

Madras High Court

Mr.S.Silambannan vs Mr.G.S.Rajasekaran on 10 June, 2011

?IN THE HIGH COURT OF JUDICATURE AT MADRAS
%DATED: 10/06/2011
*CORAM
THE HONOURABLE MRS.JUSTICE R.BANUMATHI
AND
THE HONOURABLE MR.JUSTICE V.PERIYA KARUPPIAH
+OSA.119 of 2011
#Goodyear India Limited
\$Nortan Intech Rubbers P Ltd
!FOR PETITIONER : Mr.S.Silambannan
^FOR RESPONDENT : Mr.G.S.Rajasekaran
:ORDER

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED : 10.06.2011 CORAM THE
HONOURABLE MRS.JUSTICE R.BANUMATHI AND THE HONOURABLE MR.JUSTICE
V.PERIYA KARUPPIAH O.S.A.No.119 of 2011 and M.P.No.1 of 2011 M/s. Goodyear India Limited
Mathura Road, Ballabgarh, Faridabad 121 004 (Haryana) Represented by its Zonal Manager
Mr.A.Babu Raj ... Appellant ..Vs..

1. M/s. Nortan Intech Rubbers (P) Ltd., A-4, Sipcot Complex, Gummidipoondi 601 201.

2. The Chairman MSE Facilitation Council & Industries Commissioner and Director of Industries &
Commerce Thiru.Vi.Ka.Industrial Estate Guindy, Chennai 600 032.

... Respondents

Appeal filed under Order XXXVI Rule 1 of O.S. Rules read with Clause 15 of the Letters

For Appellant : Mr.S.Silambannan
Senior Counsel for
M/s. Rajani Ramadoss

For Respondent : Mr.G.S.Rajasekaran
(Managing Director)
(Party in Person)

JUDGMENT

V.PERIYA KARUPPIAH.,J

This appeal is directed against the order of the learned single Judge dated 07.04.2011

2. The appellant herein was the petitioner before the learned single Judge and the respondent before the Arbitrator / MSE Facilitation Council. The first respondent, who was the applicant before the said Council, raised the dispute in between the appellant and first respondent in respect of payment of the money payable towards 52 bills spanning the period 23.05.1997 to 11.02.1998 amounting to a sum of Rs.70,93,422.52 and seven bills for the period 26.08.1999 to 16.10.1999 amounting to Rs.9,18,072/- for a total sum of Rs.80,11,495/- with subsequent interest. The said claim was made before the said Council by the first respondent as applicant before the said MSE Facilitation Council (herein after referred to as Council) as per the provisions of "The Micro, Small and Medium Enterprises Development Act, 2006" (herein after referred to as MSMED Act) and on the claim made, the said Council also held enquiry in accordance with the law and found the appellant liable to pay a sum of Rs.80,11,495/- with interest as prescribed in "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993)" to till date of enforcement of MSMED Act (27 of 2006) and further be liable to pay compound interest with monthly rests to the supplier / applicant on that amount at three times of the bank rate notified by the Reserve Bank of India from the date of commencement of MSMED Act till the date of settlement of the amount.

3. Against the finding and conclusion reached by the said Council, the appellant had preferred a Original Petition in O.P.No.888 of 2010 on various grounds, seeking to set aside the award dated 31.12.2009 passed by the said Council and also for costs.

4. The learned single Judge heard the arguments of both sides and had come to a conclusion on the preliminary objection as to the maintainability of the petition and had passed a conditional order. According to the said order, the learned single Judge directed the appellant to deposit 75% of the accrued interest amount also, as 75% of the principal sum i.e., Rs.60,08,622/- was deposited already. The further order passed by the learned single Judge would go to show that the said condition to deposit 75% of the award amount for filing an application to set aside the award would include both the principal as well as interest amount as ordered in the award as per the provisions of Section 19 of the MSMED Act. It has been directed by the learned single Judge that 75% of the interest amount ordered in the award shall be paid within a period of six months from the date of receipt of a copy of this order, failing which the petition shall stand dismissed and on such payment, the Original Petition will be heard on merits.

5. Now, the appellant has preferred this appeal against the said order of the learned Single Judge dated 07.04.2011 passed in O.P.No.888 of 2010.

6. Heard Mr.Silambannan, learned senior counsel appearing for Mr.Rajani Ramadoss, learned counsel for the appellant and Mr.G.S.Rajasekaran, who is the Managing Director of the first respondent company who appeared in person. No appearance for the second respondent.

7. The learned senior counsel appearing for the appellant would submit in his argument that the award passed by the Council was totally against law and all the points for setting aside the award

should have been heard along with other objections raised before the learned single Judge and order should have been passed on all the submissions of the appellant. He would further submit in his argument that the award passed by the Council was based upon repealed Act, namely, "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (Act 32 of 1993)" and therefore, the entire award is liable to be set aside and the liability to pay interest would also not sustainable and the direction to deposit 75% of the accrued interest also as a condition precedent for entertaining the petition to set aside the award itself is not correct. He would also submit in his argument that the subsequent Act, namely, MSMED Act introduced in the year 2006 does not have any retrospective effect and therefore the interest awarded by the Council is not sustainable. He would further submit that however benevolent or beneficial the legislation be, it can not be considered retrospectively in force unless the Act categorically specifies so. He would also submit that the Original Petition was admitted by the learned single Judge on 09.12.2010 after hearing elaborate arguments accepting the contention of the appellant that it would deposit 75% of the principal amount, since interest cannot be calculated for payment of such 75% of the award amount and the admission of O.P.No.888 of 2010 cannot be reconsidered for not paying the 75% of the accrued interest amount awarded by the Council. He would further submit in his argument that the question of payment of compound interest as per the award passed by the Council with reference to MSMED Act cannot be applied at all and therefore the already admitted Original Petition should have been heard by the learned single Judge in full and order should have been passed on the entire grounds of objections raised before the learned single Judge. He would further submit in his argument that the learned single Judge should not have ordered to deposit 75% of the payment of accrued interest which if calculated it would reach a sum of Rs.10 crores and the depositing of 75% of the amount would tantamount defeating the purpose of filing the Original Petition challenging the award dated 31.12.2009. He would further submit that the accrued interest would exceed ten times the principal amount and considering all these aspects, it was accepted on an earlier occasion by the learned single Judge i.e., on 19.12.2010. He would also submit that even the claim made by the first respondent before the second respondent was barred by law of limitation and it was also one of the grounds in the Original Petition for the appellant to set aside the award and therefore the conditional order should not have been made by the learned single Judge. He would also submit that the entire objections should have been heard by the learned single Judge and final order should have been passed in the Original Petition. He would further submit in his argument that the provisions of MSMED Act will not apply to the transactions had prior to the promulgation of the said Act. He would further submit that when the provisions of Section 19 of the said Act are not applicable, the condition imposed under the said provision is also not sustainable much less the condition for the deposit of the interest amount. Even otherwise, the said provisions would include only the principal amount and the award amount will not comprise the subsequent interest also. He would further insist in his argument that the arguments advanced before the learned single Judge in respect of the entire objections raised in the Original Petition to set aside the award of the Council were not considered and the preliminary objections raised as per the provisions of Section 19 of the MSMED Act was only ordered. He would therefore request the Court to interfere and set aside the order passed by the learned single Judge and to pass necessary guidelines.

8. The Managing Director of the first respondent, namely, Mr.G.S.Rajasekaran, would submit in his argument that both the Acts enacted in Act 32 of 1993 and MSMED Act repealing the earlier Act 32

of 1993 are for the purpose of protecting the suppliers, whether they are Small Scale Industries or the Ancillary Suppliers to the manufacturers and therefore stringent provisions have been incorporated and still the appellant had not paid the amount payable to the first respondent and because of its default, the bank which honoured the payment had proceeded against the first respondent before the Debt Recovery Tribunal and he (the first respondent) had paid the said amount to the bank and the said incident would also support and corroborate the claim of the first respondent against the appellant. He would also submit in his argument that there was an arbitration clause in between the parties and there was no dispute over the said existence of the Arbitration clause and Arbitration can be invoked when negotiation had in between parties, not fructified and the settlement of claims in between parties was continuously in existence and on its failure only, the arbitration clause could be invoked and therefore either Article 113 or 137 of the Limitation Act would not apply to the present case and the claim that the law of limitation would defeat the rights of the first respondent is not correct. He would also submit in his argument that the right accrued before the introduction of MSMED Act will be covered by the earlier Act 32 of 1993 and the right accrued cannot be defeated by virtue of subsequent Act. The repeal provision in Section 32 of MSMED Act is relevant and according to the said provision anything done or any action taken under the Act so repealed (Act 32 of 1993) shall be deemed to have been done or taken under the corresponding provisions of this Act (MSMED Act). The explanation of repeal in General Clause Act would also go to show that what are all the acts done or benefits accrued prior to the promulgation of the subsequent Act would not be defeated by virtue of the latter Act. He would refer to a judgment of the Hon'ble High Court of Delhi in between S.K.Mittal and others ..vs.. Union of India and another passed in the batch of Writ Petitions in W.P.Nos.112 of 2004, 1651 of 2004 etc., dated 26.05.2009. He would also submit in his argument that the provisions of Act 32 of 1993 is applicable to those transactions had prior to the enforcement of MSMED Act and at the same time the action taken i.e., appointment of Arbitrator / Facilitation Council constituted under MSMED Act could be done only through MSMED Act and the subsequent interest could be ordered only under the provisions of MSMED Act and the Arbitrator had also promptly followed the provisions of the Act and passed the award. The appellant, who wanted to question the said award ought to have deposited 75% of the entire award which included principal and interest also. He would also submit in his argument that 75% of the award amount as directed to be paid under Section 19 of MSMED Act is quite correct in view of the judgment of the Hon'ble Apex Court reported in 2010 (3) SCC 34 (Snehadeep Structures Private Limited ..vs.. Maharashtra Small Scale Industries Development Corporation Limited). He would also cite a judgment passed in a batch of Writ Petitions, viz., W.P.No.16908 of 2010 etc., by this Court in respect of the application of Section 19 of MSMED Act in a case between M/s.Eden Exports Company ..vs.. Union of India dated 20.08.2010. He would also cite a judgment of the High Court of Kerala reported in 2010 (1) KLT 65 (K.S.R.T.C. ..vs.. Union of India) for the principle that the pre-deposit of 75% of the amount due under the award is mandatory. He would also submit that the provisions in Section 19 of MSMED Act would not give any discretionary power to the Court to waive the part of deposit of award amount at the time of preferring any Original Petition to set aside the award and it is mentioned in the Act that such power can be conferred only through the exercise of legislative competence. He would also submit that similar provisions have been made under SARFAESI Act in Section 18(1). He would also submit that the dictum laid down in the judgment of the Hon'ble Apex Court reported in AIR 1999 SC 2213 (Kondiba Dagadu Kadam ..vs.. Savitribai Sopan Gujar & Others) would show that such condition

should have been strictly fulfilled before an appeal can be entertained. He would further submit in his argument that the right to appeal is neither an absolute right nor an ingredient of natural justice and if it is attached with any condition, it should have been complied with. He would draw the support from the judgments of the Hon'ble Apex Court reported in AIR 1988 SC 2010 (Vijay Prakash D.Mehta & Jawahar D.Mehta ..vs.. Collector of Customs (Preventive), Bombay) and AIR 1980 SC 2097 (Nandlal ..vs.. State of Haryana) for the said proposition. He would further argue that the award amount mentioned in Section 19 of the MSMED Act comprises both the principal and interest, and hence there was a direction in the award to pay the interest also. He would also submit that it is implicit from the judgment of the Hon'ble Apex Court reported in 2010 (3) SCC 34 cited supra, that the award amount contemplated under section 19 of the MSMED Act would contain the interest component also and the same is evident in the provisions itself. It was relied on the said judgment that the pre-deposit of the interest has been legislatively provided for to dissuade larger interest from using dilatory tactics to the total detriment of Small Scale buyers. He would also submit that the Hon'ble Supreme Court had also held in the context of the interest payable by the buyers. The Apex Court had in unequivocal terms cautioned that such buyers cannot be allowed to challenge the arbitrator's award unless 75% of the pre-deposit of the award amount including interest is paid. He would, therefore, request the Court that the finding of the learned single Judge to direct the appellant to pay 75% of the accrued interest also, as part of the award amount within a time limit is quite in accordance with law and therefore, the appeal preferred by the appellant may be dismissed.

9. We have given anxious consideration to the arguments advanced on either side.

10. The present appeal is against the order passed by the learned single Judge dated 07.04.2011 on the preliminary objections raised by both parties. The learned single Judge had given his findings resulting in a conditional order as under:-

"15. Therefore, I have no hesitation in holding that the petitioner has not complied with Section 19 of the Act 27 of 2006 in its entirety. Hence, an opportunity should be extended to the petitioner to pay 75% of the award of interest also within six weeks from the date of receipt of a copy of this order. Only when the petitioner pays 75% of the interest awarded by the second respondent within the time stipulated above, then only, the petitioner is entitled to be heard on merits and if the amount is not deposited, it is needless to state here that the O.P will be dismissed without further reference to this Court. No cost."

In the said order, it has been categorically mentioned that on complying with the direction of paying 75% of the interest amount awarded, the appellant / petitioner is entitled to be heard the Original Petition on merits. Therefore, we could understand that the learned single Judge had not dealt with the entire merits of the case in his order. The order would go to show that he has decided only on preliminary objection.

11. However, arguments have been advanced by the learned Senior Counsel appearing on behalf of the appellant as well as the first respondent / party-in-person, regarding the merits of the case in other aspects also. As far as this case is concerned, the consideration of merits like liability to pay

the amount, the limitation point, and the quantum of interest cannot be and need not be discussed in this appeal. The only point to be discussed would be whether the order passed by the learned single Judge directing the appellant to deposit 75% of the award of interest also within a period of six weeks from the date of receipt of a copy of this order, by holding that the accrued interest will also form part of the award amount could be sustained. According to the learned Senior Counsel appearing for the appellant, the quantum of interest as ordered by the Council in its order dated 31.12.2009 was as per the provisions of Act 32 of 1993, calculated till the pronouncement of MSMED Act and thereafter with the compound interest on monthly rests over the amount at three times, the rate of interest of Reserve Bank of India till the date of realisation; and the said accrued interest would be around Rs.10 crores and more and since he had questioned the quantum of interest and the applicability of the Acts and the merits of the case, there is no necessity to deposit the said amount i.e., interest.

12. For the purpose of appreciating the arguments of the learned Senior Counsel, We have to refer to the judgments cited by the first respondent in the course of his argument. Section 19 of MSMED Act contemplates the procedure for setting aside the decree, award or order passed under the provisions of the said Act. For better understanding, it is necessary to extract the provisions of Section 19, which reads as follows:-

"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."

13. The judgment of the Hon'ble Apex Court reported in 2010 (3) SCC 34 cited supra at para 42 runs as follows:

"42. 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 buyer cannot be allowed to challenge arbitral awards indiscriminately, especially when the section requires pre-deposit of 75% interest even when appeal is preferred against an award, as distinguished from an order or decree."

It is categorically referred in the judgment that 75% of the interest should also be deposited as per the requirement contemplated in Section 19 of the said Act.

14. Yet another judgment of the Hon'ble Apex reported in AIR 1999 SC 2213 cited supra would also lay down the dictum as follows:-

"It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigant being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable jurisdiction."

15. Similar view has been expressed in the judgment of the Hon'ble Apex Court reported in AIR 1988 SC 2010 cited supra, which runs as follows:-

"Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant'..

16. The judgment of the Hon'ble Apex Court reported in 2010 (3) SCC 34 cited supra was followed by the Kerala High Court reported in 2010 (1) KLT 65 cited supra which was held as follows:-

"Here, the Arbitrator passes an award in favour of the supplier. If the buyer wants to set aside that award, he has to make pre-deposit of 75% of the amount due under the award."

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 AIR 1975 SC 1234 (Anant Mills Co., Ltd., ..vs.. State of Gujarat), AIR 1992 SC 2279 (Shyam Kishore and others ..vs.. Municipal Corporation of Delhi and Another). 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.

18. It is argued by the learned Senior Counsel that once the Original Petition has been admitted to set aside the award it cannot be reviewed by the Court for passing some other order for the maintainability of the said Original Petition. The said argument of the learned Senior Counsel is not appreciable because the statutory condition imposed upon a person who wants to file an application to set aside the award of the Council should deposit 75% of the award amount which would no doubt include the interest also. The Council / Arbitrator had directed to pay the accrued interest also and

therefore when it is placed before the E.P Court for execution, the principal as well as interest would be calculated through process. Therefore, it cannot be said that the already admitted O.P cannot be dismissed for want of non-payment of 75% of the interest also. Therefore, we are convinced with the findings reached by the learned single Judge in directing the appellant to deposit the 75% of the accrued interest ordered by the Council / Arbitrator within a period of six weeks from the date of receipt of a copy of the order of the learned single Judge. However, the time limit given by the learned single Judge is not sufficient and therefore we are inclined to grant six weeks time to deposit the said 75% of the accrued interest amount as ordered by the Council / Arbitrator. In such a way, we have modified the order passed by the learned single Judge and on such deposit, the O.P would be considered to be intact and the learned single Judge will hear the O.P. on merits and at that time the parties are at liberty to argue on all points which are available to them before the learned single Judge.

19. For the foregoing discussions, we are of the considered view to concur with the order passed by the learned single Judge. But inorder to facilitate the appellant to pay the said 75% of the accrued interest, six weeks time is granted from the date of this order. The consequential condition imposed by the learned single Judge will also hold good. Accordingly, the order of the learned single Judge is confirmed with the modification regarding the time limit to deposit the said amount only. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

(R.B.I.J.,)

(V.P.K., J.)

10.06.2011

Index:Yes

Internet:Yes

mra

Note : Issue copy on 13.06.2011

R.BANUMATHI., J.

AND

V.PERIYA KARUPPIAH., J.

mra

Pre-delivery judgement made in

O.S.A.No.119 of 2011

and
M.P.No.1 of 2011

10.06.2011