



OSA (CAD) No.150 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.01.2025

CORAM :

THE HON'BLE MR.K.R.SHRIRAM, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

OSA (CAD) No.150 of 2024

&

C.M.P.No.28439 of 2024

S.U.Sirajdeen

.. Appellant

Vs.

Well Trans Logistics India Pvt. Ltd.

Rep. by the Assistant Manager/Authorised Signatory

Sh. Ravish Chand Srivastava

Flat No.306, 3rd Floor, Real Enclave Building

No.43/22, Josier Street, Nungambakkam

Chennai 600 034.

.. Respondent

Prayer : Appeal under Section 13 of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation Act, Order XXXVI, Rule 9 of the O.S. Rules against the order dated 30.08.2023 passed in Arb.O.P. (Comm. Div) No.321 of 2023.



OSA (CAD) No.150 of 2024

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For Appellant : Mr.Hari Radhakrishnan

For Respondent : Mr.T.V.Suresh Kumar
For M/s. Genicon Legal

JUDGMENT

(Judgment of the Court was delivered
by the Hon'ble Chief Justice)

This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (the “Act”), by which, an order dated 30.08.2023 passed by the learned Single Judge of this Court under Section 34 of the Act is challenged.

2. Appellant had imported certain goods from Vietnam. Respondent, who operated as a Multimodal Transport Operator, issued Bill of Lading dated 11.03.2020 (House Bill of Lading) showing one Vietnam Garment Materials Production and Business Company Ltd. as shipper and Gravity Ventures as consignee. Appellant carries on business as sole proprietor in the name and style of M/s. Gravity Ventures.



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3. The port of loading was Hai Phong Port, Vietnam and place of discharge and delivery was Chennai Port, India. The goods said to contain 2230 rolls of non-woven interlining (fabrics) were shipped in 1x40' HC container bearing No.CBHU9083374, Seal No.12819679. The Bill of Lading had an express disclaimer "shippers load and count". Container CY/CY. It also provided for 14 days free detention at destination.

4. Container was handed over by respondent to one COSCO who issued a Master Bill of Lading.

5. Container arrived at Chennai Port on or about 17/18.02.2020 and appellant filed the Bill of Entry with the Chennai Customs. Subsequently, there was an investigation by the Commissioner of Customs on the goods imported by appellant and finally, after a writ petition was filed by appellant, an order was passed by this Court on 27.05.2020 permitting the release of goods by the customs authorities. The customs authorities also issued a detention waiver certificate and also for waiver of demurrage charges. It is appellant's case that notwithstanding this certificate issued by



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the customs authorities, neither respondent nor COSCO, which was the actual carrier and had issued the Master Bill of Lading, granted any waiver. Consequently, the goods are still lying in the Containers Freight Station of a third party accumulating ground rent and detention charges.

6. In view of the disputes that arose between appellant and respondent, appellant filed an application under Section 11 of the Act. This application was disposed by an order dated 10.01.2022, by which, Advocate M.V.Swaroop came to be appointed as the Sole Arbitrator. It has to be noted that respondent did not even enter appearance when this application under Section 11 was disposed. Pursuant to the order passed by this Court on 10.01.2022, learned Sole Arbitrator entered into reference and issued notice. Appellant filed a statement of claim and respondent filed its statement of defence on 04.08.2022. A copy of the defence is annexed to the appeal memo. Both counsel state that though it is shown as “additional written submissions on behalf of respondent” that is the only defence statement that was filed by respondent. One of the grounds raised in the written submissions is that there is no arbitration agreement. It was



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respondent's case that though on the reverse of the House Bill of Lading, Clause 25 provides for arbitration, the same would not constitute a valid arbitration agreement between the parties and hence, an arbitral reference under the said clause is not maintainable. Respondent also has prayed that this objection be considered as a preliminary issue.

7. The Arbitral Tribunal proceeded to hear and dispose the reference by holding that respondent shall ensure release of the goods covered by House Bill of Lading without collecting or insisting upon payment of any detention charges and on failure to hand over the goods within three months from the date of receipt of the award, respondent shall be liable to pay the value of the goods being Rs.14,97,850/- as damages as prayed for, with simple interest at 8% per annum from the date of the award till the date of payment. Though the Arbitrator has used the expression "... respondent may be called upon to pay value of the goods ...", we would read it as a direction to respondent that respondent shall pay the value of the goods. This clarification is issued, in view of the stand taken by respondent's counsel, while reading the operative part of the award, that



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there is no clear finding by the Arbitrator to pay the value of the goods.

8. Unhappy with this award, respondent filed the petition under Section 34 of the Act which came to be disposed by the impugned order dated 30.08.2023. The learned Single Judge proceeded on the basis that the standard conditions governing Multimodal Transport Documents, which were on the reverse of the House Bill of Lading, did not apply at all and that would include Clause 25, which is the arbitration agreement and hence, there was no arbitration agreement at all. Consequently, the Arbitrator did not have the jurisdiction to proceed with the reference.

9. Counsel for appellant submitted, relying upon the judgment of the Apex Court in ***M/s. Caravel Shipping Services Pvt. Ltd. v. M/s. Premier Sea Foods Exim Pvt. Ltd.***¹ that Clause 25 indicates that parties had expressly agreed to be bound by the arbitration clause despite the fact that the printed conditions annexed on the reverse of the House Bill of Lading may not be held to be applicable. Counsel also submitted that arbitration clause, which forms a part of the contract, shall be treated as an agreement

¹ (2018) 14 SCR 289



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independent of other terms of the contract as provided under Section 16(1)(a) of the Act and hence, the learned Single Judge was not correct in holding that there was no arbitration agreement. Of course, Shri. Radhakrishnan also attacked the other findings of the learned Single Judge on merits.

10. Shri. Suresh Kumar submitted that

(a) Assuming for the sake of argument that the arbitration clause should be treated as forming an agreement independent of the other terms of the contract, still there is no definitive arbitration agreement because Clause 25 only permits the parties to refer the disputes to arbitration and nothing more;

(b) It was precisely for this reason a preliminary objection was raised before the Arbitrator, but the Arbitrator has not even considered, let alone decided that objection in the award;

(c) Even though a separate application under Section 16



was not filed, since the objection to jurisdiction was raised in the defence statement itself and a request has been made therein to treat it as a preliminary issue, the learned Arbitrator was duty bound to decide that first;

(d) Apart from other grounds, learned Single Judge should have set aside the award even on this ground.

11. Before we proceed further, it will be useful to reproduce Clauses 1(i) and (j), Clause 2 and Clause 25 on the reverse of House Bill of Lading.

The same read as under:

Clause 1 (i):

“Multimodal transportation” means carriage of goods by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India;

Clause 1(j):

“Multimodal transport contract means a contract entered into by the consignor and the Multimodal Transport operator for Multimodal Transportation;

Clause 2: Acceptability:

The provisions set out and referred to in this Multimodal Transport Document shall apply, if the transport as described on the face of the document is by two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of the goods outside India.

Clause 25: Arbitration:



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OSA (CAD) No.150 of 2024

The contract evidenced hereby or contained herein shall be governed by and constructed according to Indian laws. Any difference of opinion or dispute there under can be settled by arbitration in India or place mutually agreed with each party appointing an arbitrator.

12. As noted earlier, the place of receipt of the container was Hai Phong Port, Vietnam, Port of Lading was Hai Phong Port, Vietnam and place of discharge and place of delivery was Chennai Port, India. Therefore, the entire carriage has been a port to port shipment and only one mode of transport has been used from the place of acceptance of the goods to the place of delivery of goods. In fact, we should compliment Mr.Radhakrishnan for candidly agreeing with the Court that this was only a port to port shipment and there was no multimodal transportation. We would repeat that since multimodal transportation required carriage of goods by two or more modes of transport from the place of acceptance of the goods to the place of delivery and in this case, only one mode of transport was applied, there was no multimodal transportation.

13. The learned Single Judge, on the issue as to whether there was definitive arbitration agreement, has proceeded to hold that all terms and



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conditions given on the reverse of the House Bill of Lading, including arbitration clause, did not apply at all. According to learned Single Judge, Clause 2 of the House Bill of Lading, as quoted above, provided that the provisions set out and referred to in this Multimodal Transport Document shall apply if that transport as described on the face of the document is by two or more modes of transport from the place of acceptance of goods in India to a place of delivery of goods outside India and as it was only a Port to Port shipment, the provisions set out in the Multimodal Transport Document did not apply and that would cover the arbitration clause.

In fact, if we go a step further, since the place of acceptance was outside India and place of delivery was India, on that ground alone the terms and conditions would not apply.

Even if we proceed further to hold that it would apply where the place of acceptance was outside India and place of delivery was inside India, still, as the mode of transportation was only by one mode, certainly, the standard conditions governing Multimodal Transport Document will not



be applicable.

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14. The second issue is whether the learned Single Judge was correct in saying that even Clause 25 will be covered by the standard conditions governing Multimodal Transport Document. In our view, the learned Single Judge was not correct because as the law is well settled, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of other terms of the contract. In fact, Section 16(1)(a) & (b) of the Act also make it clear. Clause (b) of Section 16(1) goes on to say that the decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Section 16(1)(a) and (b) of the Act read as under:

16. Competence of arbitral tribunal to rule on its jurisdiction. -

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.



WEB COPY



OSA (CAD) No.150 of 2024

15. In this regard, it would be apposite to refer to the decision of the Apex Court in ***National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd.***², wherein, while considering as to whether an arbitration clause comes to an end if the contract containing such arbitration agreement was abrogated, it was held as under:

*“The respondent contends that the contract was abrogated by mutual agreement; and **when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law.** An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. **Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract** (Vide *Heyman v. Darwins Ltd.*, *Union of India v. Kishorilal Gupa & Bros.* and *Naihati Jute Mills Ltd. v. Khyaliram Jagannath*). **This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be***

² (2007) 5 SCC 692



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OSA (CAD) No.150 of 2024

treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected.”

(emphasis supplied)

16. That apart, in ***SBI General Insurance Co. Ltd. v. Krish Spinning³***, the Apex Court has held as under:

“The arbitration agreement, by virtue of the presumption of separability, survives the principal contract in which it was contained. Section 16(1) of the Act, 1996 which is based on Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (hereinafter, “Model Law”) embodies the presumption of separability. There are two aspects to the doctrine of separability as contained in the Act, 1996:

i. An arbitration Clause forming part of a contract is treated as an agreement independent of the other terms of the contract.

ii. A decision by the arbitral tribunal declaring the contract as null and void does not, ipso facto, make the arbitration Clause invalid.”

(emphasis supplied)

Further, the Apex Court has referred to *National Agricultural Coop.* (supra),

³ (2024) 7 SCR 840



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wherein it is held that even if the underlying contract comes to end, the arbitration agreement contained in such a contract survives for the purpose of resolution of disputes between the parties.

17. In the light of the above, certainly Clause 25 will not be hit even where there was no multimodal transportation.

18. Clause 25, however, as quoted above, only provides “... any difference of opinion or dispute there under can be settled by arbitration in India or place mutually agreed with each party appointing an Arbitrator”. 'There under' would mean the contract evidenced by or contained therein. Even if there was no multimodal transportation, there was certainly a contract of carriage as evidenced by the Bill of Lading.

The words used in the Clause are “... can be settled by arbitration” which only permits that the parties may refer their disputes to arbitration. It does not say that a dispute/difference arising out of the contract shall be settled by arbitration in India in accordance with the Arbitration and



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Conciliation Act, 1996. Therefore, the judgment of the Apex Court relied upon by Mr.Radha Krishnan in *Caravel Shipping Services* (supra) will not be of any assistance to him. Respondent has raised the issue before the Arbitrator. As noted earlier, respondent in the written statement, has submitted that there is no arbitration agreement between the parties. In our opinion, we would agree with respondent, considering the language used in Clause 25 that “... can be settled by arbitration in India or place mutually agreed with ...” would mean parties have not expressly agreed to refer disputes to arbitration be bound by any of the arbitration clause. Therefore, there is no definitive arbitration agreement. On this ground alone, in our view, the award ought to be set aside.

19. We have answered this issue of jurisdiction since the Arbitrator did not answer this issue though raised by respondent.

20. In view of the peculiar facts and circumstances of the case, though it is a commercial dispute, we are not inclined to impose any cost.



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21. If appellant wishes to file a suit against respondent, appellant may file a suit.

22. As the appeal was diligently pursued, in our view, the time taken in prosecuting the appeal has to be excluded in calculating the limitation. We find support for this view in paragraphs 12, 13, 16, 17 and 18 of the judgment of the Bombay High Court in ***Maharashtra State Farming Corporation Ltd. v. Belapur Sugar and Allied Industries Ltd.***⁴, which 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 1985-1986 and 1986-1987. 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 insofar 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

⁴ (2004) 3 Bom 480



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OSA (CAD) No.150 of 2024

of the statutory notice. He placed reliance on C.A. Galiakotwala and Co. Pvt. Ltd., 1984 Vol. 55 Company Cases 746. 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. Surendara Prasad Sinha, AIR 1992 SC 1815.

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 non-payment 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 counter-claim 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 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 1985-1986, the learned Company Judge cannot be said to have 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*, the Supreme Court held thus—

“2. It is not necessary for us to 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.”

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.



OSA (CAD) No.150 of 2024

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 and 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.”

23. Therefore, the time taken by appellant in prosecuting the arbitration, Section 34 petition and this appeal from the date of receipt of notice under Section 21 till today shall be excluded under Section 14 of the Limitation Act, 1963.

24. The appeal is dismissed. There shall be no order as to costs. Consequently, the interim application also stands dismissed.

(K.R.SHRIRAM, CJ)

(SENTHILKUMAR RAMAMOORTHY, J.)

27.01.2025



OSA (CAD) No.150 of 2024

Index : Yes
Neutral Citation : Yes

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THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY,J.

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OSA (CAD) No.150 of 2024