IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 1382 of 2016(O&M)
Date of decision : March 3, 2016

M/s Pratibha Industries Ltd.

.... Appellant

Versus

M/s Reva Industries Ltd.

.... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Akshay Bhan, Senior Advocate with
Mr. Amandeep Singh Talwar, Advocate
for the appellant.

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1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not? Yes
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

Notice of motion.

Mr. Sanjay Joshi, Advocate appearing on behalf of the respondent-caveator accepts notice.

Mr. Akshay Bhan, learned Senior counsel assisted by Mr. Amandeep Singh Talwar submits that in pursuance to the dispute having arisen between the parties and being governed by the provisions of Micro, Small and Medium Enterprises Development Act,2006 (hereinafter referred as ' MSMED Act') the matter was referred to the council which appointed retired District and Sessions Judge as arbitrator.

The dispute emanates from supply of certain material, in essence, cranes. The appellant through its representative appeared before the arbitrator on two dates. The arbitrator fixed the next two dates i.e. 7.12.2014 and 20.12.2014. The matter was adjourned to 3.1.2015 and without recording of the satisfaction, passed an ex-parte award dated 5.1.2015. Under the mistaken advice of the counsel, the appellant filed an application under Section 33 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') which was returned by the arbitrator and received back on 18.2.2015. The appeal under Section 37 of the 1996 Act was filed on 15.5.2015 which was returned on 16.5.2015 and thereafter objection petition under Section 34 of the 1996 Act was filed on 2.7.2015 accompanied by an application seeking condonation of delay in not filing within the period of 90 days. The delay occurred due to availing of wrong legal remedy viz-a-viz filing of the appeal and return of the same since in the month of June there were holidays in the Court, and the objections were filed on 2.7.2015., which were within grace period of 30 days.

In support of his contentions, he has relied upon the judgment of Hon'ble Supreme Court in **Coal India Limited and another Vs. Ujjal Transport Agency and others 2011 (1) SCC 117** to contend that the arbitrator before proceeding ex-parte against the adverse party has to record the satisfaction. The objecting court dismissed the objections being barred by law of limitation. He further submits that as per provisions of Section 19 of MSMED Act the appellant could not have deposited 75% of the award had there been a specific order/direction of the Court, therefore, no occasion arose for the appellant to deposit 75% of the amount, thus, urges this court for setting aside of the order under challenge, much less award.

Mr. Sanjay Joshi, learned counsel appearing on behalf of the respondent submits that the application seeking condonation of delay was lacking reasons, much less cogent reasons, rightly so the same has been declined for want of limitation, more over it is essential and mandatory requirement of provisions of Section 19 of MSMED Act to deposit 75% of the amount and in support of his contentions he has relied upon the judgment of Hon'ble Supreme Court in **Goodyear India Limited Vs. Norton Intech Rubbers (P) Ltd. & another** **2012 (6) SCC 345** to contend that in case of failure to deposit the statutory amount, objections under Section 34 of the 1996 Act are not maintainable, much less cannot be entertained. The court does not have power to grant extension to deposit the amount, at the best it can be paid by way of instalments. The appellants were aware of the arbitration award but they chose to file application under Section 33 of the 1996 Act. However, as per provisions of Section 33 the parties to the award are entitled to seek modification or clarification of the order, thus, cannot take benefit of period in pursuing the matter in different courts, much less filing an appeal.

He further submits that there is no averment qua arbitration proceedings in the application under Section 33 of the 1996 Act much less does not reveal the ex-parte proceedings having been initiated, in essence, knowledge of the award was there.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is merit in the submissions of learned Senior Counsel, for the following reasons:-

It would be apt to reproduce operative part of the order, which reads thus:-

> " *After taking into consideration the aforementioned facts and circumstances of the case, it is clear that objection has never been taken by the petitioner before the Arbitrator that the Arbitrator has become functo-officio. It is further a matter of record that the petitioner has never deposited 75% of the amount of award before challenging the said award, which is mandate of Section 19 of MSMED Act. Again contention of the petitioner that he has never been given the opportunity to defend his case or to present his case, it is clear in para No.3 of the award that an Advocate was appeared on behalf of the respondent(present petitioner) in the award but none appeared on behalf of him in the said award. This all shows that neither the petitioner is able to show any infirmity in the award nor he has complied with mandatory provisions of Section 19 of MSMED Act. In this regard, counsel for the respondent relied upon the judgment of Hon'ble Supreme Court in case titled as* ***Goodyear India Limited Vs. Norton Intech Rubbers (P) Ltd. & another 2012 (2) CTC 829(SC).***
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> *Hence, in view of the aforementioned discussion and observation, the present petition is hereby dismissed. File be consigned to the record room after due compliance."*

Section 19 of MSMED Act reads thus:-

> *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."

On clear and simple language of the aforementioned Section would mean until and unless there is an order of the objecting court calling upon the appellant to deposit the amount, the appellant cannot be thrown out for non-deposit of the amount, at the best, liberty could have been given to deposit 75% of the amount by way of installments. This is the pith and substance of the ratio decidendi culled out by the Hon'ble Supreme Court in **Goodyear India Limited's case (supra).** On going through the operative part of the impugned order it is seen that the arbitrator did not record satisfaction in proceeding against the ex-parte and thus objections are falling within the parameters of Section 34 (2) of 1996 Act.

Keeping in view the aforementioned facts and circumstances of the case, I am of the view that the appellant was not given opportunity to cause/defend before the arbitrator and it would be totally futile exercise to remand the matter to the objecting court to hear the objections afresh as the objection are for want of limitation and non-compliance of Section 19 of MSMED Act. Accordingly, the impugned order is set aside, much less the award of the arbitrator.

The appellant-plaintiff is given liberty to seek remedy, for appointment of an arbitrator, in accordance with law.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

March 3 , 2016
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