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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 22.02.2024

+ **O.M.P. (COMM) 11/2023**

CENTRAL UNIVERSITY OF JHARKHAND Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv., Mr. Vinayak Mehrotra, Ms. Mansi Sood, Mr. Saurav R., Mr. Harshil Wason, Advs.

versus

M/S. KING FURNISHING AND SAFE CO. Respondent

Through: Mr. Manish Kaushik, Mr. Mishal Johari. and Mr. Ajit Singh Joher, Advs.

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+ **O.M.P. (COMM) 12/2023&I.A. 512/2023, I.A. 513/2023**

KINGS FURNISHING AND SAFE COMPANY Petitioner

Through: Mr. Manish Kaushik, Mr. Mishal Johari. and Mr. Ajit Singh Joher, Advs.

versus

CENTRAL UNIVERSITY OF JHARKHAND

..... Respondent

Through: Mr. Rajshekhar Rao, Sr. Adv., Mr. Vinayak Mehrotra, Ms. Mansi Sood, Mr. Saurav R., Mr. Harshil Wason, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

I.A. 7684/2023 in O.M.P. (COMM) 11/2023

1. This is an application on behalf of the respondent under Section 34(3) of the Arbitration and Conciliation Act, 1996 (“Act 1996”) seeking dismissal of the present petition i.e. O.M.P. (COMM) 11/2023 as being



beyond the limitation prescribed under section 34 of Act 1996.

2. It is stated by Mr Kaushik, learned counsel for the respondent that the petitioner has failed to comply with the mandatory provision of pre deposit as per section 19 of Micro, Small and Medium Enterprises Development Act, 2006 (“*MSMED Act*”) and hence the present petition under section 34 of Act 1996 will not lie.

3. He further states that in terms of Section 19 of MSMED Act, the petitioner is required to deposit 75 % of the awarded amount at the time of filing the petition. In case the same is not done, it is *non est* filing in the eyes of law and the Court cannot grant time to make the pre deposit under section 34 of Act 1996. In the present case, in view of the award dated 23.09.2022, the last date to deposit was 21.12.2022. Since the same has not been deposited till now, the petition is liable to be dismissed.

4. Mr. Kaushik has relied upon the judgment passed by the Hon’ble Supreme Court in *Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corpn. Ltd.*, MANU/SC/0030/2010 and more particularly para 5 and 55 which reads as under:--

“5. Aggrieved, the Corporation filed an application under Section 34 of the Arbitration Act before the High Court of Bombay for setting aside the award which came to be numbered as Arbitration Petition No. 499 of 2003. During the pendency of these proceedings the appellant Company pointed out that under Section 7 of the Interest Act the Corporation has to deposit 75% of the amount awarded by the arbitrator under the award.

.....

55. This provision, 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. While the learned counsel for the appellant Company urged that the legislature had used the terms “appeal” and “application” interchangeably, we are of the view that we cannot conclusively infer the same. Use of the term “application” appears to be in the context of the dispute resolution mechanism provided for under Section 17 (sic Section 18) which essentially comprises of conciliation and arbitration, to be governed by the Arbitration Act, 1996. The legislature has intended to bring about improvements to the Interest Act as stated in the Statement of Objects and Reasons of the 2006 Act. Indeed, it might have contemplated a change in the legal position while enacting the 2006 Act, but we cannot make that change apply retrospectively. In this respect, we agree with the reasoning of the High Court and with the contentions of learned counsel for the respondents as we cannot read the provision of a subsequent enactment into an Act which was repealed by the former.”

5. Mr Kaushik further relies upon the judgement of ***Gujarat State Disaster Management Authority vs. Aska Equipments Limited, MANU/SC/0842/2021*** and more particularly para 11 which reads as under:-

“11. In view of the above and considering the language used in Section 19 of the MSME Act, 2006 and the object and purpose of providing deposit of 75% of the awarded amount as a pre-deposit while preferring the application/appeal for setting aside the award, it has to be held that the requirement of deposit of 75% of the awarded amount as a pre-deposit is mandatory. Therefore, as such, both the High Court as well as the learned Additional District Judge (Commercial), Dehradun were justified in directing the appellant to deposit 75% of the awarded amount as a pre-deposit.



However, at the same time, considering the fact that while issuing notice in the present proceedings on 23-10-2018, this Court passed the following directions:

Permission to file the special leave petition is granted.

In an appeal filed by the petitioner Gujarat State Disaster Management Authority, a public sector undertaking of the State of Gujarat, challenging the award passed under the Micro, Small and Medium Enterprises Development Act, 2006 by the Facilitation Council, pursuant to Section 19 of the said Act the petitioner Authority was directed to deposit 75% of the award amount as conditional pre-deposit for taking the appeal on file.

Being aggrieved by the direction for pre-deposit of the amount the petitioner Authority has preferred this special leave petition.

We have heard Mr Huzefa Ahmadi, learned Senior Counsel appearing for the petitioner Authority, who has submitted that the entire amount payable to the respondent supplier has already been paid to the respondent supplier and hence there is no necessity to make pre-deposit for filing the appeal. Arguments advanced by the learned Senior Counsel is on the merit of the matter.

Having regard to the facts and circumstances and considering the fact that the petitioner Authority is a public sector undertaking, in exercise of the discretion vested with the court under Section 19 of the said Act, we direct the petitioner Authority to deposit Rs 2,50,00,000 before the appellate authority within a period of four weeks from today. On such deposit, the District and Sessions Judge, Dehradun, is directed to take up the appeal on file and proceed with the same.

Issue notice to the respondent.

On deposit of Rs 2,50,00,000 (Rupees two crore fifty lakhs), the same shall be invested in a fixed deposit in a nationalised



bank for a period of three months with auto renewal so that it may enure to the benefit of the successful party and the disbursement of the same shall await further orders from this Court.

and directed the appellant to deposit Rs 2,50,00,000 (Rupees two crores fifty lakhs) and on such deposit the District and Sessions Judge, Dehradun was directed to take up the appeal on file and proceed with the same. It is reported that by now the application/appeal has been heard and the order is to be pronounced on 12-10-2021, we continue with the arrangement as per the order dated 23-10-2019 in the appeal/application under Section 34 of the Arbitration and Conciliation Act is finally decided and disposed of. We hope and trust that the learned Additional District Judge (Commercial), Dehradun shall pronounce the order at the earliest and more particularly on 12-10-2021, the date on which order is to be pronounced, as reported.”

6. *Per contra*, Mr. Rao, learned senior counsel for the petitioner states that as per the petitioner, the 75 % of the awarded amount has been deposited and in case the Court comes to a finding that there is any shortfall, the petitioner is ready and willing to deposit the same before the Court entertains the present petition.

7. Mr. Rao, learned senior counsel relied upon “***Indian Oil Corporation Limited vs. FEPL Engineering (P) Limited & Anr.***, passed by this Court on **21.10.2019** in **OMP (COMM) 144/2019**. The operative portion of which reads as under:-

“22. This Court is thus of the view that if the petition under Section 34 of the Arbitration Act is filed within the statutory period of limitation provided under Section 34(3) of the said Act, then merely because the applicant has not made a pre-



deposit of 75% along with the memorandum of the petition, would be not a ground to dismiss the said petition. The petition would have to be listed before the Court which would then entertain i.e. consider the said petition. The Court can in its discretion direct the petitioner to make a pre-deposit and only once the deposit is made, the petition would be admitted to hearing. The legislative intent by using the word 'entertain' cannot be overlooked and has to be interpreted by its plain grammatical meaning as held by the judgments aforementioned. Hence, the present petition is maintainable with the caveat that the petitioner would have to make a pre-deposit before notice is issued to the respondent herein."

8. I have learned counsels for the parties.

9. A perusal of the judgment i.e. ***Snehadeep Structure Private Limited (supra)*** shows that it is regarding the appeal under the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993 ("*Interest Act*") and the observations are made with regard to the Interest Act and the observations with regard to the provision under Section 34 of Act 1996 was not an issue before the Court but was an incidental question. Even in ***Snehadeep Structure Private Limited (supra)***, the Hon'ble Supreme Court only held that under Section 19 of MSMED Act, a pre-deposit is required to be made. There is no finding given that without a pre-deposit, the Section 34 petition would be *non est* filing.

10. In the other judgments relied upon by the learned counsel for the respondent i.e. "***Gujarat State Disaster Management Authority (supra)***", the Hon'ble Supreme Court granted time to the appellant to deposit the 75% of the amount and thereupon directed the District and Sessions Judge, Dehradun to take up the appeal and proceed with the same.



11. At this juncture, Mr. Kaushik, learned counsel for the respondent states that the said power is under Article 142 of the Constitution of India.

12. Section 19 of MSMED Act categorically uses the word ‘entertain’. The word ‘entertain’ has been explained in ***Lakshmi Rattan Engg. Works Ltd. v. CST, (1968) 1 SCR 505*** which reads as under:-

“7. To begin with it must be noticed that the proviso merely requires that the appeal shall not be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due. A question thus arises what is the meaning of the word “entertained” in this context? Does it mean that no appeal shall be received or filed or does it mean that no appeal shall be admitted or heard and disposed of unless satisfactory proof is available? The dictionary meaning of the word “entertain” was brought to our notice by the parties, and both sides agreed that it means either “to deal with or admit to consideration”. We are also of the same opinion. 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. Some of them from the Allahabad High Court itself have been brought to our notice and we shall deal with them in due course. 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. In some of the statutes which were brought to our notice such expressions have in fact been used. For example, under Order 41 Rule 1 of the Code of Civil Procedure it is stated that a memorandum shall not be filed or presented



unless it is accompanied etc.; in Section 17 of the Small Causes Courts Act, the expression is “at the time of presenting the application”. In section 6 of the Court Fees Act, the words are “file” or “shall be received”. It would appear from this that the legislature was not at a loss for words if it had wanted to express itself in such forceful manner as is now suggested by counsel for the State. It has used the word “entertain” and it must be accepted that it has used it advisedly. This word has come in for examination in some of the cases of the Allahabad High Court and we shall now refer to them.”

13. In view of the above, the filing and entertaining of a petition are two different aspects. Hence, I am of the view that there is no bar in filing a petition under Section 34 of the Act 1996 and the same can be filed without pre deposit of 75% of the awarded amount. However, the said petition will not be “entertained” without the deposit of 75 % of the awarded amount.

14. Hence the application of the respondent is dismissed.

15. Perusing the reply filed by the petitioner to the instant application, the calculations made by the petitioner are as under:-

	<i>Calculation (1)</i>	<i>Calculations (2)</i>	<i>Calculations (3)</i>
<i>(a) Principal Amount</i>	<i>86,00,000</i>	<i>86,00,000</i>	<i>86,00,000</i>
<i>(b) 9% interest on (a) from 03.03.14 to 04.10.18</i>	<i>35,56,158.90</i>	<i>35,56,158.90</i>	<i>35,56,158.90</i>
<i>(c) Accrued</i>	<i><u>From 05.10.18 to</u></i>	<i><u>Pro-rata from</u></i>	<i><u>Pro-rata from</u></i>



<i>interest on FDR of Rs. 86 Lakhs</i>	<u>16.12.22</u> [1534 days] 19,72,404	<u>05.10.18 to</u> <u>19.05.22</u> [for 1323 days] 17,01,102.02	<u>05.10.18 to</u> <u>23.09.22</u> [for 1450 days] 18,64,397.52
<i>(d) Sub-total (a+b+c)</i>	1,41,28,562.90	1,38,57,260.92	1,40,20,556.42
<i>(e) Additional accrued interest on FDR</i>	<u>From 17.12.22 to</u> <u>13.03.23</u> 88,984	-	-
<i>(f) Pro-rata amount of (e) [88,984/86 days x 23 days]</i>	<u>From 17.12.22 to</u> <u>09.01.23</u> <u>(date of filing)</u> 24,547.30	-	-
<i>(g) 12% penal interest on (d)</i>	-	<u>From 19.05.22 to</u> <u>31.03.23</u> 14,44,192.34	<u>From 24.09.22 to</u> <u>09.01.23</u> 4,97,825.78
<i>(h) Total amount due</i>	<u>Till 09.01.23</u> <u>(d+f)</u> 1,41,53,110.20	<u>Till 31.03.2023</u> <u>(d+g)</u> 1,53,01,453.26	<u>Till 09.01.2023</u> <u>(d+g)</u> 1,45,18,382.20
<i>(i) 75% of (h)</i>	1,06, 14,832.60	1,14,76,089.95	1,08,88, 786.65
<i>(j) Shortfall qua FDR</i>	Nil	8,14,701,95	2,27,398.65



16. The petitioner is granted four weeks to make a deposit of Rs. 8,14,701,95/-. In addition, the petitioner shall also deposit 25% of the balance amount with the Registrar General of this Court within six weeks, subject to the above execution proceedings.

17. The learned counsel for the petitioner shall take instructions, if with consent, the petitioner is agreeable to appointment of another Arbitrator.

O.M.P. (COMM) 12/2023 & O.M.P. (COMM) 11/2023

18. List on 09.04.2024 for consideration.

JASMEET SINGH, J

FEBRUARY 22, 2024/NG

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