

**(2004) 3 ARBLR 564 : (2006) 131 CompCas 194 : (2004) 4 CTC 690 : (2004) 4 LW 295
: (2004) 4 MLJ 182**

Madras High Court

Case No: O.S.A. No. 29 of 1999

Moolchand Exports
(P)Ltd.

APPELLANT

Vs

Man-Producten
Rotterdam BV and
Peter J. Morgan

RESPONDENT

Date of Decision: July 26, 2004

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 46, 47, 48, 49, 86#Foreign Awards
(Recognition and Enforcement) Act, 1961 " Section 6, 7

Citation: (2004) 3 ARBLR 564 : (2006) 131 CompCas 194 : (2004) 4 CTC 690 : (2004) 4 LW
295 : (2004) 4 MLJ 182

Hon'ble Judges: P.D. Dinakaran, J; N. Kannadasan, J

Bench: Division Bench

Advocate: Arvind Datar, for the Appellant;

Judgement

P.D. Dinakaran, J.

The point for consideration in this appeal is as to the enforcement of an award dated
15.11.1995 passed by an

arbitrator under the provisions of the Foreign Awards (Recognition and Enforcement Act)
1973, which was enacted to give effect to the

International Convention on Recognition and Enforcement of Foreign Arbitral Awards
done at New York on 10.6.1958, in the context of Section

85 of the Arbitration and Conciliation Act, which reads as follows:-

Section 85(1):- The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign

Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

Section 85(2):- Notwithstanding such repeal:-

a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless

otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

b) all rules made and notifications published, the said enactments shall, to the extent to which they are repugnant to this Act, be deemed

respectively to have been made or issued under this Act.

2. An award came to be passed in an arbitral proceedings between the appellant, the company in liquidation and the first respondent on

15.11.1995 by the second respondent arbitrator. Immediately thereafter, the Arbitration and Conciliation (Third) Ordinance, 1996 came to be

notified with effect from 25.1.1996, which in turn was replaced by the Arbitration and Conciliation Act, 1996 with effect from 22.8.1996. The

Arbitration and Conciliation Act, 1996, being an Act to consolidate and amend the law relating to domestic arbitration, international commercial

arbitration and enforcement of foreign arbitration awards as also to define the law relating to conciliation and for matters connected therewith or

incidental thereto, of course brought a sea-change in the arbitration enactments.

3. The enactment of Arbitration and Conciliation Act, 1996, even though came into force from the date of notification i.e., on 22.8.1996, it has to

be read with reference to the date of ordinance viz., 25.1.1996 in view of Section 86 of the Arbitration and Conciliation Act 1996, which reads as

follows:-

Section 86:- Repeal of Ordinance 27 of 1996 and Saving:-

(1) The Arbitration and Conciliation (Third) Ordinance, 1996 (27 of 1996) is hereby repealed.

(2) Notwithstanding such repeal, any order, rule, notification or scheme made or having done or any action taken in pursuance of any provision of

the said ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act.

4. The first respondent filed an application to enforce the award dated 15.11.1995 invoking Sections 46, 47, 48 and 49 of the Arbitration and

Conciliation Ordinance, 1996 in O.P.No.333 of 1996. This Court by an order dated 18.6.1997, taking note of the fact that the appellant even

though had filed vakalat, but failed to substantiate their objection, held that the appellant herein had not discharged their burden that the award

dated 15.11.1995 was not enforceable on the first respondent and allowed the petition, having satisfied with the conditions prescribed u/s 48 of

the Arbitration and Conciliation Act, 1996. Against the said order, the appellant has preferred the above appeal.

5.1. Since in the meanwhile the company went into liquidation, an Official Liquidator was appointed. Mr. Arvind Datar, learned Senior Counsel

appearing for the appellant company (in liquidation) invited our attention to Section 85 of the Arbitration and Conciliation Act, 1996 referred supra

and contends that the impugned award dated 15.11.1995 could be enforced only under the provisions of the Foreign Awards Enforcement Act

referred to above.

5.2. According to Mr. Datar, eventhough the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act, 1940 and the Foreign

Awards Enforcement Act, 1961 have been repealed by the Arbitration and Conciliation (Third) Ordinance, 1996, which was subsequently

replaced by Arbitration and Conciliation Act, 1996, in view of the non-obstinate clause u/s 85(2) of the 1996 Act, unless the parties to the award

agree to adopt the provisions of the Arbitration and Conciliation Act, 1996 for the enforcement of the award which was passed prior to the date of

notification of the said Ordinance, 1996 and the Act 1996, such arbitral proceedings including the award could be enforced only under the

respective Acts. However, Mr. Datar very fairly submits that the appellant is not canvassing the case on the merits of the award at all.

6. Unfortunately, there is no representation on behalf of the respondents.

7. We have given careful consideration to the submissions made on behalf of the appellant.

8. By virtue of Section 85(1) of the Arbitration and Conciliation Act, 1996, The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the

Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are repealed. But, in view of

the non obstinate clause in Section 85(2) of the Arbitration and Conciliation Act, 1996, the provisions of Arbitration and Conciliation Act, 1996,

The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act,

1961 shall apply in relation to the arbitration proceedings which commenced before the Arbitration and Conciliation (Third) Ordinance, 1996 and

the Arbitration and Conciliation Act, 1996 came into force.

9. Concededly, the award was passed on 15.11.1995, much earlier to the notification of the ordinance. Therefore, the impugned arbitral

proceedings was neither commenced nor completed on or after the date of notification of the Arbitration and Conciliation Act 1996 much less the

ordinance, 1996. A closer reading of Section 85(2)(a) of the Arbitration and Conciliation Act, 1996 makes it clear that unless otherwise the

parties agree to adopt the new enactment viz., the Arbitration and Conciliation Act, 1996 , the proceedings initiated and the decisions arrived at

under the respective enactments would be proceeded with only under the respective enactments. Therefore, we are of the considered opinion that

since sufficient safeguards are provided u/s 85(2) of the Arbitration and Conciliation Act, 1996 to apply the provisions of the Foreign Awards

(Recognition and Enforcement) Act, 1961 (45 of 1961), for the enforcement of the award dated 15.11.1995 made under the provisions of the

Foreign Awards (Recognition and Enforcement) Act, 1961 the same has to be enforced only as per Sections 6 and 7 of the Foreign Awards

Enforcement Act, 1961. Since this aspect of the case was not dealt with by the learned single Judge, we are constrained to interfere with the order

dated 18.7.1997 in O.P.No.333 of 1996. Accordingly, the appeal is allowed and the order of the learned single Judge is set aside, of course

recording the statement of the learned Senior Counsel Mr. Arvind Datar that the appellant is not canvassing on the merits of the award and

permitting the first respondent to work out his remedies in the manner known to law, invoking the provisions under the Foreign Awards

(Recognition and Enforcement) Act, 1961.