

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2017

CORAM

THE HONOURABLE Mr. JUSTICE M.M.SUNDRESH
and
THE HONOURABLE Mr. JUSTICE M.SUNDAR

O.S.A.No.96 of 2017
and
CMP.Nos.6698 & 8485 of 2017

Ved Prakash (Authorised Representative)
M/s.Karmic Energy Private Limited,
851, Ground Floor, Udyog Vihar Phase-V,
Gurgaon,
Haryana - 122 016. .. Appellant

vs

P.Ponram,
Managing Partner,
M/s.Unicon Engineers,
513-A/6, Bharathi Road,
Chinnavedampatty,
Coimbatore - 641 049. .. Respondent

Appeal filed under Order XXXVI, Rule 9 of Original Side Rules read with Clause 15 of Letters Patent against the order dated 22.03.2017 in Application No.1511 of 2017 in O.P. Diary No.6821 of 2017 on the file of this Court.

For Appellant .. Mr.Rajkishore Bhagwatsaran

For Respondent .. Mr.R.Sankara Narayanan
Senior Counsel
for Mr.B.Manoharan

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JUDGMENT

(Delivered by M.SUNDAR, J.)

This Intra Court appeal is directed against an order dated 22.03.2017 made in Application No.1511 of 2017 in O.P. Diary No.6821 of 2017 by a learned Single Judge of this Court.

2. Original Petition Diary No.6821 of 2017 was filed by the appellant before us under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A & C Act" for convenience) calling in question an Award dated

05.08.2016 made by Micro & Small Enterprises Facilitation Council, Coimbatore Region (hereinafter referred to as "Facilitation Council" for convenience). Along with the aforesaid O.P. Diary No.6821 of 2017, which was filed under Section 34 of the A & C Act, the appellant before us, who is the petitioner before the learned Single Judge, took out the aforesaid application being Application No.1511 of 2017 with a prayer for waiver of pre-deposit of 75% of the Award amount, which is a condition precedent for entertaining a challenge to the Award under Section 34 of the A & C Act. This condition precedent is mandated in Section 19 of Micro, Small & Medium Enterprises Development Act, 2006 (hereinafter referred to as "MSMED Act" for brevity).

3. We deem it appropriate to extract Section 19 of MSMED Act, which reads as under:

"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."

4. The thrust of the case of the appellant before us is that the Award made by the Facilitation Council is no Award at all, as according to him, it did not have jurisdiction to pass Award. Such a plea is predicated on the basis that the contract between the parties contains an arbitration clause and the same is Clause Q in the contract between the appellant and the respondent dated 12.06.2013. We deem it appropriate to extract Clause Q, which reads as under:

"Q. Arbitration

If at any time, any question, dispute, or difference whatsoever shall arise between the Purchaser and the Supplier upon or in relation to or in connection with the contract, either party may forthwith give to

the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to the adjudication of one Arbitrator to be nominated by the Purchaser in their sole discretion only with New Delhi as the Place of Arbitration. The award to be given by such arbitrator shall be final and binding on the parties."

5. On 10.8.2017, an interim order was passed as we were informed that the appellant is under immediate and imminent threat of execution of the Award. This interim order will also stand disposed of along with this judgment, which is in the main appeal.

6. Now, reverting back to the application being Application No.1511 of 2017 filed by the appellant in O.P. Diary No.6821 of 2017 with a prayer for waiver of pre-deposit of 75% of the Award amount, the learned Single Judge, after recording brief facts touching upon the dispute between the parties, permitted the appellant before us to deposit 75% of the amount awarded by the Facilitation Council in three equal instalments with each instalment to be deposited fortnightly starting from 01.04.2017.

7. Contending that the appellant is aggrieved by the aforesaid order, the present Intra Court appeal has been filed.

8. From the memorandum of grounds of appeal before us, we find that this intra-court appeal has been filed by the appellant invoking Clause 15 of the Letters Patent. We pointed out the legal principle laid down by the Hon'ble Supreme Court in Fuerst Day Lawson Limited Vs. Jindal Exports Limited [(2011) 8 SCC 333] and observed that filing of such an intra-court appeal under Clause 15 of Letters Patent is impermissible. Faced with this situation, learned counsel for the appellant requested us to construe this appeal as an appeal under Section 37 of the A and C Act and stated that this appeal shall perambulate strictly within four corners of Section 37 of A and C Act.

9. However, in the light of the language of Section 37 of A and C Act, we need to necessarily examine as to whether an appeal arising out of an order of this nature can be entertained under Section 37 of A and C Act, particularly in the light of the negative import in the language of Section 37 of A and C Act. Therefore, what we need to examine is whether the order of the learned Single Judge that has been called in question before us can be construed as an order setting aside or refusing to set aside an arbitral award under Section 34 of A and C Act. In other words, we need to examine if this appeal can be brought within the four corners of Section 37(1)(c) of

A and C Act. Given the fact that the order that has been called in question is the one that has permitted the 75% of the award amount pre-deposit being a condition precedent to be made in three equal fortnightly installments, it is an order refusing to entertain an application to set aside the award if the conditions contained in the order are not complied with.

10. The conditions contained in the order are not traceable to discretionary expression of the opinion of the court, but are strictly traceable to the mandate of Section 19 of MSMED Act. In this view of the matter, hypothetically speaking, if the prayer of the appellant before us had been acceded to by the learned Single Judge, the challenge to the award would have been entertained resulting in an order either setting aside or refusing to set aside an award. Equally, if the application of the appellant before us had been dismissed by the learned Single Judge, that would have led to not just a refusal to set aside the award, but a refusal to entertain an application to set aside the award. Therefore, considering the peculiar facts and circumstances of this case and in the light of the order which we propose to pass, the order of the learned Single Judge called in question before us can be construed to be one that can be brought within the sweep of Section 37(1)(c) of A and C Act. However, this shall not be quoted as a precedent as we take this trajectory in the light of the peculiar facts and circumstances of this case and in the light of the order that we propose to pass with the consent of both the parties.

11. To be noted, though there can be no concession qua a statutory requirement, Mr. Sankara Narayanan, learned Senior Counsel leading counsel on record for the respondent fairly stated at the Bar that he has no objection to such a course.

12. Reverting back to Section 19 of MSMED Act, which has been extracted supra, we notice that the said provision is couched in a language which starts with a negative import. Language of the statute is very clear that there is a bar on the Court from entertaining any application to set aside not just an Award passed, but also any decree or any other order made by the Facilitation Council. It is also not in dispute that validity of Section 19 of MSMED Act was put to challenge and such a challenge was negated. In other words, constitutional validity of Section 19 of MSMED Act was upheld by a Division Bench of Kerala High Court in K.S.R.T.C. v. Union of India, reported in 2010 (1) KLT 65.

13. To be noted, Section 19 of MSMED Act is a condition precedent and therefore, it is a threshold barrier. The appellant has to necessarily steer clear of this to advance any argument assailing the Award of the Facilitation Council, which the appellant intends to do in O.P. Diary No.6821 of 2017 before the learned Single Judge.

14. Mr.Rajkishore Bhagwatsaran, learned counsel appearing for the appellant has made a reference to the recent judgment of the Hon'ble Supreme Court in Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and others, reported in (2017) 7 SCC 678. We pointed out that the said decision relates to exclusivity of jurisdiction pertaining to an arbitration agreement within the meaning A & C Act. Learned counsel for the appellant fairly did not dispute this proposition, but the learned counsel attempted to advance his submission by placing before us a judgment of Chhattisgarh High Court made in WPC No.312 of 2016 (Zuberi Engineering Company v. M/s.M.P. Tar Products and another), dated 17.05.2017, wherein there is a reference to Indus Mobile Distribution Private Limited.

15. However, Chhattisgarh High Court judgment supra does not deal with Section 19 of MSMED Act. It only deals with MSMED Act, arbitration thereunder qua arbitration agreement within the meaning of A & C Act. Therefore, we are of the considered view that the judgment of Chhattisgarh High Court supra does not help the appellant in advancing its case.

16. Some submissions were made on the merits of the matter. Considering the limited and narrow scope of this Intra Court appeal, we refrain from referring to the same or expressing any opinion on such submissions on the merits of the Award dated 05.08.2016 made by the Facilitation Council.

17. On the short point that Section 19 of MSMED Act is non-negotiable, we are not inclined to interfere with the order of the learned Single Judge. No infirmity or illegality in the order of the learned Single Judge has been pointed out before us.

18. In fact, the learned Single Judge has been considerate in permitting the appellant to make pre-deposit in three instalments. Therefore, we are of the considered opinion that there is no need to interfere with the order of the learned Single Judge.

19. At this juncture, learned counsel for the appellant made a request to us that the time granted by the learned Single Judge for pre-deposit of 75% of the Award amount may be extended. Mr.R.Sankara Narayanan, learned Senior Counsel appearing for the counsel on record for the respondent in his usual fairness did not oppose this request.

20. Therefore, we are inclined to say that pre-deposit of 75% of the Award amount as contained in Section 19 of MSMED Act be made by the appellant, for which three instalments were permitted by the learned Single Judge vide order dated 22.03.2017 in Application No.1511 of 2017 in O.P. Diary No.6821 of 2017, now stands extended/modified. The

extended/modified time frame is that the aforesaid 75% of the pre-deposit Award amount shall now be made in three equal fortnightly instalments and the first instalment shall be within a fortnight from the date of receipt of a copy of this judgment. In all other aspects of the matter, the order of the learned Single Judge stands confirmed.

21. With the above observations and directions, the appeal is disposed of. Interim order already granted by this Court vide order dated 10.08.2017 shall continue to operate for a period of eight weeks from the date of receipt of a copy of this order. Considering the nature of the matter and the trajectory of the proceedings, there will be no order regarding costs. Consequently, CMP.Nos.6698 & 8485 of 2017 are disposed of.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

bbr

To
The Sub Assistant Registrar,
Original Side, High Court, Madras.

+2cc to Mr.B.Manoharan, Advocate SR.No.75452
+2cc to Mr.Vibhu shankar, Advocate SR.No.75164

O.S.A.No.96 of 2017

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