



O.S.A.No.8 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.09.2023

Pronounced on : 22.12.2023

CORAM

**THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS.JUSTICE R.KALAIMATHI**

**O.S.A.No.8 of 2014
and
C.M.P.No.12349 of 2022**

The Chief Executive,
Arignar Anna Sugar Mills,
Kurungulam-613 303,
Thanjavur District.

... Appellant / 1st Respondent

Versus

1.R.Raghavendran
Resolution Professional
for M/s.Thiru.Arooran Sugars Ltd.,
Flat No.3, Dr.Rajendra Prasad Road,
Tatabad,
Coimbatore-641 012.

2.The Commissioner of Sugars /
Cane Commissioner / Sole Arbitrator,
690, Anna Salai, Chennai-600 035.



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3.M/s.Kalis Distilleries Limited,
Rep. by its Chairman and Managing Director,
Office at No.23,5,Thanikachalam Road,
Parthasarathipuram,
T.Nagar, Chennai-600 017.

... Respondents

[(1) R1 amended vide Court Order
dated 29.06.2022 made in
C.M.P.No.8337 of 2022 in
O.S.A.No.8 of 2014.

(2) R3 impleaded as party
respondent vide Order of Court
dated 20.04.2023 made in
C.M.P.No.180026 of 2023
in O.S.A.No.8 of 2014]

PRAYER: This Original Side Appeal is filed under Order XXXVI Rule 1
of Original Side Rules read with clause 15 of the Letters Patent against
the Order and decretal Order passed by this Court dated 22.11.2012
made in Arb.O.P.No.550 of 2010.

For Appellant : Mr.P.S.Raman, Senior Counsel
for Mr.M.Palanimuthu

For 1st Respondent : No Appearance

For 2nd Respondent : Mr.Mohammed Umar, K.
for Mr.B.Dhanaraj

For 3rd Respondent : Mr.R.Vidhyashankar



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JUDGMENT

(Judgment was delivered by **R.KALAIMATHI, J.,**)

Appellant has preferred the present Original Side Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, aggrieved by the order passed in Arb.O.P.No.550 of 2010, dated 22.11.2012.

2. For the sake of brevity, the appellant (Arignar Anna Sugar Mills) will be referred to as AASM. The first respondent (Thiru Arooran Sugars Limited) will be referred to as TASL. The second and third respondents will be referred to as per their litigative status.

3. The third respondent has been impleaded by this Court. The third respondent has taken over the business of the first respondent by a Scheme approved by the National Company Law Tribunal (NCLT- II), Chennai under Insolvency and Bankruptcy proceedings initiated against TASL.

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4. The learned single Judge set aside the award passed by the second respondent dated 01.09.2009, by holding that Clause 9 of Memorandum of Understanding (MOU) dated 18.07.2006 is not an arbitration agreement within the purview of Arbitration and Conciliation Act. Learned Judge further held that the second respondent cannot be judge of his own cause and set aside the award. Aggrieved by the said order, this appellant AASM has preferred the present appeal.

5. To appreciate the short facts that has led to the present dispute, reference is made to Clause 9 of MOU, dated 18.07.2006, entered between AASM and TASL.

6. The second respondent had issued a Circular dated 03.03.2006, to the Special Officer / Administrator / Chief Executive of Co-operative Sugar Mills permitting them to enter into MOU with Private



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Sugar Mills which includes TASL. On the strength of the said Circular

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AASM and TASL entered into an MOU dated 18.07.2006. In terms of the MOU, AASM would supply 1,00,000 MTS., of sugarcane to TASL for crushing for the crushing season 2006 - 07. But, as per the terms of MOU, TASL did not draw entire quantity of 1,00,000 MTS., of cane from AASM.

7. Aggrieved by such non drawal, AASM raised a dispute before the second respondent in terms of Clause – 9 of the MOU.

8. TASL filed its counter statement along with preliminary objections regarding maintainability of the proceedings on the following grounds;

i) that Clause – 9 does not provide for a mechanism for referring the dispute to arbitration.



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ii) Objection regarding the second respondent to act as an arbitrator.

iii) that MOU dated 18.07.2006 stood terminated.

9. The sole Arbitrator / second respondent passed an award dated 01.09.2009 holding that the MOU was not cancelled and it is enforceable between the parties.

10. Aggrieved by the award, TASL filed the Arbitration Original Petition in A.O.P.No.550 of 2010 under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the arbitral award dated 01.09.2009 passed by the Commissioner of Sugar in Arbitration Claim No.17742/Cane 2 /2008.

11. After hearing the arguments, the learned single Judge held that Clause 9 of MOU does not amount to an Arbitration Agreement and



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that the Arbitrator cannot act as a Judge of his own cause. The learned

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single Judge set aside the Arbitral award on the above said two grounds.

12. The learned Senior counsel appearing for the appellant would contend that the MOU did not get terminated and TASL lifted only 46,602 MTS., of sugarcane instead of 1,00,000 MTS., thereby committing breach of condition in the MOU. He would further contend that neither party to MOU withdrew the agreement and the agreement did not get terminated, as per the letter of Commissioner of Sugar, dated 26.09.2006.

13. The learned Senior counsel further contended that the Circular dated 03.03.2006, issued by the Director of Sugar is only instruction, but AASM is an independent body governed by the rules and regulations passed by the Board of Tamil Nadu Sugar Corporation



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Limited. It is his further argument that 55,394 MTS., of sugar cane was not lifted by TASL and the quality of it severely degraded resulting in loss of Rs.252/- per quintal. He further added that the MOU was in existence and not cancelled. Clause – 9 of MOU clearly indicated the mode of settlement of dispute with named Arbitrator which was mutually agreed by the parties.

14. To buttress his arguments, several citations were circulated.

i. Smt.Ruckmanibai Gupta vs. District Collector, Jabalpur and others reported in 1980 (4) SCC 556.

ii. Mallikarjun vs. Gulbarga University reported in 2004 (1) SCC 372.

iii. State of Punjab and others vs Dina Nath and others reported in (2007) 5 SCC 28.



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15. Per contra, the learned counsel appearing for the 3rd respondent would contend that Clause 9 of MOU is not a binding Arbitration agreement and circulated a list of citations.

i.K.K.Modi vs. K.N.Modi and others reported in (1998) 3 SCC

573.

ii.Bihar State Mineral Development Corporation and Another vs.

Encon Builders (I)(P) Ltd reported in (2003) 7 SCC 418.

iii.Jagdish Chander vs. Ramesh Chander and others reported in

(2007) 5 SCC 719.

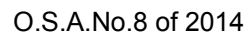
iv.Food Corporation of India vs. National Collateral

Management Services reported in (2020) 19 SCC 464.

v.P.Dasaratharama Reddy Complex vs. Government of

Karnataka reported in (2014) 2 SCC 201.

16. In Ruckmanibai Gupta's case, the Hon'ble Supreme Court had an occasion to interpret Clause-15 of Lease Agreement between



17. Clause-15 is extracted as follows:

“Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or money payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final.”

18. The Apex Court observed that Clause-15 read as a whole clearly stipulated that the words 'in the matter of reference' amounted to 'disputes' and reference was to be made to the lessor, who is the Governor. It is pertinent to mention that the Hon'ble Supreme Court much latter in Bhagyadhar Dash's case reported in 2011 (7) SCC 406 expressed its doubts over its correctness of interpretation of Clause - 15



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in Ruckmanibai Gupta's case.

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19. In Mallikarjun's case, the Hon'ble Supreme Court interpreted Clause - 30 of a construction agreement.

20. Clause - 30 is extracted as follows:

"The decision of the Superintending Engineer of Gulbarga Circle for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or material used on the work, or as to any other question, claim, right, matter, or thing whatsoever, in any way arising out of, or relating to the contract designs, drawings, specifications, estimates, instructions, orders or those conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof in case of



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dispute arising between the contractor and Gulbarga University."

21. The contract was for construction of indoor stadium for University. The Superintending Engineer, PWD., was the named Arbitrator in Clause - 30. The Hon'ble Supreme Court was of the view that the Superintending Engineer was not an Officer of the University and did not supervise work or issue directions to the contractor. The Apex Court held that Clause - 30 was a valid arbitration clause within the meaning of Arbitration and Conciliation Act. It is pertinent to note that in this particular case, the respondent in the arbitration did not raise preliminary objection as to the maintainability of arbitration and participated in it until the passing of the award.

22. In Punjab State and others vs Dina Nath and others reported in (2007) 5 SCC 28, the Hon'ble Supreme Court interpreted Clause - 4 of the Work Order and held it amounted to a valid arbitration Clause. In

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Para - 19, the Hon'ble Supreme Court observed that the Clause in question spells out "existence of dispute" and "reference of dispute" to the arbitrator.

7. Section 2(a) of the Act defines "arbitration agreement" which means a written agreement to submit present or future differences to arbitration whether arbitrator is named therein or not. Mr Rathore, learned Additional Advocate General appearing on behalf of the appellants contended that although the Work Order was allotted to the respondent on 16-5-1985, the respondent had failed to execute the work allotted to him and the appellant had got the work executed at its own cost in terms of clause 13 of the Work Order which, as noted herein earlier, provides that in case the contractor does not execute the allotted work, the department could get the same executed by other agencies or by itself. He further contended that owing to such failure on the part of the respondent, final bills were not prepared nor were the final measurements taken for the purpose of payment to the respondent. Accordingly, Mr Rathore contended that there was no existence of any dispute and



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accordingly, the question of referring such disputes in terms of clause 4 of the Work Order could not arise at all. This submission of Mr Rathore was contested by the learned counsel for the respondent. Therefore, a dispute arose as to whether the respondent had completed the work allotted to him under the Work Order. This is an issue, according to the High Court as well as the Subordinate Court, which should be referred for decision to an arbitrator.”

23. In K.K.Modi vs. K.N.Modi and others reported in (1998) 3 SCC 573, the Hon'ble Supreme Court interpreted Clause - 9 of an MOU entered into between two groups of family members.

Clause 9 is extracted hereunder.

"Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."



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24. The Hon'ble Supreme Court held that the Chairman of IFCI acted in the capacity of expert and his decision is not an arbitration award. The Apex Court further observed that the intent of Clause - 9 was to ensure proper implementation of settlement already arrived at between the parties and not to settle future disputes.

25. In Bihar State Mineral Development Corporation and another vs. Encon Builders (I) (P) Ltd., reported in (2003) 7 SCC 418, the Apex Court held that when the actions of arbitrator during execution of contract was in question, he cannot act as an arbitrator and adjudicate his own case as the same would amount to bias.

26. In Jegadish Chander's case, the Hon'ble Supreme Court held that Clause -16 of Partnership Deed not amounting to an arbitration Clause, since the Clause contained the words "shall be referred for arbitration if the parties so determined". The said Clause gives an



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option to the parties to opt for arbitration and did not amount to a binding arbitration agreement.

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27. In P.Dasaratha Rama Reddy Complex vs. Government of Karnataka and another reported in (2014) 2 SCC 201, the Hon'ble Supreme Court was of the view that Clause -48 of the Agreement was not an arbitration Clause, since emphasis was on the performance and completion of work. The said Clause did not prescribe any procedure for settlement of disputes through arbitration.

28. In furtherance of the grounds raised in the Appeal, after hearing the submissions of the counsel for appellant and the rival submissions, the following issues arise for consideration.

(i) Whether Clause 9 of MOU is in the nature of arbitration agreement.

(ii) Whether the second respondent could have acted as an



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arbitrator over the dispute raised.

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(iii) Whether TASL committed breach of conditions of MOU.

29. It is relevant to extract Section 7 of Arbitration and Conciliation

Act to understand what constitutes a valid arbitration agreement.

7 Arbitration agreement. —

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or



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(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

30. The said provision clearly postulates that the parties should be at consensus ad idem to refer the dispute to an Arbitrator.

31. The Hon'ble Supreme Court in Bhagyadhar Dash case reported in (2011) 7 SCC 406, has encapsulated the essentials of a valid Arbitration Clause by referring to its previous judgements.

“2. In K.K. Modi v. K.N. Modi MANU/SC/0092/1998 : 1998 (3) SCC 573 this Court enumerated the following attributes of a valid arbitration agreement:

(1) The arbitration agreement must contemplate that



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the decision of the Tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner, with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law, and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the Tribunal.

3. Following K.K. Modi and other cases, Bihar State Mineral Development Corporation v. Encon Builders (IP) Ltd.



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MANU/SC/0611/2003 : 2003 (7) SCC 418, this Court listed the following as the essential element's of an arbitration agreement:

- (i) There must be a present or a future difference in connection with some contemplated affair;
- (ii) There must be the intention of the parties to settle such difference by a private tribunal;
- (iii) The parties must agree in writing to be bound by the decision of such tribunal; and
- (iv) The parties must be ad idem.

4. In Jagdish Chander v. Ram Chandra MANU/SC/7338/2007 : 2007 (5) SCC 719, this Court, after referring to the cases on the issue, set out the following principles in regard to what constitutes an arbitration agreement:

- (i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the



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agreement to refer their disputes to a private tribunal for adjudication and willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing, (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal, (c) The private tribunal



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should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority,



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he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration,



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as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

32. Keeping in mind the principles laid down in the citations discussed above, attention is drawn to Clause -9 of MOU.

“9. Disputes, if any, arises between the two mills in respect of the Cane Diversion /Drawal, the decision of the Director of Sugar shall be final and binding on both the mills.”

33. The said Clause clearly does not spell out any consensus among the parties to refer the disputes to the arbitrator. It is to be noted that the arbitrator in his capacity as the Commissioner of Sugar issues necessary instructions as regards cane diversion and drawal to the Mills concerned. He is also the Executive Authority for the said purpose. Therefore, any decision on dispute regarding cane drawal or diversion



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can be taken by him on the basis of materials available with him and not on the basis of judicial adjudication in the capacity of arbitrator.

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34. We are in agreement with the observation of learned single Judge that Clause 9 of MOU does not provide for a mechanism for settlement of disputes through arbitration.

35. As regards Issue No.2, it is seen that the MOU dated 18.07.2006, owes its existence to a circular from the office of Director of Sugar, dated 03.03.2006. Wherein, permission was granted for AASM to enter into MOU with TASM for crushing 1,00,000 MTS., of sugarcane. Clause -5 of the letter dated 03.03.2006, stipulates that any instruction or modification issued by the Commissioner of sugar ought to be followed by AASM and TASL.

36. During the subsistence of the MOU, it is the case of TASL



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that the Commissioner of Sugar issued a letter dated 26.09.2006, which

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categorically spelt out that the earlier order issued by the Director of Sugar dated 03.03.2006 is cancelled and instructed the Chief Executives of Public Sector Sugar Mills not to act upon it.

37. It is the contention of the counsel for TASL that the later order of Commissioner of Sugar dated 26.09.2006 is to be treated as instructions / modifications in terms of Clause (V) of order dated 03.03.2006. In terms of the said Clause, any instructions / modifications issued by the Commissioner of Sugar (second respondent) will have to be followed by both AASM and TASL. As a result of the letter dated 26.09.2006, TASL contends that the MOU is cancelled.

38. It is the contention of the learned counsel for the Appellant/ AASM that the Commissioner of Sugar does not have power to cancel the order dated 03.03.2006 which was issued by the Director



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of Sugar and such a cancellation order is not binding on it as the

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Commissioner of Sugar does not hold any superintendence over the affairs of AASM. It is for the aforesaid reasons that AASM would contend that the MOU did not stand terminated due to the actions of the Commissioner of Sugar.

39. It is to be noted that when the parties AASM and TASL are at dispute over the implication of the letter dated 26.09.2006 on the MOU dated 18.07.2006, the real issue is whether the person who issued the said letter dated 26.09.2006 sits as an arbitrator, over a dispute concerning his own decision.

40. When the Act of Arbitrator done during the execution of contract is called into question in the arbitration proceedings, the same would amount to bias as enunciated in Bihar State Mineral Development Corporation vs Encon Builders (I) (P) Ltd., reported in



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2003 (7) SCC 418 and Issue No.ii is answered against the appellant.

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41. In view of the findings rendered on, issue Nos.i and ii issue iii need not be traversed.

42. It is made clear that in terms of this judgment, though the arbitration award passed by the 2nd respondent in Arbitration Award Claim No.17742/Cane2/2008 dated 01.09.2009 stands set aside, the parties are at liberty to pursue their claims before the appropriate forum. It is also made clear that the time spent hitherto is saved in terms of Section 21 of the Arbitration and Conciliation Act r/w. Section 14 of the Limitation Act.



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43. With the aforesaid observations, this Original Side Appeal

stands dismissed. Consequently, connected miscellaneous petition is closed. No costs.

[R.S.M., J.,] [R.K.M., J.,]

22.12.2023

To

The Commissioner of Sugars /
Cane Commissioner / Sole Arbitrator,
690, Anna Salai, Chennai-600 035.

SSN/AKV

Index : Yes / No

Internet : Yes / No

Neutral Citation : Yes / No

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Pre-delivery judgment in
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and
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