IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.6194 of 2018 (O&M)
Date of Decision:September 25, 2019

State of Punjab

...Appellant

Versus

Jai Bhushan Malik and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Sandeep Singh Deol, DAG Punjab
for the appellant.

Mr. Akash Singla, Advocate
for respondent No.1.

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JAISHREE THAKUR, J.

1. The instant appeal has been filed seeking to challenge the order dated 13.04.2018 passed by the Addl. District Judge, Barnala whereby, he has dismissed the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') for setting aside the award passed by the Arbitrator.

2. The facts in brief are that a bid of respondent No.1 was accepted by the appellant for the work of providing sewerage scheme at village Kattu, Block Barnala, District Barnala under the World Bank Scheme. On account of a dispute between the parties, arbitration clause was invoked by appointing an arbitrator, who accepted the claim of respondent No.1 by passing an award dated 27.06.2015 for a sum of ₹4,18,767/-.

Aggrieved against the said award, the appellant herein preferred an application under Section 34 of 1996 Act for setting aside the award, which application was contested by respondent No.1-contractor. The ADJ, Barnala dismissed the said application filed under Section 34 of 1996 Act on the ground of non-compliance of Section 34(5), which stipulates the service of prior notice upon the other party and filing of affidavit endorsing such compliance, before filing objections under Section 34 of 1996 Act. Aggrieved against the said order of the ADJ, Barnala, the instant appeal has been filed. Notice of motion was issued in the matter and appearance has been caused on behalf of respondent No.1-contractor.

3. Mr. Sandeep Singh Deol, learned DAG Punjab, appearing on behalf of the appellant contends that the ADJ, Barnala has erred in dismissing the application, as the compliance of Section 34(5) of 1996 Act is not mandatory, as has been held by the Supreme Court in the case of ***State of Bihar & others vs. Bihar Rajya Bhumi Vikas Bank Samiti, Civil Appeal No.7314 of 2018, decided on 30.07.2018***. It is submitted that in the said judgment, it has been held that Section 34(5) of 1996 Act is a procedural provision and infraction of which would have no consequence. It is prayed that the matter be remanded back to the ADJ, Barnala for a decision on merit.

4. On the other hand, Mr. Akash Singla, learned counsel appearing on behalf of respondent No.1-contractor vehemently urges that the instant appeal cannot be heard without the compliance of deposit of 75% of the awarded amount, as envisaged under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (for short '2006 Act'). He

submits that this issue came up for consideration before the Gujarat High Court in the matter of ***JMC Projects (India) Ltd. and another vs. Mechtech Engineers and another, 2011(16) RCR (Civil) 317*** wherein, it was held that the language of Section 19 of 2006 Act would not permit restriction of its applicability only to an award under Section 18 of 2006 Act. It is further submitted that the said judgment was subsequently affirmed by the Division Bench of the Gujarat High Court in ***LPA No.194 of 2011 decided on 17.09.2013.*** Subsequent to the said judgment, another Division Bench of the Gujarat High Court in the case of ***Saryu Plastics Pvt. Ltd. and another vs. Gujarat Water Supply and Sewerage Board, Special Civil Application No.12769 of 2017, decided on 11.09.2017*** was seized of the similar question, whether an objector to the award under Section 34 of 1996 Act was required to deposit 75% of the amount, as awarded by the Arbitrator, in compliance of Section 19 of 2006 Act. In the case of ***Saryu Plastic (supra)***, the Division Bench held that the pre-deposit as envisaged under 2006 Act would also be applicable to proceedings under 1996 Act, while deciding objections under Section 34 of the Act. It is submitted that without the pre-deposit of 75% of the decreed amount, the instant appeal cannot be heard.

5. In response thereto, Mr. Sandeep Singh Deol, learned DAG Punjab, appearing on behalf of the appellant contends that the argument as raised by counsel for respondent No.1 is untenable. A preliminary objection has been taken to the very argument raised, that respondent No.1 had put an appearance before the ADJ, Barnala in proceedings pending under Section 34 of 1996 Act and he had not taken any objection regarding maintainability on the ground that there is non-compliance of Section 19 of 2006 Act. It is

also argued that the judgment as relied upon by the counsel for the respondent has been set aside by the Supreme Court in the case of ***Messrs JMC Projects (India) Ltd. vs. Messrs Mechtech Engineers & another, Civil Appeal No.10388 of 2013 (Arising out of S.L.P. (C) No.32719 of 2013) decided on 01.11.2013*** and the question as raised before the Supreme Court remains unanswered.

6. Be that as it may, I have heard counsel for the parties and deem it necessary to deal with the objection as raised by the counsel for respondent No.1- whether the pre-deposit of 75% of the decreed amount, as envisaged under Section 19 of 2006 Act could be made applicable to the proceedings that have been initiated under the provisions of 1996 Act.

7. As per the record available, it is an admitted fact that agreement dated 25.07.2013 was entered into between the parties for work of providing sewerage scheme, in which there was a specific clause that in case of any dispute, the dispute/differences were to be settled in terms of clause 25.2 of the agreement, which was to be in accordance with the 1996 Act. The Arbitral Tribunal was appointed in consonance with the said agreement and proceedings concluded as per the provisions of 1996 Act. Aggrieved against the award passed, the objections were filed under Section 34 of 1996 Act.

8. Mr. Akash Singla, learned counsel appearing on behalf of respondent No.1-contractor contends that Section 24 of 2006 Act has an overriding effect and, therefore, Section 19 of 2006 Act will prevail, which has a stipulation of pre-deposit of 75% of the decreed amount.

9. To get the root of the controversy, it would be necessary to

reproduce Sections 15, 16, 17, 18, 19 and 24 of 2006 Act, which is as follows-

> "***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.*
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> ***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.*
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> ***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.*
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> ***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.

xxx xxx xxx

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."*

10. The 2006 Act, was enacted with an aim to facilitate, promote, develop and enhance Micro, Small and Medium Enterprises and it repealed the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993. Under Chapter V of 2006 Act, provisions are made to effect recoveries on account of delayed payments to Micro and Small Enterprises. Section 15 of 2006 Act made it incumbent upon a buyer to make payment on or before agreed date and when there is no agreement in this behalf, before the appointed day as defined under section 2(b) of 2006 Act. Section 16 provides the very date from which interest was payable on account of failure of the buyer to make the payment to the supplier. Section 17 made the buyer liable to pay interest on the payment. In

case any party has a dispute with regard to the amount due under Section 17, such party can make a reference to the Micro and Small Enterprises Facilitation Council as prescribed under Section 18 itself. Against the award passed by the Council itself or by any institution or the Arbitrator appointed under the Council, an application under Section 19 of 2006 Act was to be filed for setting the decree, award or order. It is the said Section 19 which stipulated that no application for setting aside the decree, award or order could be entertained by the court, unless the appellant (not being a supplier) has deposited 75% of the amount, in terms of the decree, award or order. Section 2(e) of 2006 Act defines the term “enterprise” as under:-

> *"enterprise" means an industrial undertaking or a business concern or any other establishment, by whatever name called, engaged in the manufacture or production of goods, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act/ 1951 or engaged in providing or rendering of any service or services;*

11. The Arbitration and Conciliation Act, 1996 improves upon the previous laws regarding arbitration in India namely the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The new statute also covers conciliation which had not been provided for earlier. So, the Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitration awards, as also to define the law relating to conciliation and matters connected thereto or incidental

thereto. For a party to invoke arbitration, there is a requirement that there must be an agreement in writing to refer the dispute to an arbitrator, whereas, 2006 Act was enacted with an aim to provide for facilitating the promotion and development and enhancing the competitiveness of the Micro, Small And Medium Enterprises and to ensure a prompt payment of dues for goods supplied and for services rendered. Arbitration could be invoked by the persons, who are individuals without being classified as enterprise as defined by Section 2(e) “enterprise” or other sections defining the others terms i.e. 2(g) “medium enterprise”, 2(h) “micro enterprise” or 2 (m) “small enterprise”.

12. A reading of 2006 Act would reflect that Section 15 can be invoked on account of non-payment by the buyer to any supplier who supplies any goods or renders any services to a buyer. Meaning thereby, the ambit and spore of 2006 is limited to any dispute arising there under. The term “goods” has been defined under Section 2(f) and means every kind of movable property other than actionable claims and money whereas, the terms “rendering of services” has not been defined under the 2006 Act. Therefore, it would be left open to judicial interpretation. On the other side, the scope and ambit of referring a dispute to an arbitrator is much wider under the 1996 Act and parties, who are not micro, small or medium enterprises, can refer the dispute to an Arbitrator arising out of non-fulfillment of any contract, tender etc. etc. Disputes can arise out of various subjects and not limited to non payment alone which is the subject matter of Sections 15 and 17 of 2006 Act. The other difference that one can draw upon is that, under 1996 Act to refer a dispute to Arbitrator, there has to be

an agreement in writing to that effect, which is not a requirement under the 2006 Act, where the liability to pay by the buyer to the supplier regarding goods bought or non-payment of services rendered arises. The provisions of 1996 Act and challenge to the award under Section 34 are wholly independent of the proceedings that are initiated by a party to the dispute on account of non-payment for the goods supplied for which a remedy has been given under the Act of 2006. Under the 2006 Act, in case of non-payment by the buyer on account of the goods supplied, the supplier may make a reference to the Micro and Small Enterprises Facilitation Council, the procedure is prescribed in Section 18. However, there are divergent views of various high Courts regarding the issue whether the 2006 Act can be invoked in the light of an agreement between parties to settle disputes under 1996 Act. The procedure as prescribed under the 2006 Act envisages that conciliation would be held before the matter is referred to the arbitration, which is a different procedure followed than from proceedings under 1996 Act. Section 19 of 2006 Act is very clear wherein, it is stated that no application for setting aside any decree, award or other order shall be entertained by any court, without the deposit of 75% of the amount of such decree or award or other order. In other words, it is only when an award or a decree either passed *by the Council itself* or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, is challenged under Section 19 of 2006 Act, that a pre-deposit of 75% amount of such decree or award is required.

13. The argument raised by counsel for respondent No.1 that Section 24 of 2006 Act has an overriding effect, consequently, Section 19 of

2006 Act will prevail as well when an award is challenged being an award passed by the Arbitrator under 1996 Act, is in the opinion of the court not sustainable. No doubt, Section 24 of 2006 Act has an overriding effect by stipulating that Section 15 to 23 "*shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in for"* but a reading of Section 19 makes it clear that Section 19 is limited in its application **to an award or a decree or other order passed by the Council itself or by any institution or an Arbitrator appointed on a reference made by the Council**. Therefore, it cannot be held that Section 19 by virtue of Section 24 will prevail over proceedings that have been initiated under Section 34 of 1996 Act. Moreover, there is nothing in 2006 Act which is inconsistent with the proceedings held under the 1996 Act. Once respondent No.1 has invoked the proceedings under the 1996 Act, he would be stopped from invoking provisions of Section 19 of 2006 Act in these proceedings.

14. The judgment, as relied upon by counsel for respondent No.1-contractor of the case of ***JMC Projects (India) Ltd. and another vs. Mechtech Engineers and another (supra)****,* which was subsequently affirmed by the Division Bench of the Gujarat High Court in ***LPA No.194 of 2011 (supra)*** as well as subsequently followed by the Division Bench of the Gujarat High Court in the case of ***Saryu Plastics Pvt. Ltd. and another vs. Gujarat Water Supply and Sewerage Board(supra)*****,** has been set aside by the Apex Court in ***Messrs JMC Projects (India) Ltd. vs. Messrs Mechtech Engineers & another (supra).*** In that case, the precise question raised before the Apex Court was regarding the applicability of Sections 18

and 19 of 2006 Act to an application filed under Section 34 of 1996 Act. Without deciding the said question and leaving it open, the orders passed by the High Court were set aside, since substantial amount already stood deposited. Consequently, the civil appeal was allowed by the Apex Court. As far as the judgment rendered by the Division Bench of Gujarat High Court in ***Saryu Plastics Pvt. Ltd. and another vs. Gujarat Water Supply and Sewerage Board (supra)***, as relied by counsel for respondent No.1, with due respect has not taken note of the fact that the Apex Court had set aside the judgment rendered of the Gujarat High Court in the case of ***JMC Projects (India) Ltd. and another vs. Mechtech Engineers and another (supra)***. Moreover, another Division Bench of the Gujarat High Court in case of ***Gujarat Energy Transmission Corporation Ltd. (GETCO) vs. Deora Wires N. Machines Pvt. Ltd., Appeal from order No.98 of 2017 with Civil Application No.4374 of 2017, decided on 10.04.2017*** has categorically held that the provisions of 2006 Act are not applicable to the proceedings initiated under the 1996 Act and insistence of deposit of 75% of the award amount under Section 19 of 2006, prior to hearing of application under Section 34 of 1996 Act would not be sustainable. The Division Bench, while rejecting the plea of pre-deposit of 75% of the amount, took note of the orders of the Supreme Court passed in ***Messrs JMC Projects (India) Ltd. vs. Messrs Mechtech Engineers & another (supra)*** and held as under:-

> "*8.0. Now, so far as the submission on behalf of the respondent that with respect to any decree passed by the Civil Court or even the award either declared under the provision of the Arbitration Act when application for*

setting aside such decree or award is made, Section 19 of the MSMED Act shall be applicable, more particularly, when the applicant is Small Scale Unit is concerned, it is the case on behalf of the respondent that word "decree" used in Section 19 of the MSMED Act, shall also be given some meaning. It is submitted that, therefore, even in an application for setting aside any decree passed by the Court, before entertaining such application, the judgment debtor is required to deposit 75% of the amount in terms of the decree. Therefore, it is submitted on behalf of the respondent herein that even in application under Section 34 of the Arbitration Act challenging the award declared under the Arbitration Act, 1996, the aggrieved party is required to deposit 75% of the amount in terms of award, the aforesaid seems to be attractive but has no substance. The wording used in Section 19 are very clear. Section 19 of the MSMED Act, reads as under:

> *19. 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.

8.1. Therefore, only in an 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, aggrieved party is required to deposit 75% of the amount in terms of decree / award and unless and until such an amount is deposited, the Court shall not entertain such an application. Such a requirement is not there under the provisions of the Arbitration Act, 1996, more particularly, Section 34 of the Arbitration Act, 1996."

15. In view of the above detailed discussion and ratio of law, this court holds that the provisions of 1996 Act and challenge to the award under Section 34 are wholly independent of the proceedings that are initiated by a supplier on account of non-payment for the goods supplied or services rendered for which a remedy has been given under the Act of 2006. Therefore, there would be no requirement of making a pre-deposit of 75% of the awarded amount, as provided under Section 19 of 2006 Act, before a challenge can be made under Section 34 of 1996 Act. Contentions as raised by Mr. Akash Singla, counsel for respondent no.1 are ejected.

16. On the appeal, it is held the impugned order dated 13.04.2018 passed by the Addl. District Judge, Barnala is liable to be set aside, since compliance of Section 34(5) of 1996 Act is not mandatory as held by the Supreme Court in the case of **State of Bihar & others vs. Bihar Rajya Bhumi Vikas Bank Samiti(supra).**

17. Resultantly, the appeal is allowed and the impugned order

passed by the Addl. District Judge, Barnala is hereby set aside. Consequently, the matter is remanded back to the lower court to decide the matter afresh on merits. The parties (through their counsel) are directed to appear before the concerned lower court on 23.10.2019.

18. The appeal stands allowed accordingly.

(JAISHREE THAKUR)
JUDGE

September 25, 2019
vijay saini

Whether speaking/reasoned Yes
Whether reportable Yes