact affirmed by the Supreme Court in *Goodyear India Ltd v Norton Intech Rubbers*, (2012) 6 SCC 345. I may state here that the stand taken by the Ms. Divan by relying upon *Mardia Chemicals (supra)* to contend that Section 19 of MSME Act be read in reasonable manner not to include interest is clearly misconceived. In *Mardia Chemicals (supra)* the challenge was inter-alia against the vires of Section 17 of the SARFAESI Act, 2002 which mandated a pre-deposit. The Apex Court, struck down the said Section stating that pre-deposit was mandated at the initial stage of proceedings was oppressive in nature and unreasonable. However, under Section 19 of the MSME Act, the pre-deposit is mandated at the stage of appeal. Relevant paragraph of the *Mardia Chemicals (supra)* reads as under :

"64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of 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 meager 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. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

45. Ms. Divan's contention that the Kerala High Court in Kerala SRTC (supra), while upholding the constitutional validity of Section 19 of the MSME Act, did not deal with issue of whether or not 'amount' as prescribed will include interest is also devoid of merit as the Apex Court in Goodyear India Ltd v Norton Intech Rubbers, (2012) 6 SCC 345, has approved the judgment in KSRTC (supra) as well as affirmed the conclusion of the Madras High Court in Goodyear India Ltd v Norton Intech Rubbers, 2011 SCC OnLine Mad 712, which held, that amount includes both principal and interest.

46. On the primary issue I may state that the arguments advanced by Mr. Jethmalani warrants merit. MSME Act is a beneficial legislation and Chapter V is unambiguous with regard to the meaning of the term 'amount'. Section 15 of the MSME Act mandates payment to be made to the supplier for products or services within 45 days from the date agreed/appointed date. Section 16 imposes a stringent rate of interest in case of default made by a party to make payments in terms of Section 15. Section 17 entitles the supplier to recover the amount due under Section 15 with interest as computed in terms of Section 16. The forum for reference (MSME Council) in case of any dispute in terms of amount due under Section 17 is designated under Section 18. It is therefore reasonable to presume that the what has been contemplated as 'amount' in Section 18 is both inclusive of principal and interest as Section 17 entitles for the recovery of not just the principal amount but also the interest. Logical conclusion that follows is Section 19 which mandates a pre-deposit of 75% of the awarded/decreed/ordered amount, for the Court to entertain a challenge against the award/decreed/order, includes not only the principal amount but also the interest component.

47. Moreover, Mr. Jethmalani has relied Coordinate Bench judgment of this Court in GE T&D Ltd (supra), wherein the Court while dealing with an application seeking waiver for deposit under Section 19 of the MSME Act, has clearly held that as per the said Section, no discretion lies with the Court to reduce the amount of pre-deposit. The relevant paragraphs reads as under :

"37.The following observations in Snehadeep Structures Pvt. Ltd. v.

Maharashtra Small Scale Industries Development Corporation Ltd. (supra) which dealt with the statute of 1993 preceding the MSMED Act equally applies to the MSMED Act:

"47. The requirement of pre-deposit of interest is introduced as a disincentive to prevent dilatory tactics employed by the buyers against whom the small-scale industry might have procured an award, just as in cases of a decree or order. Presumably, the legislative intent behind Section 7 was to target buyers, who, only with the end of pushing off the ultimate event of payment to the small-scale industry undertaking, institute challenges against the award/decreed/order passed against them. Such buyers cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires predeposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

Xxx xxxx xxxx

42. For the above reasons, the Court negates the plea of the Petitioner that the MSMED Act does not apply. Consequently, the question of the Petitioner seeking a waiver of the requirement of depositing 75% of the amount in terms of Section 19 of the MSMED Act does not arise. As explained by the Supreme Court in *Goodyear India Ltd. v. Norton Intech Rubbers Pvt. Ltd.* (supra), there is no discretion in the Court to reduce the amount of pre-deposit."

48. At this stage I may state that contention of Ms. Divan as to the inapplicability of Apex Court judgment in *Snehadeep* (supra) to the present issue is also not appealing as in *GE T&D Ltd* (supra), the Court has held that the observations in *Snehadeep* (supra) equally applies to the MSME Act.

49. Mr. Jethmalani has also relied on a Division Bench judgment of this Court in *United Electrical Industries* (supra) in a challenge to the Single Bench direction to deposit 75 % of the both principal as well as interest component of the 'amount', the Court directed payment of the interest component as well, upholding the direction of the Single Bench. Ms. Divan went to on distinguish the said judgment by stating that the direction to deposit the interest component was de hors the applicability of Section 19 of MSME Act and on the merits of the matter. Relevant paragraphs reads as under:

"3. It is stated that the appellant has deposited 75% of the principal amount but is contesting direction to deposit 75% of the interest amount. The contention raised is that the issue whether the Micro, Small and Medium Enterprises Development Act, 2006 would be applicable is a subject matter of the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996. It is also submitted that this issue is not foreclosed and decided as has been recorded in the arbitration award as the decision in the writ petition filed in this Court had left the issue open.

4. Learned counsel for the respondent has, however, disputed the last contention

and submitted the issue with regard to applicability of the Micro, Small and Medium Enterprises Development Act, 2006, was specifically adjudicated in the Letters Patent Appeal and SLP was dismissed.

5. Be that as it may, we would not like to enter into detailed discussion on the said aspect as the contention is pending before the single Judge and the next date of hearing is fixed on 19th July, 2018.

6. On the question whether the appellant should be asked to deposit 75% of the interest amount, we would notice that the arbitration award itself records admission made by the appellant that they had received goods of Rs. 19,82,15,096/-, but had made payment of Rs. 18,23,31,840/-. There was also a letter written by the respondents dated 1st October, 2011 wherein they had admitted shortfall of Rs. 86,29,281/-. The award also refers to admissions made by the appellant on other occasions as well.

7. The supplies in question were admittedly made during the period 14th December, 2006 till 2nd November, 2010. It may be noted that till the award was pronounced, no further payment was made.

8. In these circumstances looking at the prima facie case, we do not think that the direction given by the single Judge that the appellant should deposit 75% of the interest amount in terms of the award can be treated as a harsh and burdensome. The appellant de-hors the applicability of Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006, does not deserve any indulgence and leniency. The appellant would accordingly deposit the said amount in terms of the order passed by the single Judge."

50. The plea of Ms. Divan that GE T&D Ltd (supra) is as non-applicable owing to non-consideration Section 19 of the MSME Act along with plea that the Court in United Electrical Industries (supra) directed 75 % deposit of interest component was on merits and dehors the applicability of Section 19, has no bearing on the basis of my discussion above more particularly, when the judgment of the Madras High Court in Goodyear India Ltd v Norton Intech Rubbers, 2011 SCC OnLine Mad 712, on the precise issue, as reproduced above, has been upheld by the Supreme Court. Thus, it is clearly concluded that not only does the term 'amount' in terms of Section of MSME Act include the components of both principal and interest but also no discretion lies with the Court to reduce the amount or quantum of the pre-deposit of 75 % awarded/decreed/ordered amount as mandated under Section 19 of the MSME Act.

51. Insofar as the second issue that in what manner can the Court exercise its discretion for release of pre-deposit under proviso to Section 19 of MSME Act is concerned, Mr. Jethmalani, on comparison made with the predecessor statute, Interest on Delayed Payments Act, contended that the proviso to Section 19 is an addition, compared to similar provision that existed in the predecessor statute and the same is worded in mandatory manner with discretion on the Court only to decide on the extent of percentage of release of amount of pre-deposit based

on the circumstances and not to disallow the release of pre-deposit. As against this, Ms. Divan has only contended that the release of any amount from the pre-deposit of principal lying with the Court, owing to the admitted precarious financial situation of the applicant/respondent shall make the recovery amount, if released, at the relevant stage impossible. Without prejudice, it was also contended by Ms. Divan that the discretion vested with the Court under Section 19 should be exercised in favour of the petitioner on the merits of the present case.

52. In fact, Ms. Divan on merits, has taken the plea that adjudication of the disputes by the MSME Council was in absolute disregard of the provisions of MSME Act read with the provisions of the Act of 1996 and in support has relied upon the Apex Court Judgment in Govind Prasad (*supra*). I hold that the plea taken by Ms. Divan on merits of the matter is clearly premature and cannot be delved into at this stage of adjudication on an application for deposit and withdrawal pre-deposit amount in terms of Section 19 of the MSME Act.

53. I agree with the submission made by Mr. Jethmalani that the proviso to Section 19 of the MSME Act, which contemplates 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, as mandatory. The legislature in its collective wisdom has formulated such a proviso to keep the supplier (applicant/respondent herein) financially viable pending the litigation against an award in its favour being guided by the object of the legislation, which is promotion, development as well as enhancing the competitiveness of MSMEs and, other incidental and connected matters relating to MSMEs. However, the said proviso gives discretion to the Court for imposing such reasonable conditions as it deems necessary under the circumstances of the case. Therefore, a purposeful interpretation of the proviso means, if no viable security is provided by the supplier then the discretion can be exercised not to release the amount pre-deposited.

54. No doubt the apprehension of Ms. Diwan that owing to precarious financial situation of the respondent, the recovery of any amount, if released, at a relevant stage may become impossible is justified but such an eventuality can be taken care of, by the Court by directing the release of money against bank guarantee as security.

55. Moreover, it is a settled position of law that an Arbitral Award passed in favour of a party, for the purpose of execution and challenge in terms of Act of 1996 shall be treated as money decree. (Ref-: Hindustan Construction Company Limited and Ors. vs. Union of India (UOI) and Ors. AIR 2020 SC 122; Indian Oil Corporation Limited vs. Toyo Engineering Corporation and Ors., MANU/DE/0728/2020).

56. In the light of above discussion, this Court is of the view that the prayers made by the applicant/respondent are liable to be granted and accordingly, the following directions are issued:

(i). the petitioner/non-applicant shall deposit with Registrar General of this Court 75% of the interest awarded by the Arbitral Tribunal computed till the date of deposit of the principal amount in this Court within three weeks;

(ii). the Registry shall release an amount of 50% of the 75% of the principal amount deposited in this Court, pursuant to Order dated October 21, 2019, to the applicant/respondent on the applicant/respondent furnishing a bank guarantee in favour of the Registrar General of this Court for the amount to be released and shall keep the bank guarantee alive till further orders.

57. The amount to be deposited by the petitioner/non-applicant in terms of (i) above shall be kept in interest bearing FDRs with periodical renewals till further orders.

58. It is made clear, the release of the amount in favour of the applicant/respondent shall be subject to the final outcome of the aforesaid petition filed by the petitioner under Section 34 of the Act of 1996.

59. Application is disposed of.

60. The matter shall now be listed before the Registrar General for verification of bank guarantee on August 17, 2020.

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List on October 1, 2020.