

(2018) 04 DEL CK 0155
In the Delhi High Court
Case No : CS(OS) No.2554 of 2008

LAL MAHAL LIMITED

APPELLANT

Vs

ABDUL GHAFFAR; ABDUL GHAFFAR ABDUL REHMAN

RESPONDENT

Date of Decision : 26-04-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9, 43(4), 17, 11(6), 3, 43, 8
Limitation Act, 1963 — Section 14, 18, Article 27
Code of Civil Procedure, 1908 — Order 7 Rule 11, Order 39 Rule 1, Order 39 Rule 2,
Order 23 Rule 2
Arbitration Act, 1940 — Section 37(5), 43

Citation : (2018) 04 DEL CK 0155

Hon'ble Judges : RAJIV SAHAI ENDLAW

Bench : Single Bench

Advocate : Devander N. Grover, Kailash Vasdev, Ekta Mehta, Shreyans Singhvi,
Sumer Singh Sandhu, Limayinla Jamir, Umrao Singh Rawat, Divija Rajkhowa??
Panwar, Vishrut Raj, Rameez Siddiqui,

Final Decision : Disposed Of

Judgement

RAJIV SAHAI ENDLAW

1. The plaintiff Lal Mahal Limited, then known as Shiv Nath Rai Harnarain (India) Ltd, prior to filing this suit, filed OMP No.300/2001 under Section 9

of the Arbitration and Conciliation Act, 1996 (Arbitration Act), pleading that:

(i) M/s. Abdul Ghaffar Abdul Rehman, Karachi, Pakistan, respondent therein and defendant no. 2 in this suit, had during October to November, 2000

approached the plaintiff for buying sugar and a number of invoices were raised for supplying sugar and a number of contracts were entered into

between the parties and shipments of sugar were sent by the plaintiff from India to the defendant no. 2 at Pakistan; (ii) however the defendant no.

2 committed breach of contract with respect to the following three contracts:-

(1)Contract No. 2001- S.I/25 dated 12th January, 2001 for purchase of 3800 MT of sugar for a price of USD 988000.

(2)Contract No. 2001-S.I/26 dated 12th January, 2001 for purchase of 3800 MT of sugar for a price of USD 988000.

(3)Contract No. 2001-S.II/41 dated 28th February, 2001 for purchase of 12500 MT of sugar for a price of USD 3000000. (iii) the defendant no. 2

failed to arrange payment of the entire quantity of goods subject matter of the aforesaid three contracts resulting in non-lifting of the said quantities of

sugar and resultant loss to the plaintiff;Â

(iv)the plaintiff vide its letter dated 8th September, 2001 to the defendant no. 2 made a total demand of USD 584500 on the defendant no. 2 for

compensation for such breach of contracts by the defendant no. 2; and,Â

(v)the plaintiff was approaching ICA for appointing an Arbitrator to adjudicate upon the disputes which had so arisen between the parties and pending

the same was seeking interim measure of maintenance of status quo of cargo of unpaid sugar which had already been dispatched and which were in

transit.

2.OMP No.300/2001 came up first before this Court on 3rd October, 2001 when vide ex parte order the defendant no.2 was directed to maintain

status quo as regard movement of sugar lying loaded in the Railway wagons. The said interim order continued and the proceedings were adjourned

from time to time.Â

3.Vide order dated 16th December, 2002 on the application of Railways for impleadment, Railways were impleaded as respondent no. 2 in the petition,

to safeguard their claim for demurrage. Vide order dated 18th March, 2004, reasoning that the value of the sugar in transit qua which status quo had

been ordered was being lost with the passage of time, the said sugar was ordered to be sold by the Railways through public auction and the sale

proceeds ordered to be deposited in this Court. Subsequent order dated 28th May, 2004 records that a total sum of Rs.1,95,30,000/- had been

deposited in this Court by the Railways and the same was ordered to be kept in a fixed deposit.Â

4.Vide order dated 24th September, 2004 a sum of Rs.19,70,064/- and Rs.2,33,800/- out of the amounts lying deposited in this Court were ordered to

be paid to the Excise Authorities. However on the defendant no. 2 preferring SLP (C) No.21127/2004 vide order dated 1st October, 2004,

disbursement of the said amounts was stayed. However thereafter vide order dated 24th August, 2006 the Special Leave Petition was disposed of

directing the expeditious disposal of the OMP. However OMP No.300/2001 continued to languish, with plethora of applications being filed by all the parties.

5. On 15th September, 2008, the counsel for the plaintiff handed over in the Court an order dated 11th September, 2008 of the Arbitrator based at

Singapore directing that during the pendency of the application under Section 17 of the Arbitration Act filed by the plaintiff, the monies deposited in

this Court to remain deposited in the interest bearing account. The counsel for the defendant No.2 on that date stated that since the plaintiff had

already approached the Arbitrator for an interim order, no further orders were required in OMP No.300/2001 and the same was liable to be disposed

of.

The same was not opposed by the counsel for plaintiff. Accordingly, OMP No.300/2001 was disposed of permitting the parties to approach the

Court for appropriate orders, as and when the application filed by the plaintiff and pending before the Arbitrator was disposed of and/or when the

award was made. As far as the claim of Railways for demurrage charges was concerned, the same was disposed of observing that the same had

to be adjudicated before an appropriate forum and granting liberty to the Railways to seek adjudication of its claim against the plaintiff before a

competent Court. The monies lying deposited in this Court were ordered to remain deposited in interest bearing account.

6. This suit has been filed for recovery of Rs.6,46,00,000/- with interest and for mandatory injunction directing/commanding the defendants to

discharge the liability of the Railways and the Excise Department relating to the sugar consignment aforesaid, pleading that:

(i) late Abdul Ghaffar was the sole proprietor of defendant No. 2 M/s Abdul Ghaffar Abdul Rehman; Abdul Ghaffar has died on 31st October, 2006

and Mr. Irfan Patel and Mr. Ashfaq Patel are his sons and legal heirs; the plaintiff was not aware of the then constitution of defendant No. 2 M/s

Abdul Ghaffar Abdul Rehman and was thus impleading the said Mr. Irfan Patel

and Mr. Ashfaq Patel also as defendants;

(ii) in the year 2000 to 2001, Mr. Samuel J. Marshall, a Singapore based U.K. citizen and an internationally reputed agent facilitated several contracts

between plaintiff and the defendant No.2 for supply of approximately 48100 MT of sugar;

(iii) the suit was confined to following four contracts:-

1. Contract No.2001-SI/25 dated 12th January, 2001 for supply of 3800 MT of sugar at the price of USD 260/- PMT.

2. Contract No.2001-SI/26 dated 12th January, 2001 for supply of 3800 MT of sugar at the price of USD 260/- PMT.

3. Contract No.2001/SII/41 dated 28th February, 2001 for supply of 12500 MT of sugar at the price of USD 240/- PMT.

4. Contract No.2001-S-III/41 dated 3rd March, 2001 for supply of 3800 MT of sugar at the price of USD 263/- PMT.

(iv) the defendant opened Letters of Credits in favour of the plaintiff against the aforesaid contracts;

(v) in or around July, 16 to July, 19, 2001, the prices of sugar fell considerably in the Pakistan market and owing where to the defendants refused to

accept consignments of sugar under the aforesaid contracts and the same were rejected by the defendants, allegedly being beyond the terms of Letter

of Credit and on other flimsy and concocted grounds;

(vi) the plaintiff on 8th September, 2001 raised a claim of USD 584500 on the defendants;

(vii) the defendants, to wriggle out of the contractual commitments, filed a suit before the Civil Judge, Lahore seeking damages from the plaintiff for

breach of contract by the plaintiff and obtained ex parte order dated 29th September, 2001 from the Court to stop the movement of two rakes of sugar

supplied by the plaintiff to another party in Pakistan;

(viii) the plaintiff had also shipped another two rakes of sugar but apprehending further trouble from the defendants at Pakistan, filed OMP

No.300/2001 seeking stay of movement of those rakes to Pakistan and sugar in which rakes had vide subsequent order in OMP No.300/2001 been

ordered to be auctioned and the sale proceeds deposited in Court;

(ix) around January, 2002, the defendants approached Mr. Samuel J. Marshall and requested him to intervene to resolve the dispute; (x) the parties

arrived at an agreement to resolve the disputes inter alia pertaining to the case filed by the defendants in Lahore, the return of the plaintiff??s

consignment of two rakes shipped to another party back to India and an Agreement dated 18th January, 2002 was signed by the parties; the said

Agreement also had a clause for arbitration by Mr. Samuel J. Marshall who also signed the Agreement as the sole Arbitrator;Â

(xi)subsequently the defendants withdrew the suit filed at the Lahore High Court and the plaintiff also performed its part of the obligations under the

Settlement Agreement dated 18th January, 2002 by furnishing a Bank Guarantee of USD 3,60,000;Â

(xii)however the defendants were not sincere in carrying out the terms of the Settlement Agreement dated 18th January, 2002, resulting in the

consignment of sugar qua which stay was obtained in OMP No.300/2001 being not released to the plaintiff and resulting in auctioning of the same by

the Railways under Court orders and the auction money of Rs.1.93 crores thereof continuing to lie with the Registry of this Court;Â

(xiii)in November, both the defendants and the plaintiff invoked the Arbitration clause in the Settlement Agreement dated 18th January, 2002 and it

was agreed that the Arbitration will be governed by Indian law and the venue of Arbitration was agreed to be Singapore, since Mr. Samuel J.

Marshall, the mutually agreed Arbitrator was a resident of Singapore;Â

(xiv)the plaintiff filed its statement of claim before the Arbitrator including the claims arising under the four contracts aforesaid and for payment by the

defendants of the demurrage charges claimed by the Railways relating to the said stock of sugar;Â

(xv)the defendants chose not to participate in the Arbitration and the Arbitrator proceeded with the Arbitration and on 20th June, 2005 passed an

Award in favour of the plaintiff and against the defendants for more than Rs.7.16 cores with interest;Â

(xvi)the defendants challenged the said Award before the High Court of Republic of Singapore inter alia on the ground of violation of the principles of

natural justice and having no binding Arbitration Agreement;Â

(xvii)the High Court of Singapore by order dated 31st July, 2006 set aside the Award with liberty to the parties to apply;Â

(xviii)the plaintiff took steps for appointment of Arbitrator before the Supreme

Court of India by applying under Section 11(6) of the Arbitration Act;

however the said application was dismissed;Â

(xix)the plaintiff thereafter revived its claim before the named sole Arbitrator Mr. Samuel J. Marshall;

(xx)vide order dated 15th September, 2008, OMP No.300/2001 was disposed of (as aforesaid);Â

(xxi)the defendants, after so agreeing to disposal of OMP No.300/2001, made wild allegations on the integrity and impartiality of Mr. Samuel J.

Marshall and once again disputed the existence and/or validity of the Arbitration Agreement and asked the Arbitrator to withdraw as the sole

Arbitrator;Â

(xxii)in view of such defamatory allegations made by the defendants, the Arbitrator, vide order dated 6th October, 2008, recused himself from the

matter; and,Â

(xxiii)the plaintiff is entitled to the reliefs claimed in the suit on account of breaches of contract by the defendants.Â

7.The suit was entertained and vide order dated 8th December, 2008, summons thereof ordered to be issued. The suit was accompanied with an

application under Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 (CPC) for the amounts lying deposited in OMP No.300/2001 to be

retained in an interest bearing account till the disposal of the suit; however in view of the order dated 15th September, 2008 in OMP No.300/2001 it

was not deemed appropriate to pass the same order in the suit.Â

8.Though the defendants, on 15th September, 2008 when OMP No.300/2001 was listed, had stated that since the plaintiff had already approached the

Arbitrator for an interim order no further orders are required in OMP No.300/2001 and sought disposal of OMP No.300/2001 and OMP was disposed

of as aforesaid, but filed IA No.13034/2008 for review of the order dated 15th September, 2008. The said application remained pending till the counsel

for the defendants on 9th April, 2010 withdrew the same reserving the right to file an application as and when deemed necessary.Â

9.Thereafter the defendants filed IA No.8552/2010 in OMP No.300/2001 has been filed by the defendants for release of the monies lying deposited

therein.

10.The defendants, in CS(OS) No.2554/2008, filed IA No.9251/2009 for rejection of the plaint inter alia on the grounds of (i) the suit claim being

barred by time; (ii) the subject matter of the suit being the subject matter of Arbitration and being barred by res judicata; and, (iii) jurisdiction of the

Court being barred owing to the claim subject matter of the suit being subject matter of Arbitration Agreement between the parties.

11.IA No.8552/2010 in OMP No.300/2001 and IA No.9251/2009 in CS(OS) No.2554/2008 remained pending and were taken up for hearing on 7th

March, 2017 and 16th March, 2017 when no merit was found in the grounds of the subject matter of the suit being the subject matter of Arbitration

and being barred by res judicata and of the jurisdiction of the Court being barred owing to the claim subject matter of the suit being subject of

Arbitration Agreement between the parties, urged for rejection of the plaint in CS(OS) No.2554/2008. However on request of the counsels, in the

order dated 16th March, 2017, further hearing on the ground of rejection of the suit claim being barred by time was adjourned to 20th April, 2017 and

thereafter to 27th April, 2017 and on both of which dates the counsel for the plaintiff did not appear resulting in the orders on the aspect of suit claim

being barred by time was reserved, giving liberty to the counsel for the plaintiff to file written synopsis/submissions and which have been filed. This

order is thus confined to the question whether the plaint in CS(OS) No.2554/2008 is liable to be rejected on the ground of the claim therein, as per the

averments contained in the plaint itself, being barred by time.Â

12.As far as IA No.8552/2010 in OMP No.300/2001 was concerned, the same was disposed of vide order dated 16th March, 2017 by directing that

unless there is an order binding on this Court for retention of the monies deposited in this Court together with interest thereon, the same be refunded to

the respondent therein i.e. the defendant No. 2 herein, after 31st May, 2017. The defendant No. 2 filed IA No.14438/2017 seeking release of the

monies deposited in OMP No.300/2001 and the said application came up before this Court on 12th December, 2017 when it was allowed and the

monies along with interest accrued were ordered to be refunded to the respondent therein. Thereafter the plaintiff filed IA No.15108/2007 in OMP

No.300/2001 for recall/modification/keeping in abeyance of the order dated 12th December, 2017 in IA No.14438/2017. However the said application

was dismissed on 22nd December, 2017.

13. Thereafter the plaintiff filed IA No.15631/2017 under Order XXXIX Rules 1&2 of the CPC in CS(OS) No.2554/2008 and which application came

up before the Court on 2nd January, 2018 when orders thereon were reserved and it was directed that till pronouncement of the orders, the monies

lying deposited in this Court together with interest thereon be not refunded to the respondent/defendant. This order would thus also deal with the fate

of the monies lying deposited in OMP No.300/2001.Â

14. During the hearings on 7th March, 2017 and 16th March, 2017, on the aspect of the claim subject matter of CS(OS) No.2554/2008 being within

time, it was recorded that (i) the claim of the plaintiff in CS(OS) No.2554/2008 is for recovery of monies as well as for mandatory injunction on

account of breach of contract by the defendants; (ii) according to the plaintiff also the breach of the Agreements occurred in the year 2001; (iii) it was

thus the contention of the defendants that the suit filed in the year 2008 was barred by time of three years commencing from the time when the

contract was to be performed prescribed in Article 27 of the Schedule to the Limitation Act, 1963; (iv) the plaintiff was seeking benefit of Section 14

of the Limitation Act; (v) the counsel for the plaintiff, in his written arguments filed as far back as in February, 2011 had relied on (a) Panchu Gopal

Bose Vs. Board of Trustees (1993) 4 SCC 338; (b) Fateh Chand Vs. Wasudeo Shrawan Dalal AIR 1948 Nag 334; (c) Firm Behari Lal Baij Nath

Prasad Vs. Punjab Sugar Mills Co. Ltd AIR 1943 All 162; and, (d) M.P. Steel Corporation Vs. Commissioner of Central Excise (2015) 7 SCC 58

laying down that Arbitration proceedings are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act and

therefore Section 14 of the Limitation Act would be applicable to the Arbitration proceedings as well; (vi) the counsel for the plaintiff had also drawn

attention to Sections 3 and 43 of the Arbitration Act to contend that thereunder also time taken in the arbitration proceedings is liable to be extended;

and, (vii) the counsel for the plaintiff however on 16th March, 2017 was unable to tell, on what date of the year 2001 the cause of action for the reliefs

claimed in the suit accrued, on which date the arbitration proceedings commenced, whether the time till the date of Arbitral Award only was to be

excluded or the time till the date of the setting aside of the Arbitral Award by the

Singapore Court to be excluded.Â

15.It was further enquired from the counsel for the plaintiff on 16th March, 2017 as to how the ingredient of Section 14 of the Limitation Act, of the

Court in which the proceedings were being pursued, from defect of jurisdiction or other cause of like nature being unable to entertain it, was fulfilled

inasmuch as it appeared that the option of arbitration was/is available to the plaintiff on the date of institution of the CS(OS) No.2554/2008 also.Â

16.The senior counsel for the defendants in response to the aforesaid query, on 20th April, 2017 referred to (i) India Electric Works Ltd. Vs. James

Mantosh AIR 1971 SC 2313; (ii) Zafar Khan Vs. Board of Revenue, U.P. AIR 1985 SC 39; (iii) Consolidated Engineering Enterprises Vs. Principal

Secretary, Irrigation Department (2008) 7 SCC 169; and, (iv) M.P. Steel Corporation Vs. Commissioner of Central Excise (2015) 7 SCC 58.

17.The counsel for the plaintiff, in his written arguments submitted on 1st May, 2017, has contended that (i) the defendant has been taking inconsistent

stand with respect to the existence of the Arbitration Agreement; while the defendant sought disposal of OMP No.300/2001 on the ground of the

plaintiff having initiated arbitration, the defendant thereafter challenged the existence of the Arbitration Agreement; (ii) the said inconsistent stand of

the defendant has left the plaintiff remediless for its claims against the defendant; (iii) since the Settlement Agreement by which arbitration of Mr.

Samuel J. Marshall was agreed is dated 18th January, 2002 when Bhatia International Vs. Bulk Trading S.A. (2002) 4 SCC 105 was in vogue,

notwithstanding overruling thereof vide Balco Vs. Kaiswer Aluminum (2012) 9 SCC 552, the parties will be governed by Bhatia International supra;

(iv) as per Bhatia International supra, inspite of the seat of arbitration being outside India, since the parties agreed to be governed by Indian law, Part-I

of the Arbitration Act would apply; reliance is placed on Union of India Vs. Reliance Industries Limited 2015 (10) SCALE 149; (v) the defendant was

thus required to apply under Section 8 of the Arbitration Act and having not so applied, cannot take the plea of the parties being required to be

referred to Arbitration; (vi) this Court has jurisdiction also because the monies are lying deposited in OMP No.300/2001 in this Court; (vii) OMP

No.300/2001 was instituted on 3rd October, 2001 and disposed of on 15th September, 2008, immediately whereafter CS(OS) No.2554/2008 was filed

on 8th December, 2008; (viii) the cause of action has been continuing and was extended from time to time on the basis of correspondence,

agreements litigation between the parties from 2001 till 2008 and which is fully covered under Section 18 of the Limitation Act; and, (ix) even if it

were to be held that the suit is delayed, it will come under Section 14 of the Limitation Act.

18. As far as the contention aforesaid of the counsel for the plaintiff, of the suit being maintainable for the reason of the defendant having not applied

under Section 8 of the Arbitration Act is concerned, as aforesaid, the grounds taken in IA No.9251/2009 for rejection of the plaint, of the suit claim

being not maintainable for the reason of Arbitration Agreement between the parties, has already been dismissed and this order is confined only to the

aspect of limitation and that too on demurrer since issues have not been framed and trial has not taken place as yet. The counsel for the plaintiff in the

written arguments has failed to give the dates which were enquired from him on 16th March, 2017 as aforesaid.

19. As also recorded in the order dated 16th March, 2017, the suit for recovery of damages for breach of contract occurred in 2001, under Article 27

of the Schedule to the Limitation Act could have been filed within three years therefrom i.e. till the year 2004 and the suit filed in 2008 is palpably

barred by time. To get over the same, the plaintiff though has not filed any separate application under Section 14 of the Limitation Act but in cause of

action paragraph 25 of the plaint has pleaded as under:-

25. The cause of action accrued in favour of the plaintiff as detailed in the plaint continuously, firstly on January, 12, 2001, February 28, 2001 and

March, 03, 2001 when Contracts No.25 & 26, 41 and 4th Contract were entered into between the parties. The cause of action again arose when the

goods sent by the Plaintiff were rejected by the Defendant and the Plaintiff issued the demand note dated September 8, 2001. The cause of action

again arose on January 18, 2002 when the Settlement Agreement was executed. The cause of action again arose in November 2002 when both the

Plaintiff and the Defendant issued notices for arbitration. The cause of action also arose on June 20, 2005 when the arbitral award covering all the

claims of the Plaintiff (including those in the present suit) was passed in favour of the Plaintiff and against the Defendant. The cause of action again

arose on July 31, 2006 when the High Court of Singapore set aside the said arbitral award. The cause of action further arose on September 11, 2008

when the arbitrator revived the claim of the Plaintiff and passed an interim order. The cause of action also arose on September, 15, 2008 when the

Defendants requested for the disposal of O.M.P. No.300 of 2001 in view of the order passed by the arbitrator. The cause of action further arose on

October 06, 2008 when in view of undated Notice of Challenge the Ld?? Arbitrator recused himself from the arbitration. The claims made by the

plaintiff in the present suit were the claims before the Arbitral Tribunal. The defendants suffered an award, which was set aside by the High Court of

Singapore. The defendants claimed that there was no arbitration agreement notwithstanding that they had consented to an order before this

Hon??ble Court in OMP 300 of 2001. The arbitral proceedings are civil proceedings and the award by the Arbitral Tribunal is a civil decree. The

plaintiff is filing the present suit to recover the large amounts due and recoverable from the defendants without wasting any further time on the false

and frivolous technical objections by the defendants that there is no arbitration agreement existing and subsisting between the parties. Arbitration

proceedings were pending before Court and Arbitral Tribunal. The arbitral decree is deemed to be a decree passed by the Court. In any case, the

defendants are deemed to have accepted their liability to meet their obligations. The order passed in OMP 300 of 2001 on September, 15, 2008 was a

consent order, and deals with the substratum of all claims of the plaintiff. Arbitration was pending till the time the Ld?? Arbitrator recused himself

on October 06, 2008. Thus, until September, 15, 2008/October 06, 2008, civil proceedings were pending before Court/Arbitral Tribunal. Therefore, for

the purpose of limitation, the time upto the said order has to be excluded. Suit of the plaintiff is, well within the period of limitation.???

20.The counsel for the plaintiff however on 16th March, 2017 was asked to satisfy the entitlement of the plaintiff to invoke Section 14 of the

Limitation Act which is as under:-

??14. Exclusion of time of proceeding bona fide in court without jurisdiction ??

(1)In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding,

whether in a court of first instance or of the appeal or revision, against the

defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such

proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1)

shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the

ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation - For the purpose of this section, -

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it

ended shall both be counted; Â Â

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction. Â?? Â

It was enquired from the counsel for the plaintiff that when according to the plaintiff itself the arbitration clause exists, how can plaintiff satisfy that

the Arbitral Tribunal, from defect of jurisdiction or other cause of a like nature was unable to entertain the claim subject matter of the suit within the

meaning of Section 14 Supra. Â

21. While Section 3 of the Arbitration Act is not found to be of any relevance to the aspect of limitation, Section 43 Sub-Section (4) was referred to, is

as under:

43. Limitations. (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Court. Â

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred

in section 21.Â

(3)Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred

unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies,

the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed

has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.Â

(4)Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of

the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings

(including arbitration) with respect to the dispute so submitted.Â??

22.Chagla, C.J., speaking for the Division Bench of High Court of Bombay in Purshottamdas Hassaram Vs. Impex (India) Ltd. AIR 1954 Bom 309

held that Courts referred to in Section 14 of Limitation Act are judicial Courts, i.e. Courts established by the law of the land and not Courts in the

wider sense of domestic forums or tribunals. Therefore in computing the limitation period prescribed for any suit, the time taken upÂ by the plaintiff in

prosecuting against the defendants, infructuous proceeding before an Arbitrator cannot be excluded under Section 14 even if the other ingredients of

the Section are satisfied. It was further held that as Section 37 (5) of the Arbitration Act, 1940 then in vogue made a statutory provision for exclusion

of time taken up in arbitration proceedings, it is not open to Court to rely on Section 14, as applying by analogy to arbitration proceedings and the time

taken up in arbitration proceedings can be excluded under Section 37(5) of the Arbitration Act (of 1940) and not under Section 14 of the Limitation

Act. A three Judge Bench of the Supreme Court in The Commissioner of Sales Tax, U.P. Lucknow Vs.Â Parson Tools and Plants, Kanpur (1975) 4

SCC 22 approved of the said judgment of the Division Bench of the High Court of Bombay.Â

23.Supreme Court in Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department (2008) 7 SCC 169 again held that the

Arbitration Act is a special law, consolidating and amending the law relating to

arbitration; the Act does not prescribe the period of limitation for various proceedings thereunder, except where it intends to prescribe a period different from what is prescribed in the Limitation Act; Section 43 of the Arbitration Act makes the provisions of Limitation Act applicable to proceedings both in Court and arbitration; there is also no express exclusion of application of any provision of the Limitation Act to proceedings under the Arbitration Act, but there are certain specific departures from the general provisions of the Limitation Act.Â

24. Applying the aforesaid principle Section 43(4) of the Arbitration Act (a special law), having expressly provided for computing the time prescribed by the Limitation Act for commencement of proceedings (including arbitration) with respect to the dispute submitted to arbitration and arbitral award wherein is set aside by the Court, the provisions of Section 14 of the Limitation Act will have no application to the said situation and the computation of limitation will be under Section 43(4) of the Arbitration Act only.

25. As per averments in the plaint, the cause of action for the suit can be said to have accrued on 8th September, 2001 when the plaintiff raised a claim of USD 584500 on the defendants. Thus the last date for institution of the suit was 8th September, 2004. The arbitration proceedings are informed to have commenced in November, 2002. Though the date of the month of November is not pleaded but for the present purposes we will take the same to be 30th November, 2002. The Arbitral Award was announced on 20th June, 2005 and set aside on 31st July, 2006. Thus, the period w.e.f. 1st December, 2002 to 31st July, 2006 is to be excluded in computation of limitation for this suit instituted on 5th December, 2008, under Section 43(4) of the Arbitration Act.

26. Computing limitation on the basis of the aforesaid dates, limitation commenced running on 8th September, 2001 and continued to run till 30th November, 2002 when arbitration commenced, exhausting one year two months and twenty two days.

27. Limitation again began to run from the day next of 31st July, 2006 when the award was set aside, i.e. from 1st August, 2006 and by 5th December, 2008 when the suit was instituted, two years four months and four days had lapsed. Adding the pre-commencement of arbitration time of one year two months and twenty two days to this time, the suit, even after excluding the

period between commencement of arbitration and the date of setting aside of the award by the Court, was instituted beyond the prescribed limitation of three years.Â

28. Though I have held Section 14 of the Limitation Act, being a general law, to be not applicable but may state that the plaintiff is unable to satisfy the

ingredient thereof the Arbitration Tribunal, before whom the plaintiff was pursuing the said claim, owing to defect of jurisdiction or any other cause of

like nature being unable to entertain it. Merely because the defendant is disputing Arbitration Agreement does not mean that the Arbitration

Agreement does not exist. The plaintiff, instead of establishing the existence of the Arbitration Agreement which it pleads before this Court, before

the appropriate forum has chosen to give up the plea of existence of the Arbitration Agreement and which is not permissible for invoking Section 14.

For Section 14 to apply, it has to be established that the forum before which the plaintiff was bona fide with due diligence pursuing the claim earlier

from defect of jurisdiction was unable to entertain it. Even if the defendant, before the other forum is contesting the jurisdiction of that forum, the

same would not entitle the plaintiff to give up its plea of that forum having jurisdiction and approach the Court. A plaintiff cannot be so permitted to

ride in two boats and has to elect and after having elected, pursue the remedy with due diligence and bona fide.

29. Thus the plaint is liable to be rejected under Order VII Rule 11 of the CPC on the ground of claim therein, from averments in the plaint itself, being

barred by time. The equitable argument, of the defendant by its conduct having not allowed the plaintiff to pursue its claim neither in arbitration nor

before this Court, cannot make a claim which is barred by time within time.Â

30. The plaint in CS(OS) No.2554/2008 is thus rejected.Â

31. That brings me to IA No. 15631/2017, orders wherein were also reserved to be pronounced along with this order.Â

32. Though ordinarily on rejection of the plaint, the question of the plaintiff being entitled to any interim relief does not arise and though IA

No.8552/2010 in OMP No.300/2001 filed by the defendant for release of the monies lying deposited therein has already been allowed but I must admit

that the said application came to be allowed on the representation and understanding that the said monies were deposited in this Court by the

defendant itself. However as aforesaid, the said monies are auction proceeds of the sugar qua which OMP was filed and qua which interim protection was granted.Â

33.I have wondered of the entitlement of the defendant to the said monies and interest accrued thereon. The defendant has not filed any claim against the plaintiff and has no decree for recovery of money against the plaintiff. Sugar, which was auctioned, admittedly belonged to the plaintiff though in pursuance to the contract of sale thereof entered into by the plaintiff with the defendant, was headed for delivery to the defendant and which delivery was interdicted vide order dated 3rd October, 2001 in OMP No.300/2001. It is the plaintiff alone which has been pursuing its money claims against the defendant. The defendant has nowhere shown any entitlement to the monies, not even in IA No.8552/2010 in OMP No.300/2001, file whereof has remained attached to file of this suit. The only reason given for seeking release of the said monies was that the plaintiff having not approached any appropriate forum for appointment of fresh Arbitrator and instead having filed a suit and having abandoned OMP No.300/2001 also, the defendant had become entitled to the monies lying deposited. I am unable to fathom as to how that can be a reason for the monies, being auction proceeds of the sugar belonging to the plaintiff, being released to the defendant.Â

34.Thus, even though the claim of the plaintiff in the suit has been found to be barred by time, the same does not disentitle the plaintiff from obtaining the monies lying deposited in OMP No.300/2001 in this Court. However, out of the said monies, the claims of Railways and Excise Department as have already been found in the orders in OMP No.300/2001 mentioned hereinabove, have to be satisfied unless have since been satisfied by the plaintiff/petitioner.Â

35.Accordingly, IA No. 15631/2017 is disposed of by directing the monies lying deposited in OMP No.300/2001 together with interest accrued thereon to be released to the petitioner/plaintiff less the amounts already ordered to be released in favour of the Railways and Excise Authorities.Â To enable the defendants, if aggrieved, for taking their remedies against this order, the release be not effected before 15th May, 2018.Â Â Â Â Â Â