

Bombay High Court

The Maharashtra Small Scale ... vs Snehadeep Structures Pvt. Ltd. A ... on 5 February, 2008

Equivalent citations: 2008 (2) ARBLR 175 Bom, 2008 (2) BomCR 526, 2008 (3) MhLj 635

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Bench: F Rebello, J Devadhar

JUDGMENT F.I. Rebello, J.

1. This appeal is directed against the order of the learned Single Judge of this Court dated 25.1.2005 in Arbitration Petition No. 499 of 2003 deciding a preliminary objection. The appellants before this Court by that Petition had challenged the award dated 30.6.2003.

2. A preliminary objection was raised to the maintainability of the petition on behalf of the Respondents. The preliminary objection was that considering the provisions of Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (hereinafter referred to as "the Interest Act") more specifically Section 7, the petition as filed being an appeal against an award cannot be entertained unless the Appellant deposits, 75% of the amount in terms of the award in the manner directed by the court or as the case may be by such authority. The appellants contended that the petition challenging the award is not an appeal against the award nor is it a decree and consequently there is no requirement of deposit of 75% of the amount awarded. Secondly it was contended that the appellant being a supplier was not called upon to deposit the amount as required in terms of Section 7 of the Act of 1993 and consequently the objection as raised ought to be rejected.

The learned Single Judge first proceeded to answer the issue as to whether the appellant was a Supplier in terms of Section 2(f) of the Interest Act and after considering the definitions in the Act, the terms of the supply order and judgment which were relied upon came to the conclusion that the respondent is not a supplier and consequently the objection raised on behalf of the appellant was rejected.

In so far as the second contention as to whether the petition challenging the award under Section 34 of the Arbitration Act 1996 and Conciliation Act, 1996 hereinafter referred to as "Arbitration Act" held that for the purpose of Section 7, it can be treated as an appeal and consequently held that the provisions of Section 7 are attracted and as the appellant had not complied with the requirement of Section 7 of the Act, though the appellant had made submissions, which are recorded in the order dated 9.8.2005 that they will furnish bank guarantee as the Bank guarantee was not furnished, held that the petition cannot be entertained and consequently dismissed the same. It is this order which is the subject matter of the present appeal.

3. The counsel for the parties have reiterated the respective contentions, whilst challenging or supporting the findings of the learned Single Judge. We may now frame the points which arise and which require consideration:

(1) Whether an application under Section 34 of the Arbitration Act, can be included within the expression "Appeal" under Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993.

(2) Whether the appellant is supplier within the meaning of Section 2 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993.

The question for determination have been reframed as answer to the first issue if held in favour of the appellants, would not require answering the second issue for the purpose of this appeal considering that the second question is the only substantive question that has to be answered in a challenge to the award and which the learned Judge was considering was the preliminary objection to the maintainability of the petition for failure to pre-deposit.

4. On behalf of the appellant, it is submitted that the legislature in its wisdom requires predeposit only in the case of an appeal that is filed against a decree, award or order under Section 7 of the Interest Act and is not applicable to a Petition challenging an award under Section 34 of the Arbitration and Conciliation Act, 1996. It is submitted that the nature of appeal that emanates from civil proceedings such as decree and proceeding that culminates into award are clearly distinctive and different proceedings. Proceedings under the Arbitration Act of 1940 as also the Arbitration and Conciliation Act, 1996 result into an award. That award is not a judicial decision. If it is to be judicial recognition under the Arbitration Act, 1940 the court had to draw decree. Under the Arbitration and Conciliation Act, 1996 only in a case award is not challenged, can it be executed as a decree. In case of challenge to the award what the court is required to examine is its legality in terms of Section 34 of the Arbitration Act, 1996. An appeal against an award it is submitted lies specifically under Section 37 of the Arbitration and Conciliation Act, 1996.

On the other hand on behalf of the Respondents it is submitted that Section 7 is required to be interpreted in the context of the entire Act and its purpose. The object of the section is to secure the amount adjudicated in favour of the supplier. The intention was to protect supplier in getting his adjudicatory dues. The word "appeal" is used in the sense of "challenge" to a forum which can vary or set aside the adjudication. A Petition under Section 34 of the Arbitration Act, 1996 is a challenge to the adjudication by the Arbitrator with a request to vary or set aside the adjudication. Hence, the challenge under Section 34 is in the context of the Interest Act, is an appeal, and the provisions of Section 7 of the Act stand attracted. Reference has been made to various dictionary meanings of the expression "judgment" to contend that the petition challenging the award under Section 34 is an appeal. The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 it is submitted is a beneficial legislation as it confers benefit on SSI's by relieving them of onerous conditions/obligations of contracts entered into by them.

Alternatively it is submitted that if the provisions of Section 7 are ambiguous since under the Arbitration Act, 1996 there is no provision for "Appeal", then the provisions of the Micro Small and Medium Enterprises Development Act, 2006 (the New Act) which in Section 19 uses the word "Application" can be looked into, to construe Section 7 of the Act. The provisions of the New Act clearly shows that a deposit is required to be made before challenging the Award. The provisions of

Section 7 of the Act in that view are required to be construed to apply in the case of challenge to the award.

5. We shall now proceed to answer the first contention. Under the Arbitration Act, 1940, hereinafter referred to as Act of 1940, every award considering the terms of Section 17, where the court saw no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award. The appeal provided was under Section 39 of the Act of 1940. The appeal to be filed was in the normal hierarchy of courts considering the decree that was passed.

Under the Arbitration and Conciliation Act, 1996, the arbitral proceeding stands terminated amongst others on the final award being passed by virtue of Section 32. Section 34 provides that the reference to court against the arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2). The order passed is an order setting aside or refusing to set aside an arbitral award under Section 34. The decision therefore, of the competent court under Section 34 is neither a judgment nor decree. The order so passed is appellable under Section 37(1)(b) of the Act of 1996. Remedy by way of appeal, therefore, is provided under the Act of 1996 itself. The Act of 1996, therefore, in respect of an arbitral award makes a distinction between a challenge to an award and an appeal against an order refusing to set aside or setting aside an award in a Petition filed under Section 34(2) of the Act of 1996.

Section 7 of the Interest Act reads as under:

Appeal :; No appeal against any decree, award or other order shall be entertained by any court or other authority 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, other order in the manner directed by such court, or, as the case may be, such authority.

The Interest Act, therefore, requires pre-deposit only in an appeal against a decree, award or order. It is therefore, only in an appeal preferred against a decree, award or order is there the requirement of pre-deposit. 6. The question is whether the Petition challenging an award under Section 34 of the Act of 1996 can be described as an appeal, considering that against an order passed under Section 34, an appeal lies under Section 37 of the Act of 1996. If one considers the expression "appeal" in the context of the expression decree, it can only be a judicial determination by a Regular Civil Court considering the hierarchy of courts. In so far as an Award in the context of the Arbitration Act, 1940 is concerned, the expression has to be considered in the context of Section 17 which provides for an appeal where the judgment is passed in terms of the award. Under the Act of 1996 and construing the language of Section 37, in case the award is not set aside under Section 34 an appeal can be preferred against that order under Section 37. The provisions of Section 7 may apply to such an appeal. We are not considering such a case here. There may be other cases also of statutory provisions providing for award and appeals. Can it be said that the arbitral proceedings which

emanates pursuant to a contract between the parties or pursuant to statutory provisions are judicial proceedings for the purpose of reading the expression appeal when a challenge is made to an award under Section 34(2) of the Act of 1996. In *Tirupati Balaji Developers (P) Ltd. v. State of Bihar* the Supreme court noted that the two requirements to constitute appellate jurisdiction, are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. The Supreme Court in the same judgment further observed as under:

...Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reserve, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of the latter to carry out such directions or show disrespect to or to question the propriety of such directions would - it is obvious be destructive of the hierarchical system in administration of justice. The seekers of justice and the society would lose faith in both.

If these tests are applied in so far as an arbitral award is concerned, the court hearing the challenge under Section 34 of the Arbitration & Conciliation Act, 1996 has limited jurisdiction of either setting aside the award or confirming the award. It has no power to issue alternative decisions binding on the forum below. If the test as laid down in *Tirupati Balaji* (supra) is applied, then the petition under Section 34 of the Arbitration Act, 1996 would not fall within the expression appeal.

6. The various dictionary meanings and judgments cited to the extent necessary for the purpose of considering the contention that the Petition to challenge to an award under Section 34 can be said to be an appeal can now be considered. In *Stroud's Judicial Dictionary*, sixth edition, 'Appeal' has been described as:

The right of appeal is only by statute. It is not in itself a necessary part of the procedure in an action, but: is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. In *Black's Law Dictionary*, Eighth Edition, the appeal has been described as a proceeding undertaken to have a decision reconsidered by a higher authority esp. the submission of a lower court's or agency's decision to a higher court of review and possible reversal....

In *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rd Edition, "appeal" amongst others has been described as right of entering a superior court and invoking its aid and interposition to redress the error of the court below.

In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatraya Bapat*, the Court was considering expression "appeal" in the context of revisional jurisdiction. The court held that it is one of the modes of exercising power conferred by the statute. Basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. In *State of Gujarat v. Salimbai*, the Supreme Court held that the appeal is a proceeding taken to rectify

an erroneous decision of a Court by submitting the question to a higher court. Reliance was placed on the judgment of Madras High Court in Chotilal Sowear v. R. Jawantraj Sowear . The court there was considering whether "Reference" under Section 30 of the Land Acquisition Act 1894, would be one to which the provisions of the Usurious Loans Act could be invoked by the concerned party and the proceeding could be treated as one to which Section 2(3) of the Act applies. Relying on the judgment it is sought to be contended that the application under Section 34 of the Act of 1996 should be treated as an appeal under Section 7 of the Interest Act.

In Hanskumar Kishan Chand v. The Union of India , the issue was the compensation payable under the provisions of the Defence of India Act and rules framed thereunder. There was a provision for arbitration. The Additional District Judge who was appointed as an Arbitrator, pronounced his award, against which an appeal was preferred to the Supreme Court. The preliminary objection raised was that it was award and not a judgment or decree within the meaning of Section 110 of the Code of Civil Procedure. It was sought to be contended that even if it be award, once the matter comes before the High Court by way of appeal, it becomes a civil proceeding in the ordinary jurisdiction of the Court. While answering the issue, the Hon'ble Supreme Court was pleased to observe as under:

Before discussing the authorities cited on either side in support of their respective contentions it will be useful to state that the well established principles applicable to the determination of the present question. When parties enter into an agreement to have their disputes settled by arbitration, its effect is to take the dispute out of the hands of the ordinary Courts of the land and to entrust it to the decision of what has been termed as private tribunal....

The court then further proceeding in the matter observed:

...In other words, it is the decision of the arbitrator where it is not set aside that operates as the real adjudication binding on the parties, and it is with a view to its enforcement that the Court is authorised to pass a decree in terms thereof. There is thus a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on the merits and one which is given by it in a proceeding for the filing of an award. The former is a judgment, decree or order rendered in the exercise of its normal jurisdiction as a Civil Court, and that is appellable under the general law as for example under Section 96,100,104,109 and 110 of the Civil P.C. The latter is an adjudication of a private tribunal with the imprimatur of the Court stamped on it and to the extent that the award is within the terms of the reference, it is final and not appellable....

In other words, a clear distinction is made between the award of the arbitral tribunal and the decision of a Civil Court.

Various other judgments cited at Bar in our opinion need not be referred to or would not really be relevant for the purpose of answering the controversy.

The normal principle of construction of a statutory provision is to first consider the language in the statute in its literal sense. It is only when it is not possible to give effect to legislative intent by literal

interpretation or such an interpretation gives rise to an absurdity or defect then legislative intent, will the court proceed to apply other modes of interpretation. Learned Counsel for Respondent submitted that the Interest Act is a beneficial legislation as it confers benefits on SSI's by relieving them of onerous conditions/obligations of contracts entered into by them. The principle it is submitted while interpreting such a statute is that, there is no room for taking a narrow view, and that the Court is entitled to be generous towards persons on whom the benefit is conferred. Applying these principles, in our opinion and considering the history of the Act and the Legislation which were in force when the Interest Act, 1993 was enacted, it would be clear that the application to challenge the award under Section 34 apart from it not being a judicial proceedings or emanating from the court, cannot be considered as an appeal within the meaning of Section 7 of the Act. That contention has therefore to be rejected.

7. On behalf of the respondents, learned Counsel has alternatively submitted that as the provisions of Section 7 are ambiguous, since under the Arbitration Act, there is no provision for "Appeal", then the provisions of the Micro Small and Medium Enterprises Development Act, 2006 which in Section 19 uses the word "Application" can be looked into to construe Section 7 of the Act of 1993. In reply on behalf of the appellants, their learned Counsel submits that the proceedings under the Act of 2006 has been provided under Section 30(2). The provisions of Section 34 of the Arbitration and Conciliation Act, it is submitted being prior to the Act of 2006 would not be applicable. Alternatively Section 19 makes a condition of predeposit applicable only in respect of an award or order made either by the Council itself or by an institution or Centre providing for alternate dispute resolution services to which a reference is made by the Council.

Section 32(2) of the Act of 2006 reads as under:

...Notwithstanding such repeal, anything done or any action taken under the Act so repealed under Sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act.

Considering the terminology the application for setting aside the decree, award or other order must be in respect of proceedings emanating from the Council itself or by an Institution or centre providing alternative disputes reconciliation services to which a reference is made by the Council. It is only in respect of such an award or order, the application would not be entertained by any court unless 75% of the amount in terms of the decree or award as the case may be, is deposited. In the instant case, the award was made on 30.6.2003 and the order in appeal was passed on 25.1.2005. The reference to arbitration was not in terms of the Section 19 of the Act of 2006 or Interest Act of 93. At the time when the learned Judge heard the challenge of predeposit under Section 7 of the Act, the 2006 Act was not in force. The award was pursuant to an Arbitration Agreement which required that any dispute or difference shall be referred to the Sole Arbitrator, Chairman of the Petitioner Corporation or any other person nominated by him under Clause 27. The respondents called on the appellants to appoint the Chairman of the appellant as arbitrator. As that was not done, the respondent invoked the jurisdiction under Section 11 of the Act of 1996 and Justice Puranik (Retd) was appointed as Arbitrator who has given his award on 30.6.2003. Considering Section 32(2) even if we proceed to hold that there are proceedings under the repealed Act and are saved as pending in

the court, the requirement is that they must be under the corresponding provisions of the repealed Act. The corresponding provision is Section 6(2) of the Act of 1993. In the instant case, the award is not pursuant to reference made by the Industry Facilitation Council whose composition is provided by Section 7B of the Act of 1993. Therefore, it will not be possible to read the provisions of Section 19 of the Act of 2006, assuming they can be so read into Section 7 of the Act of 1993. The alternative contention as raised has also to be rejected.

8. Once we hold that the Petition challenging an award under Section 34 of the Act of 1996 is not appeal, provisions of Section 7 of the Interest Act of 1993 would not be applicable and consequently there is no requirement that the appellant is required to deposit 75% of the award. The finding of the learned Single Judge on that count therefore, is liable to be set aside.

9. That brings us to second contention namely as to whether the appellant is buyer and respondent is seller within the meaning of the Interest Act. It is true that the learned Single Judge held in favour of the Respondents. The learned Counsel for the respondents has also sought to bring to our attention various judgments including the judgments in Assam Small Scale Industries Dev. Corporation v. Medical Association and Ors. . According to learned Counsel, the Supreme Court in respect of a similar legislation and in respect of the similar contract has held a person like the appellant viz a viz respondent, as buyer and respondent as seller. In our opinion, the main challenge in the petition challenging the award is on the basis that the appellants are suppliers, and not buyers and consequently they are not liable to pay interest. That issue considering the earlier finding will have to be decided when the challenge to the Petition against the award under Section 34 of the Act is heard and finally disposed off. That really cannot be treated as a preliminary objection on the basis of our first finding though before the learned Single Judge, the appellant had raised the said issue and the learned Judge considering the issue of pre-deposit was bound to answer it. In our opinion, it would not be appropriate, once we hold that there is no requirement of pre-deposit to answer the substantive challenge which will have to be answered whilst disposing of the challenge to the award. We therefore, decline to answer that issue in this appeal. The finding of the learned Single Judge on that issue at the highest can be considered to be a prima facie finding as it was given pursuant to a preliminary objection pertaining to pre-deposit.

In the circumstances of the case, the appeal is allowed and the impugned order is set aside. The pending Petition to be disposed of according to law by the appropriate Bench. There shall however, be no order as to costs.