IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.699 OF 2015

M/s. Omkar Gratings Private Limited ....Petitioner
Vs.
Maharashtra Shetkari Sugar Limited ....Respondent

Mr. A.P. Singh I/b. M/s. S.K. Srivastav and Company for petitioner.
Mr. Kaushik Upadhyay, Director of petitioner present.
Ms. Fatima Barodawala I/b. Mr. Raval Shah for respondent.
Mr. Abhijit Deshmukh, Managing Director of respondent company present.

CORAM : K.R.SHRIRAM, J.
DATE : 5th SEPTEMBER 2018

P.C.:

1 Parties tendered consent minutes of order whereby the parties have agreed to refer the dispute, which is the subject matter of the petition together with counter claim, if any, to arbitration by a sole Arbitrator.

2 Order in terms of the consent minutes of order.

3 In view of the above, Ms. Aditi Pawar, an advocate practicing in this Court is appointed as Sole Arbitrator to arbitrate on all disputes and differences, including counter claim, if any, arising out of or in connection with or relating to the subject matter of the petition. All rights and contentions of the parties including issue of limitation on the counter claim except challenging the jurisdiction of the arbitrator are kept open.

4 The fees to be fixed by the Arbitrator, administrative expenses, typing charges and venue charges to be shared equally between the parties, i.e., 50% by petitioner and 50% by respondent and the same shall be subject

to cost in the arbitral proceedings.

5 The Arbitrator to communicate in writing to the Advocate for petitioner with copy to respondent the disclosures as required under Section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 within two weeks of receiving a copy of this order from any of the party.

6 For ease of reference a scanned copy of the minutes of order is reproduced hereunder :

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COMPANY PETITION NO. 699 OF 2015

M/s. Omkar Gratings Pvt. Ltd. ...Petitioner

Versus

Maharashtra Shetkari Sugar Ltd. ...Respondent

CORAM K.R. SHRIRAM J.

DATE: 5 September 2018

MINUTES OF ORDER

1. The present Company Petition was filed under section 433 (e), 434 and 439 of Companies Act, 1956 praying *inter alia* for the winding up of the Respondent Company on the alleged ground of the Respondent's inability to pay monies towards purported supply of certain quantities of materials which was allegedly delivered to the Respondent.

2. During the course of hearing on 3 September 2018, the parties agreed to refer the disputes in the Company Petition to Arbitration. Accordingly, by consent of the Parties the present dispute in the Company Petition is referred to Arbitration. The Respondent is at liberty to file Counter Claim if any. All the rights and contentions, including limitation, are hereto kept open, to be agitated before the Arbitrator, who shall decide the same on merits.

3. The parties agree that Ms. Aditi Pawar, an Advocate, practicing in the Hon'ble Bombay High Court, is appointed as Sole Arbitrator, having her contact details as below:

Address: 110, Yusuf building, M.G Road, Fort, Mumbai 400 001,

Mobile number: +91 9158003228.

4. No order as to costs.

M/s. Omkar Gratings Private Limited
Director, Kaushik Upadhyay

A.P. Singh
Advocate for the Petitioner
S.K. Srivastava Co

Maharashtra Shetkari Sugar Ltd.
Chairman cum Managing Director
Mr. Abhijit Deshmukh

Advocate for the Respondent
Fatima Barodawalla
Rawal - Shah & co.

7 I have to note that petitioner has diligently pursued this petition and the time spent in prosecuting this petition has to be excluded in calculating the limitation. I find support for this view in the judgment of the Division Bench of this Court in ***Maharashtra State Farming Corporation***

Limited and Anr. V/s. Belapur Sugar & Allied Industries Ltd.[1] Paragraphs 12, 13, 16, 17 and 18 of the said judgment read as under :

> *12. Is the defence of the company claiming rent of their properties in possession of the Corporation from the year 1964 legally sustainable? It is not in dispute that the claim of rent is unconnected with the claim of the Corporation against the Company for non-payment of the sugarcane supplied during the seasons 1985-86 and 1986-87. The legal position is well settled that a plea in the nature of equitable set off is not available when the cross demands do not arise out of the same transaction. The law recognises the right of equitable set off provided the claim arises out of the same transaction which is the foundation of plaintiff's claim and so long as it has not become time barred; the underlying principle being that it would be inequitable to drive the defendant to separate suit for the purpose. In the present case, the condition precedent from claiming equitable set off is not made out and cannot be said to be available as the cross demands do not arise out of the same transaction. The learned counsel for the company sought to urge that in so far as the proceedings for winding up of the company is concerned, if a plea of equitable set off is raised by the company, that would furnish the reasonable excuse for non-payment and the company cannot be said to have neglected to pay the debt due to the petitioner despite service of the statutory notice. He placed reliance on C.A. Galiakotwala & Co. (P.) Ltd., In re [1984] 55 Comp. Cas. 746 (Bom.). The learned counsel for the Company would also urge that Section 3 of the Limitation Act only bars the remedy but does not destroy the right and therefore, it is lawful for the company to adjust even time barred claim of rent against the Corporation and thus, there was valid defence in opposition to the petition for winding up of the company.*
>
> *In this regard, the learned counsel placed reliance on the judgment of the Supreme Court in Punjab National Bank v. Surendra Prasad Sinha .*
>
> *13. When the claim of equitable set off does not arise out of the same transaction on which the Corporation's claim is founded, the prerequisite condition of equitable set off is not made out and such plea cannot be considered to be the plea of valid set off; much less in the facts and circumstances of the present case the plea of equitable set off can be said to be a bona fide defence to constitute reasonable excuse for nonpayment by the company in opposition to the petition for winding up. In this view of the matter the observation made by the learned Company Judge that the company has a plausible defence insofar as their counterclaim of rental charges for three years prior to the filing of the company petition was not justified. However, the fact of the matter is that the learned Company Judge has held in an unequivocal terms that the company has no valid defence against the Corporation in respect of the claim of Rs. 59,73,348.75 and Rs. 22,35,251.28. As regards the Corporation's claim in the sum of Rs. 11,32,974.97 in respect of the sugarcane supplied for the season 1985-86, the learned Company Judge cannot be said to have*

1. 2004 (3) Bom CR 480

erred in observing that there was genuine dispute. The learned Company Judge in his order observed thus-

"It is the specific case of the Company that they had paid the said amount to the Petitioners under two separate cheques. It is not disputed by the petitioners that they had received the payment towards their bills dated December 16, 1986 and December 30, 1986. However, the Petitioners say that the said amount was appropriated by them towards their earlier bills and this was done with the consent of Mr. Maheshwari, Director of the Respondent Company. On perusal of the correspondence between the parties, it is clearly seen that by their letter dated January 20, 1987, the Respondent Company categorically disputed the case of adjustment sought to be made out by the petitioners. It was specifically averred in the said letter that Mr. Maheshwari has never agreed to such adjustment. In my opinion, the dispute raised by the Petitioners in that behalf cannot be said to be frivolous or without any substance."

…………..

16. In Rameshwarlal's case (supra) the Supreme Court held thus-

"2. It is not necessary for us go into the question of the legality of the order of the High Court in refusing to grant the relief. It is axiomatic that the exercise of the power under Article 226 being discretionary, the learned Single Judge as well as the Division Bench have not exercised the same to direct the respondent to pay the alleged arrears of salary alleged to be due and payable to the petitioner. Under these circumstances, the only remedy open to the petitioner is to avail of the action in the suit. Since the limitation has run out to file a civil suit by now, which was not so on the date of the filing of the writ petition, the civil court is required to exclude, under Section 14 of the Limitation Act, 1963, the entire time taken by the High Court in disposing of the matter from the date of the institution of the writ petition.

3. Normally for application of Section 14, the court dealing with the matter in the first instance, which is the subject of the issue in the later case, must be found to have lack of jurisdiction or other cause of like nature to entertain the matter. However, since the High Court expressly declined to grant relief relegating the petitioner to a suit in the civil court, the petitioner cannot be left remediless. Accordingly, the time taken in prosecuting the proceedings before the High Court and this Court, obviously pursued diligently and bona fide, needs to be excluded. The petitioner is permitted to issue notice to the Municipality within four weeks from today. After expiry thereof, he could file suit within two months thereafter. The trial court would consider and dispose of the matter in accordance with law on merits." (p. 100)

17. We are of the view that the Corporation having pursued winding up petitions and appeals before this court diligently and bona fide, the time taken in the said proceedings needs to be excluded.

18. Resultantly we dispose of the four appeals by the following order: The Maharashtra State Farming Corporation Ltd. is granted two months' time to file the suit for recovery of the due amount against the Company *viz. Belapur Sugar & Allied Industries Ltd. The time taken by the Maharashtra State Farming Corporation Ltd. in prosecuting the winding up petition and the appeals before this court shall be excluded under Section 14 of the Limitation Act, 1963. The company, if advised and legally available, may also pursue appropriate remedy for its claim against the Corporation. Obviously claim of the parties shall be considered in accordance with law. For a period of two months, the Government guarantee furnished by the Maharashtra State Farming Corporation Ltd. shall remain operative and thereafter, the said Government guarantee shall stand discharged unless ordered otherwise.*

8 Therefore, the time taken by petitioner in prosecuting this winding up petition shall be excluded under Section 14 of the Limitation Act 1963.

9 Petition accordingly stands disposed.

(K.R. SHRIRAM, J.)