

(2011) 07 AHC CK 0099
In the Allahabad High Court
Case No : Writ Petition No. 2125 of 2010 (M/S)

Indian Telephone Industries Limited

APPELLANT

Vs

Raj Enterprises and Others

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37, 43, 7(1)
Companies Act, 1956 — Section 617
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings (Amendment) Act, 1998 — Section 6(2)
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 3, 4, 5, 6, 6(1)

Citation : (2011) 7 ADJ 280

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioner is a Government Company within the meaning of Section 617 of the Companies Act and is engaged in manufacturing of Telephones and its related accessories. Respondent No. 1 is a partnership firm engaged in the business of supply of raw materials. M/s Raj Enterprises-opposite party No. 1 earlier filed a writ petition No. 1513 (MB) of 1995 for giving a direction to the Petitioner to pay the bills submitted by it towards certain goods/materials supplied by it. The aforesaid writ petition was dismissed as not maintainable. Thereafter the Firm preferred a Regular Suit No. 258 of 1996 for declaration of payment of Rs. 24,18,435/- due upon the Petitioner. The Government Company i.e. Petitioner filed its written statement and set up a counter claim of Rs. 23,55,772.28. The Firm moved an application in the aforesaid suit for referring the dispute for Arbitration before the Industry Facilitation Council but the same was rejected by the Trial Court on 15.11.2000. The said order of the Trial Court was assailed in Civil Revision No. 13 of 2001. During the pendency of the civil revision, the Firm moved an Arbitration Petition before the U.P. Industry Facilitation Council on 4.2.2001, which was registered as

Case No. 1FC/04/01. Against this petition, Petitioner raised objections regarding its maintainability of the petition before the Council and about the jurisdiction of the Arbitrator, in the meantime, the answering Respondent got the Civil Revision dismissed as not pressed vide order dated 4.5.2002. U.P. Industry Facilitation Council [in short referred to as "Council"] passed an Award in favour of the Firm. Feeling aggrieved by the illegal and unjustified Award, Petitioner preferred objections u/s 34 of the Act, 1996 but the same were rejected by the District Judge vide its order dated 9.2.2010.

2. Now, the Petitioner has assailed the Award dated 10.10.2006 passed by the U.P. Industry Facilitation Council, Kanpur and the order dated 9.2.2010 passed by the District Judge.

3. Shri Krishna Chandra, Counsel for the Petitioner has submitted that pursuant to the order of the writ Court, the Petitioner had filed a Civil Suit No. 258 of 1996 before the Civil Judge (Senior Division) Rae-bareilly, wherein the Firm made an application dated 24.8.2000 for referring the dispute to the Industry Facilitation Council but the same was dismissed vide order dated 15.11.2000. Thereafter the answering Respondent filed a Civil Revision against the said order but got the same dismissed as not pressed and as such the order dated 15.11.2000 rejecting the prayer for referring the dispute to the Council attained finality and is binding between the parties.

4. It has also been vehemently argued on behalf of the Petitioner that the provision of Section 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings (Amendment) Act, 1998 [in short referred to as "1998 Act"] providing for arbitration before the Industry Facilitation Council was made applicable with effect from 10.8.1998 but on the said date, civil suit No. 259 of 1996 between the parties was already pending in the competent civil Court and the provision of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 [in short referred to as "1993 Act"] as amended in the year 1998 does not envisage that all pending disputes would be brought under the purview of the Act. Therefore, the Council committed manifest error in law while giving the Award. Even otherwise, the claim filed by the Firm before the Council was time barred as the dispute relates to the year 1992 and the case was filed only on 4.1.2001.

5. Elaborating the submissions, Learned Counsel for the Petitioner also submitted that under the provisions of Section 43 of the Arbitration and Conciliation Act, 1996, the provisions of Limitation Act are applicable to arbitration as it applies to the proceedings in Court but the same was also not taken into consideration by the Council while giving the impugned Award.

6. Lastly, it has also been argued that the Award made by the Council is in violation of the provisions of Section 34(b)(ii) of the 1996 Act inasmuch as the Arbitrator had not stated the reasons upon which the Firm-Respondent's claim of Rs. 5,30,672.44 alongwith the interest as per Section 5 read with Sections 3 and

4 of the Act, 1993 was awarded in his favour. For the reasons aforesaid, it has been vehemently contended that the Award is without jurisdiction as the dispute prior to 10.8.1998 cannot be considered by the Industry Facilitation Council.

7. Sri Bireshwar Nath appearing on behalf of the Firm raised a preliminary objection that the order impugned in the writ petition is an appealable order in view of Section 37 of the Act of 1996 and as such the writ petition is not maintainable.

8. Elaborating his arguments, Counsel for the contesting Respondent stated that the application for referring the matter to the Council for Arbitration was based on wrong legal advice and as such these proceedings were given up and the Respondent approached the Council on 4.1.2001. The assertion of the Petitioner that petition before the Council was not maintainable in view of the pendency of the suit between the parties, it has been contended that the said objection is misconceived as it is mandate of law that irrespective of the pendency of proceedings before the judicial authority, arbitration may commence or continue and Arbitral Award can be made. After the commencement of arbitration and Award, no proceedings prior to Award can be questioned except as provided under the Arbitration & Conciliation Act, 1996.

9. Placing reliance on *Modern Industries Vs. Steel Authority of India Ltd. and Others*, decided on 14.2.2010, Council for the Respondent submitted that purpose and object behind 1993 Act as amended in 1998, is to ensure that buyer promptly pays the amount due towards the goods supplied or the services rendered by the supplier. On the strength of observations made in para 34 of the judgment, Counsel for the Respondent-Firm has stated that the Respondent is entitled for interest on delayed payment and the same was rightly awarded by the Council. Lastly, it has been stated that the Award passed by the Council is legally correct and the pleas which have been raised before this Court were never raised by the Petitioner before the District Judge and as such same cannot be considered by this Court.

10. A perusal of the agreement executed between M/s Raj Enterprises and the Indian Telephone Industries shows that there was a specific clause of arbitration. Clause 10(vii) of the said agreement provides that in case of any dispute arising between the Company and the Ancillary Unit, the same shall be referred to the General Manager (Co-ordination) of the Company, whose decision thereupon shall be final and conclusive, which is not open to challenge or review. During the course of argument, Learned Counsel failed to establish that the Respondent ever invoked the aforesaid clause. Instead, from the record, it comes out that Respondent-Firm had filed a writ petition bearing No. 1513 of 1995, referred to above, before this Court for a direction to the ITI Limited to pay the bills submitted by the contesting Respondent but the same was dismissed as not maintainable. Thereafter, as averred above, the Respondent-Firm filed a Civil Suit No. 258 of 1996 and made a claim of Rs. 24,18,435.90. In the said suit, the present Petitioner had filed written statement setting off a counter claim of Rs.

23,55,772.28/- and when the matter was sub judice before the Civil Court, the Respondent-Firm approached the Council for arbitration pursuant to the amendment dated 10th August, 1998. There also the Petitioner raised serious objections regarding continuance of proceedings not only on the ground of being time barred but availability of the same during the pendency of the civil suit.

11. Before proceeding further, it would be relevant to point out that the preliminary question regarding maintainability of the writ petition has already been answered in negative by this Court by a detailed order dated 2.7.2010. This order remained unchallenged and as such there is no need to deal this point again.

12. The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act 1993, regulates the procedure for payment of interest on delayed payments to small-scale and ancillary undertakings. By the amending provisions i.e. Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings (Amendment) Act, 1998 certain amendments were brought. This Act received the assent of the President on August 10, 1998 and was published in the Gazette of India, Extra, Part II, Section dated 11th August, 1998. The amendment of Section-6 which is relevant for the present purposes reads as under:

5. Amendment of Section 6.--Section 6 of the Principal Act shall be renumbered as Sub-section (1) thereof and Sub-section (1) as so renumbered, the following Sub-section shall be inserted, namely:

(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 the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in Sub-section (1) of Section 7 of that Act.

13. By Section 7A of the amending Act, it was provided that the State Government shall establish one or more Industry Facilitation Council. Section 7B of the amending Act deals with the composition of Industry Facilitation Council.

The state Government on January 22, 2000 issued a notification in exercise of the powers conferred u/s 7A of the 1993 Act for the establishment of an Industry Facilitation Council at Kanpur for the whole of the Uttar Pradesh and provided that the said Council shall have jurisdiction to act as an arbitrator or conciliator with respect to a reference made to it under Sub-section (2) of the Section 6 of the said Act. On the same day, in exercise of the powers u/s 7B of the Act enacted the Uttar Pradesh Industry Facilitation Council Rules, 2000.

14. Perusal of the record shows that the answering Respondent has made a Reference u/s 6(2) of the Act, as amended till date, only on 4th January, 2001 claiming that award be made in his favour for an amount of "24, 16, 398, 47

plus interest 1.5 times of the Prime lending rate of State Bank. The claim was in respect of dues on the Petitioner on 26.11.1992. Later on a revised claim was submitted before the Council in respect of dues of 1992-93.

15. It is relevant to point out that in Rampur Fertilizer Limited v. Vigyan Chemicals Industries 2009 (3) ALJ 660 when a controversy arose as regards to the applicability of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, the Apex Court held that as the Act has come into effect from 23.9.1992, therefore, it would have no application and would not apply to the transactions which took place prior to the aforesaid date. The aforesaid 1993 Act is prospective in operation is also settled by the decision of the Apex Court in Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and Another, There is no provision in the 1998 amending Act that it would be retrospective in nature and can be applied in respect of the claims made before the effective date, i.e., 11.8.1998.

16. In Modern Industries (supra) on which reliance has been placed by the Respondent though the initial agreement was entered on 15.1.1983 i.e. before coming into force of 1993 Act but it was altered from time to time and alterations continued up to 28.4.1995. Therefore, the Apex Court held that 1993 Act is applicable. However, in para 52 of the report, the Apex Court clarified that 1993 Act will have no application in relation to the transaction made in 1991. Relevant paragraph of the report reads as under:

The 1993 Act, thus, will have no application relation to the transactions entered into between June 1991 and 23-9-1992. The trial Court as also the High Court, therefore, committed a manifest error in directing payment of interest at the rate of 23% up to June 1991 and 23.5.% thereafter.

17. Here the facts are quite distinct. It is not disputed that the answering Respondent was an ancillary unit of the Petitioner but according to the Petitioner, it ceased to be ancillary of Petitioner 1993. As averred above, in the agreement entered into between the parties, there existed an arbitration clause, but it was never invoked by the answering Respondent. All the 21 disputes raised except two by the answering Respondent are before coming into force of the Act. There is no averment that the agreement was altered or modified after coming into force of the Act. As indicated above, the answering Respondent before coming into force of 1998 Act, had already preferred a suit and during the pendency of the suit proceedings, when 1998 Act came into force, the answering Respondent made a reference to the Council and that too only on 4.1.2001. Therefore, the assertions of answering Respondent that there was no illegality in approaching the Council, is wholly fallacious and the Modern Industries" case is of no help to him.

18. Having considered the materials on record and facts averred as above, I am of the considered opinion that the claim of the answering Respondent before the Council was not only the time barred but the Council also committed an error

and exceeded its jurisdiction while entertaining the claim filed by the answering Respondent in respect of dues even for the period of 1992-93 as Section 6(2) was brought on the statute book by means of an amendment on 10th August, 1998. The amendment so made in the "1993 Act" by the amending Act, 1998 is prospective in nature, therefore, the Council ought not to have entertained any claim in respect of dues prior to 10th August, 1998 more so, when it was brought to the notice of the Council and the District Judge that civil suit in this behalf filed by the answering Respondent was pending at the relevant time.

19. As averred above, the Council for the purposes of arbitration or conciliation was created through an amendment u/s 6(2) of the 1993 Act by Act No. 23 of 1998 and came into force on 11th August, 1998, the impugned Award passed by the Council is without jurisdiction and consequently order of the District Judge is also not sustainable. In view of the aforesaid legal position, I am not entering into other aspects of the matter. It is also to be noted that even after the judgment having been reserved, the answering Respondent was pressing hard the execution proceedings and a news item was also published in the Newspaper that bank account of the ITI Ltd. Rae Bareilly has been attached, the Petitioner moved an application for staying the said proceedings till the pronouncement of the judgment. This Court being satisfied with the materials on record, vide an order dated 8.7.2011 directed for keeping the execution proceedings in abeyance.

20. For the reasons aforesaid, the writ petition is allowed and the impugned Award dated 10.10.2006 passed by the U.P. Industry Facilitation Council, Kanpur in case No. IFC 04/01 and the order dated 9.2.2010 passed by the District Judge in Civil Misc.(Non-related) Case No. 03 of 2007 is hereby set-aside. However, it will be open for the answering Respondent to pursue the remedy as available to him under law.

21. Parties shall bear their own cost.