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Development Consultants Pvt. Ltd. Vs. Rama Engineering

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Court : Kolkata

Decided On : Apr-06-2016

Judge : Indira Banerjee

Appellant : Development Consultants Pvt. Ltd.

Respondent : Rama Engineering

Judgement :

ORDER
SHEET GA 3759 OF2015APOT560OF 2015 AP202OF 2015 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction ORIGINAL SIDE DEVELOPMENT CONSULTANTS PVT. LTD. Versus RAMA ENGINEERING BEFORE: The Hon'ble JUSTICE INDIRA BANERJEE The Hon'ble JUSTICE SAHIDULLAH MUNSHI Date :

6. h April, 2016. For appellant : Mr. Ranjan Bachawat, senior advocate, Mr. D. Dutta, Mr. R. Medora, Mr. S. Mukherjee. For respondents : Mr. J.

Chowdhury, Mr. S. Bhattacharyya, Mr. S. Basu, Ms. N. Bahal. The Court : This appeal is against a judgment and order dated 9th October, 2015 whereby the application filed by the appellant under section 34 of the Arbitration and Conciliation Act, 1996 , hereinafter referred to as the 1996 Act, for setting aside of an arbitral award, has been dismissed on the ground of noncompliance with section 19 of the Micro, Small Medium Enterprises Development Act, 2006,

hereinafter referred to as the 2006 Act. The impugned award, sought to be set aside was passed under the 2006 Act. Some of the relevant provisions of the 2006 Act are set out hereinbelow for convenience : Section 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 for refer to it 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 any 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.

. Section 18[ii]. specifically provides that on receipt of reference under subsection [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 refernece to such an institution or centre. The conciliation proceedings are to be conducted in accordance with the provisions of sections 65 to 81 of 1996 Act in the same manner as if the conciliation was being conducted under part-III of the 1996 Act. Where the conciliation under sub-section [2]. of Section 18 is not successful and stands terminated without any settlement between the parties, the council shall either take up the dispute for arbitration itself or refer the dispute for arbitration to any institution or centre providing alternate dispute resolution services and the provisions of the 1996 Act would apply to such arbitration in the same manner as if the arbitration were in pursuance of an arbitration agreement referred to in sub-section [1]. of Section 7 of the 1996 Act. Mr. Ranjan Bachawat, Senior Advocate appearing on behalf of the appellant has taken us through the award impugned which indicates that the case was taken up for consideration on several dates. The case was finally taken up for conciliation on 20th January, 2011. Further time was sought. The council decided to take up the matter at the next meeting. As observed above, the provisions of Sections 65 to 81 are applicable to conciliation under the 2006 Act. Sections 73, 74, 75, 76 and 77 relevant for the purposes of these proceedings are set out hereinbelow for convenience.

73. Settlement agreement.-[1]. When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such

observations. [2]. If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement. [3]. When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively. [4]. The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

74. Status and effect of settlement agreement.- The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral Tribunal under section 30.

75. Confidentiality.- Notwithstanding anything contained in any other law for the time being in force, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where is disclosure is necessary for purposes of implementation and enforcement.

76. Termination of conciliation proceedings.- The conciliation proceedings shall be terminateda]. by the signing of the settlement agreement by the parties on the date of the agreement; or b]. by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or c]. by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or d]. by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliator proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

. Mr. Bachawat submitted that the conciliation proceedings had not been terminated in accordance with the aforesaid provisions of the 1996 Act. There was no declaration of the conciliator in terms of section 76[b]. that further efforts at conciliation were no longer justified nor any written declaration of the parties in terms of section 76[c]. to the effect that the conciliation proceedings were terminated on the date of the declaration. Nor was there any written declaration of one party to the other in terms of section 17[d]. of the 1996 Act. The conciliation proceedings not having succeeded, it was incumbent upon the council to take a decision to take recourse to arbitration as the arbitration could be conducted by the council itself or entrusted to some other institution or centre. Mr. Bachawat extraneously argued that the appellant had no knowledge of further arbitration proceedings and could not appear. No copy of the award was served on the appellant and the award was in any case non-speaking award and, hence, in contravention of the provision of the 1996 Act which makes it mandatory for an arbitral award to be reasoned, unless there is express agreement between the parties, which dispenses with the requirement to give reasons. Mr. Jishnu Chowdhury appearing on behalf of the respondent argued that a copy of the award had duly been served on the appellant before initiation of execution proceedings. The respondent had furnished a copy of the award to the appellant and called upon the appellant to discharge the award. Mr. Chowdhury argued that under the West Bengal Micro and Small Enterprises Facilitation Council Rules, 2006 and in particular rule 12 thereof, the Council is to make an arbitral award in accordance with section 31 of the 1996 Act within the time specified in sub-section [5]. of Section 18 of the 2006 Act. The award is to be stamped in accordance with the relevant law in force. Copies of the award are to be made available within seven days of filing of an application. Mr. Chowdhury argued that no application had been made for copies of the award. The learned Single Bench very rightly observed that the rules of the Council could not have overridden the mandate under section 31[5]. of the 1996 Act that obliges an arbitral tribunal to deliver a copy of the arbitral award to a party thereto. Under section 34[3]. of the 1996 Act, an application for setting aside may not be made after three months elapsed from the date on which the party making that application had received the arbitral award or if a request had been made under section 33 from the date on which that

request had been disposed of by the arbitral tribunal. The provision to sub-section [3]. enables the court to entertain an application within a further period of thirty days, but not thereafter if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the period of three months stipulated under subsection [3].. It is well settled that limitation starts running from the date on which the applicant applying for setting aside of an award receives a copy of the arbitral award from the Arbitral Tribunal in terms of section 31[5]. of the 1996 Act. The learned single Bench did not, however, deem it necessary to go into the question of whether the application was at all barred by limitation, since the Single Bench found that section 19 of the 2006 Act requires the applicant applying for setting aside of an award to make a deposit. The learned court found that such deposit had not yet been made. Till such time the deposit made, the petition could not be accepted to arrest the clock of limitation. A petition would be regarded to have been belatedly filed if statutory pre-condition thereto was not complied with. The learned single Bench dismissed the application under section 34 of the 1996 Act as not maintainable since it was the admitted position that no deposit in terms of section 19 of the 2006 Act had been made till then. Section 19 of the 2006 Act prohibits the court from entertaining an application for setting aside an award, unless the appellant [not being a supplier]. has deposited with it, 75% of the amount in terms of the award. The proviso to the aforesaid section provides that pending disposal of the application to set aside the award, 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. The short question in this appeal is whether pre-deposit of 75% of the awarded amount is a condition precedent for filing an application for setting aside of an award by an applicant, not being the supplier. In M/s. Lakshmiratan Engineering Works Ltd. V. Asst. Commissioner (Judicial) 1, Sales Tax, Kanpur Range, Kanpur & another, reported in AIR1968 Supreme Court 488, the three Judges Bench of the Honble Supreme Court held: The question, therefore, is at what stage can the appeal be said to be entertained for the purpose of the application of the proviso?. Is it `entertained when it is filed or is it `entertained when it is admitted and the date is fixed for hearing or is it finally `entertained when it is heard and disposed of?. Numerous cases exist in the

law reports in which the word `entertained or similar cognate expressions have been interpreted by the Courts. .. . .. . .. .. . .. . For the present, we must say that if the legislature intended that the word `file or `receive was to be used, there was no difficulty in using those words.

9. The word `entertain is explained by a Divisional Bench of the Allahabad High Court as denoting the point of time at which an application to set aside the sale is heard by the Court. The expression `entertain, it is stated, does not mean the same thing as the filing of the application or admission of the application by the Court. A similar view was again taken in Dhoom Chand Jain v. Chamanlal Gupta, AIR 1962 ALL543in which the learned Chief Justice Desai and Mr. Justice Dwivedi gave the same meaning to the expression `entertain. It is observed by Dwivedi, J.

that the word `entertain in its application bears the meaning `admitting to consideration, and therefore when the Court cannot refuse to take an application which is backed by deposit or security, it cannot refuse judicially to consider it.

10. In our opinion these cases have taken a correct view of the word `entertain which according to dictionary also means `admit to consideration. It would therefore appear that the direction to the Court in the proviso to S.9 is that the court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the Court for the first time.

. Mr. Jishnu Chowdhury, learned Advocate, cited Snehadeep Structures Private Limited Vs. Maharashtra Small-Scale Industries Development Corporation Limited reported in (2010) 3 SCC, 34 where the Honble Supreme Court was considering Section 7 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, which has been repealed and re- enacted by the 2006 Act. A judgement is a precedent for the issue of law which is raised and decided. In Snehadeep Structures (supra), the Honble Supreme Court found that the legislation and the contextual meaning of the term appeal would include an application under Section 34 as well. It is true that the Honble Supreme Court made a passing observation that this provision (sic Section 19 of the 2006 Act) no doubt, requires the deposit to be made before an application under Section 34 of

the Arbitration Act is filed. However, we are not inclined to read this provision of a subsequent legislation into the provision in question.. The question of whether pre-deposit was required to be made before an application was filed for setting aside of an award under Section 34 of the 1996 Act was not in issue in Snehadeep Structures private Limited (supra) . Furthermore, the judgement in M/s. Lakshmiratan Engineering Works Ltd.(supra) has been rendered by a larger Bench of the Honble Supreme Court of three Judges. Moreover, Snehadeep Structures Private Limited has not considered various earlier decisions of the Honble Supreme Court interpreting the expression `entertain. The expression entertain is to be construed as the stage at which an application is first taken up for consideration. The expression entertain cannot in our view be used interchangeably with the expression receive or the expression file. The judgement and order under appeal cannot be sustained and the same is set aside. The appellant shall, however, deposit 75% of the awarded amount in cash with the Registrar, Original Side, of this Court within three weeks from the date of receipt of a certified copy of this order. The appellant may, if it deems appropriate make an application to the appropriate Division Bench for withdrawal of the bank guarantee, as otherwise the appellant will have to face double jeopardy of 150% deposit, 75% by way of bank guarantee in terms of the order dated 1st September, 2015 of the Division Bench and 75% cash deposit in terms of our order, based on section 19 of the 2006 Act. The appeal and the connected application are disposed of. (INDIRA BANERJEE, J.) (SAHIDULLAH MUNSHI, J.) Pkd/CS A.R.[C.R.].

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