

IN THE HIGH COURT OF DELHI AT NEW DELHI

EX.P. 223/2007 & E.A. (OS) No.576/2008

Reserved on: February 15, 2012

Decision on: February 28, 2012

MARINA WORLD SHIPPING CORPORATION

LTD.

..... Decree Holder

Through: Mr. Amitava Majumdar, Mr.
Arvind K. Gupta, Mr. Rahul
Mangla and Mr. Siddharth Ranka,
Advocates.

Versus

JINDAL EXPORTS & IMPORTS PRIVATE

LTD.

..... Judgment Debtor

Through: Mr. Ramji Srinivasan, Senior
Advocate with
Mr. Shailesh Kapoor, Mr. Animesh
Kumar Sham and Mr. Vivek Paul
Oriel, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

28.02.2012

“Although *charter party* sounds like an afternoon of fun in a rented boat, it is actually a very dry document filled with an ocean of fine print.”

- James E. Clapp ***Random House Webster’s Dictionary of the Law*** (2000), 79.

1. This petition under Sections 44 and 46 of the Arbitration & Conciliation Act, 1996 (‘Act’) involves an exercise of trying to find an arbitration agreement in the “ocean” of fine print in the Charter Party in question. This petition by Marina World Shipping Corporation Limited (‘Marina’) seeks to enforce a foreign Award dated 26th September 2000 whereby the Respondent Jindal Exports Private Limited (‘Jindal’) was directed to pay Marina US Dollar (‘USD’) 47,506.42 as demurrage earned

by Marina under the terms of the Charter Party ('C/P') dated 5th November 1994 together with interest at 7% per annum or *pro rata* thereof from 31st April 1995 until payment. Jindal was also directed to pay the costs of arbitration of GBP 2,250 together with interest at 8.5% per annum from the date of the Award till date of payment.

2. Marina states that by a telex dated 5th November 1994 Nederkoorn Shipbroking Pte. Limited ('Nederkoorn'), acting as the broker of Jindal, confirmed to M/s. Portshire Limited Shipbrokers and Consultants ('Portshire'), a co-broker for Marina, the fixture in respect of a vessel M.T. Bakri Adventurer for carriage of cargo consisting of coconut oil and palm oil from Pasir Gudung Port, Kelang to the Port of Novorossik. This was confirmed by a telefax dated 7th November 1994 to the same effect sent by Nederkoorn to Portshire. Copies of the telex dated 5th November 1994 and the fax message of 7th November 1994 have been enclosed with the petition.

3. It is stated that on 28th November 1994 a vessel M.T. Bakri Adventurer proceeded to load at the Port of Pasir Gudang. It thereafter commenced a second loading to ship from M.V. Ararat. On 21st November 1994 the vessel proceeded for a third loading from Port Kelang. This was completed on 21st November 1994. The vessel thereafter proceeded to the discharge Port of Novorossik.

4. Marina states that although the vessel was scheduled to berth at Novorossik on 30th December 1994, it could not do so as it was repairing its pump mid-stream. It is then stated that between 2nd and 4th January 1995 there were heavy rains at Novorossik resulting in the flooding of the Port and its temporary closure.

5. The case of Jindal, however, is that the captain of the vessel, taking advantage of the situation, issued a Notice of Readiness ('NOR') for discharge on 2nd January 1995 while the pumps were still out of order. The NOR was accepted on behalf of Jindal by its receiver on 6th January 1995 and discharge of cargo commenced at 16:48 hours on that date. However, the discharge rate could not be maintained since both the pumps lost power and there was no sedimentation due to improper heating. According to Jindal, the discharge concluded on 9th January 1995. However, the complete cargo could not be discharged due to sedimentation. Jindal claimed that it suffered losses on account of short discharge of cargo.

6. On 24th January 1995, M/s. Harlec Shipping Inc. ('Harlec'), an agent of Marina, raised the bill on Jindal for demurrage charges for the period from 2nd January 1995 to 9th January 1995 for USD 47,506.42. This claim was refuted by Jindal. On 1st February 1995, M/s. Hontrade Ltd. ('Hontrade'), an agent of Jindal, raised a claim of USD 34,514 against Marina for short receipt of their consignments. On 2nd February 1995, Jindal sent Marina a fax objecting to the demurrage claimed and requested for the requisite documents and details. Jindal states that on 20th February 1995, Harlec sent a reply which was forwarded by Portshire to Nederkoorn with instructions to pass it on to the charterers. This according to Jindal showed that Nederkoorn was a co-broker of Marina itself and was not acting as Jindal's agent.

7. Jindal states that on 15th March 1995 it received a fax from the North of England Protection and Indemnity Association ('NEPIA') on behalf of Marina calling upon Jindal to pay Marina USD 47,506.42 in respect of outstanding demurrage. The fax message referred to a C/P dated 5th

November 1994 which provided that “demurrage payments, if any, to be settled within 15 days after completion of discharge.” It was added in the said fax message that “For the avoidance of doubt kindly (note) that any alleged/ cargo claim which (you) may be thinking about pursuing should not be confused with the outstanding demurrage claim (and) both be dealt with separately and any such cargo claim will be dealt with by P&I clause.”

8. This was followed by another fax message on 5th April 1995 from Ms. Tejpal Dhesi of NEPIA to Jindal requesting Jindal to agree to appointment of an arbitrator pursuant to the C/P dated 5th November 1994. It was stated in this fax as under:

“We would draw your attention to Line 4 of rider Clause 14, which states that “arbitration in London under English law to apply”. Therefore, please provide us with your agreement within the next forty eight hours to the appointment of one of the following:

Mr. Christopher Moss
Mr. Mark Hamsher
Mr. Michael Baskerville

This confirmation is required by latest close of business 7th April 1995, failing which we shall proceed with the proper appointment with assistance from the court.”

9. On 6th April 1995, Jindal sent a fax message to NEPIA as under:

“To: The North of England Protecting & Indemnity Association Limited.

Kind Attn: Miss Tejpal Dhesi (Barrister FD & D DEPT.)

Sub: Bakri Adventure (Bakri Navigation)

Please refer to your fax message dated 05-04-95. The fax message dated 15-03-95 was replied on the same

day which we believe must have received by the owners. We would request you to send us the copy of the signed charter party dated 05-11-94 where we have accepted the terms mentioned at line 4 of rider clause 14 on receipt of the above c/p we will revert back to you.”

10. Marina states that on 24th April 1995 a fax was sent by Nederkoorn to Portshire forwarding an amended draft copy of the C/P. Marina states in response thereto Portshire replied to Nederkoorn on 1st May 1995 stating “please note the following from the owners” and appending a fax dated 30th April 1995 from Marina to Portshire suggesting the insertion of an arbitration clause as under:

“This charter party shall be governed by and construed in accordance with English law and any dispute arising out of this charter party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party’s arbitrator, the other party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.”

11. Copy of the above letter from Portshire to Nederkoorn was not marked to Jindal. Marina claims that on 4th May 1995 Nederkoorn wrote to Portshire enclosing the “first/second original” copy of the C/P for signatures. Again a copy of this letter was not marked to Jindal. Marina claims that on 5th June 1995 itself, Marina signed the C/P as requested by Nederkoorn and sent the original back to Nederkoorn. According to Marina, as a result of the exchange of above correspondence, it was

evident that Marina and Jindal had agreed upon an arbitration agreement in writing. It is specifically pleaded in an affidavit dated 7th August 2007 filed in these proceedings by the constituted attorney representing Marina that “an arbitration agreement is contained in exchange of letters or telex messages between the parties.”

12. Jindal’s case is that the fax message dated 24th April 1995 was sent by Nederkoorn to Portshire without any notice to Jindal and without consulting or obtaining consent of Jindal. Jindal was also not kept in the loop in such communications exchanged between Nederkoorn and Portshire on 1st and 4th May and 5th June 1995. Jindal states that even by that date it did not receive a copy of the C/P. NEPIA sent it a fax message dated 31st May 1995 referring to “earlier communications in this matter” and that “Members advise that a signed copy of the Charter Party has been sent via the broking channels.” Jindal was by that message asked by NEPIA to agree to the appointment of one of the three persons named in the letter as the sole Arbitrator. These three names were the same as indicated in NEPIA’s earlier letter dated 5th April 1995. On 5th June 1995, Jindal wrote to NEPIA as under:

“Dear Sir,

1. We regret to inform you in spite of our umpteen reminders to brokers, we still await to receive a copy of signed charter party agreement. We want you to use your good office for organising the same. Even we had informed you about this in our last fax to you.
2. Further we still await reply to our request for compensating us for short shipment at unload port the value for claim was approx. 34,000/- USD.
3. We are surprised that in the present case what is required is the document/compensation mentioned at Sl. No.1 & 2

above and what you are doing is ignoring them and giving the so called generous time extension unilaterally which we never asked for. We are not in a position to give any reply unless we get the above document/ reply.”

13. By a reply dated 8th June 1995, NEPIA informed Jindal that Jindal should receive shortly a copy of the C/P which had been sent to it through the broking channel. There was no reference made to the earlier correspondence exchanged between Nederkoorn and Portshire. Jindal states that on 29th June 1995 it received two sets of the original C/P purportedly dated 5th November 1994 signed by Marina. It was projected to be the original C/P. Jindal states that it refused to accept or consent to the said C/P or accept the terms and conditions therein including the arbitration clause. Jindal therefore did not return to Marina the signed C/P. It is Jindal’s case that the document purporting to be the C/P dated 5th November 1995 is illegal, invalid and not binding upon it. Jindal maintains that the rights and liabilities of parties are to be governed only by the terms and conditions agreed under the telex dated 5th November 1994 and telefax dated 7th November 1994, which formed the basis of the agreement between the parties.

14. On 20th September 1995, NEPIA wrote to Jindal disclosing, according to Jindal, for the first time, the rider clause of Part-I of the C/P which reads as under:-

“No.16 Arbitration in London under English law to apply”

“No.19 Charter party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 and any statutory modification or re-enactment thereof at the time being enforced, unless the parties agree upon a sole arbitrator, one arbitrator shall be

appointed by each party and the arbitrators so appointed shall appoint a third arbitrator”.

15. In the above letter dated 20th September 1995, NEPIA informed Jindal that it was proceeding with the appointment of an arbitrator in accordance with the C/P and that under Clause 19 thereof it was proposing the names of three arbitrators, one of whom would act as the sole Arbitrator and sought confirmation of Jindal. Two of the three names were different from those suggested in the previous letter dated 5th April 1995. Jindal states that it sent a fax dated 12th October 1995 to NEPIA stating that the claims of Marina were without merit and could not be referred to arbitration. On 25th January 1996, NEPIA sent another fax informing Jindal that they had appointed Mr. A.S. Christofides as Marina’s arbitrator as per the terms of the C/P dated 5th November 1994. Jindal was called upon to appoint its arbitrator within 14 days, failing which Mr. Christofides would be requested to accept appointment as the sole Arbitrator. On 26th January 1996 Mr. Christofides sent a fax to NEPIA stating that his acceptance to act as an arbitrator “is subject to LMAA terms”. It is stated that a copy of the said fax was not sent to Jindal. The LMAA terms were not, in any event, part of the arbitration clause invoked by Marina.

16. On 20th February 1996 Jindal sent its representative to the NEPIA office to convince them that Marina’s claims were baseless and that Jindal was entitled to its counter claim towards short supply of the consignment. Jindal, on 29th February 1996, forwarded to NEPIA its counter claims and also pointed out that the C/P Agreement had been forwarded to it only on 29th June 1995, six months after the purported date of the said C/P Agreement.

17. Jindal states that between 1st March 1996 and 12th April 1999, nothing was heard from either the sole Arbitrator or NEPIA or Marina. On 12th April 1999, M/s. Bose and Mitra, Advocates, acting for Marina, sent a legal notice to Jindal demanding the demurrage amount stating that the arbitration clause would be invoked if the claim was not paid. A reply was sent on 19th April 1999, by Jindal's lawyer, denying the acceptance of the C/P dated 5th November 1994. Jindal claims that on 19th January 2000 M/s. Bose and Mitra wrote to NEPIA seeking further documents and expressed concern about the limitation to initiate arbitration as C/P Agreement was more than five years old. On 4th April 2000, NEPIA addressed a letter to Mr. Christofides stating that he should proceed with the arbitration. By a fax message dated 5th April 2000, Mr. Christofides accepted his appointment as the sole Arbitrator. On 6th April 2000, Jindal sent a fax message to NEPIA with a copy to Mr. Christofides stating that NEPIA had withdrawn its earlier notice for appointment of an arbitrator and that arbitration proceedings had not commenced till date. It was maintained that Marina's claims against Jindal were not valid as there was no agreement between them to have the disputes settled through arbitration. By a letter dated 18th April 2000, Jindal sought time from the Arbitrator to file objections to the continuation of the arbitration. In a reply dated 19th May, 2000, sole Arbitrator informed Jindal that since he has already accepted his appointment, "only the Court may disturb it" and, therefore, he could not entertain Jindal's objection to his jurisdiction.

18. On 26th September 2000, the sole Arbitrator gave an Award allowing the claims of Marina and rejecting the counter claims of Jindal in the manner indicated hereinbefore.

19. On 21st July 2002 on the strength of the aforementioned Award,

Marina filed a winding up petition C.P. No. 278 of 2002 under Section 433 and Section 434 of the Companies Act, 1956 in this Court. The said petition was dismissed by this Court, by a judgment dated 16th December 2003, holding that the said petition was not maintainable and that Marina had an effective remedy to seek the enforcement of the foreign Award. This Court noted Jindal's objection with regard to the existence and validity of the arbitration clause and the fact that the said issue "relates to the very foundation on the basis of which the arbitrator has assumed the power and sought to decide the dispute. Such a widely important question, therefore, required to be examined minutely and decided in accordance with law."

20. Thereafter, Marina filed claims in the High Court, Queen's Bench Division, Commercial Court on 25th February 2004 for permission from that Court to enforce the foreign Award dated 26th September 2000 as a judgment and an order of the Court under Section 26 of the Arbitration Act, 1950 of the United Kingdom. On 5th March 2004, the High Court of Justice, Queen's Bench Division, granted Marina permission, as prayed for. Jindal filed a witness statement of Mr. S.K. Jindal before the High Court of Justice on 27th April 2004 objecting to the foreign Award having been made a rule of the Court. An order was passed on 2nd August 2004 by the High Court of Justice refusing to recognize the witness statement filed by Jindal and on 12th August 2004 it entered judgment in terms of the foreign Award.

21. Thereafter, Marina filed Execution Petition No.16 of 2006 in this Court under Section 44A of the Code of Civil Procedure, 1908 ('CPC') for execution of the decree dated 12th August 2004 of the Queen's Bench Division, which had also issued a certificate dated 21st October 2004

under the Foreign Judgment (Reciprocal Enforcement) Act, 1933. By a judgment dated 21st March 2007, the said petition was dismissed as not being maintainable. Thereafter, the present Execution Petition was filed by Marina on 18th August 2007. Pursuant to the notice issued in the present petition, Jindal filed its reply and an affidavit to which Marina has filed a rejoinder.

22. The principal issue that arises for consideration in the present proceedings is whether there was an arbitration agreement between the parties. The said issue arises in the context of Section 47(1)(b) of the Arbitration Act, which reads as under:

“47. Evidence. – (1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court –

(a).....

(b) the original agreement for the arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award”

23. It is the contention of Jindal that in the absence of Marina’s producing before this Court a copy of the “original agreement for arbitration or duly certified copy thereof”, the present petition is not maintainable as such. The second contention is that even under Section 47(1) (c) there was mandatory requirement for Marina to produce “such evidence as may be necessary to prove that the award is a foreign award.” Jindal urges that in order to test case that there was an arbitration agreement between the parties, witnesses and documents would have to be examined. Reliance is placed on the judgment of the Supreme Court in

Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC 234.

Marina's case on the other hand is that the exchange of correspondence between Nederkoorn and Portshire establishes that there was a C/P agreement between the parties which included the arbitration clause. In particular, reliance is placed on a communication from Jindal dated 2nd August 2000 addressed to the learned Arbitrator in which it was confirmed by Jindal that, "we wish to proceed in this arbitration on documents only and would also like to submit further submissions." Marina's case is that by submitting to the arbitral proceedings, Jindal waived its objection to the jurisdiction of the Arbitrator or to the existence of the arbitration clause.

24. Section 47(1) does make it mandatory for a party applying for enforcement of a foreign award to produce before the Court the original agreement for arbitration or a duly certified copy thereof. While Section 47 (1) (a) of the Act does not itself spell out the consequence of a party failing to produce the original arbitration agreement, this has to be read in the context of Section 48(2) (a) of the Act which states that a court could refuse to enforce an award if it finds that the subject matter of the dispute "is not capable of settlement by arbitration under the law of India." Under the Act, a dispute between parties cannot be referred to arbitration in the absence of there being an arbitration agreement between them as defined in Section 7 of the Act which reads as under:

"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

(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.”

25. Mr. Amitava Majumdar, learned counsel for Marina, has produced before this Court a copy of the ‘Tanker Voyage Charter Party’ dated 5th November 1994, purportedly made at Singapore between Marina and Jindal. The document has been issued by Nederkoorn. It has the signature of only Marina and admittedly not of Jindal. The standard clause in Part-II appended to the C/P concerning arbitration is Clause 31 which, in fact, has been struck off. That clause states that any dispute arising between the parties from the performance of the C/P shall be settled in New York. The next document which forms part of C/P is a “side letter” which states that it had been mutually agreed between Marina and Nederkoorn that 5% commission including 2.5% co-broker commission would be paid to Nederkoorn “with deviation of freight/dead freight/demurrage.” Also appended to the C/P is an “Addendum No.1”. This consists of 21 clauses. Clause 19 thereof is the arbitration clause

which has already been extracted hereinbefore. This Addendum No.1 has only been signed by Marina and not by Jindal. Marina does not dispute that Jindal failed to return to Marina the copy of the C/P signed by Jindal. With Jindal questioning the validity of the said document, Marina seeks to bring its case under Section 7 (4) (b) of the Act to show that there was an arbitration agreement evidenced by “exchange of letters, telex, telegrams or other means of telecommunications which provide record of the agreement.”

26. The observations of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*** regarding evidence having to be led by the parties in order to prove the existence of an arbitration agreement were made in the context of Section 45 of the Act which envisages one of the parties to the agreement requesting a judicial authority to refer parties to an international arbitration. It was observed that “at the pre-reference stage contemplated by Section 45, the court is required to take only a *prima facie* view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal (itself) or before the court at the post-award stage.” The need for a full-fledged trial at the post award stage in order to ascertain if there was a valid arbitration agreement might be necessary if the party seeking to assert the existence of an arbitration agreement is able to even *prima facie* show the existence of an arbitration agreement between the parties.

27. A perusal of the correspondence, much of which has been extracted hereinbefore, reveals that the telex dated 5th November 1994 and the telefax dated 7th November 1994 is admitted by Jindal and has, in fact, been acted upon by the parties. In fact, it was reiterated by Mr. Ramji Srinivasan, learned Senior counsel for Jindal, during the course of the

arguments, that there were seven clauses forming part of Addendum No.1 which alone would have read between the parties at the time of fixture, i.e., 5th November 1994. Any addition to the owner's conditions could not have been made unilaterally by Marina without notice to and consent of Jindal. A careful perusal of the telefax dated 5th November 1994 bears out the above submission. It clearly states "owner's clauses 1-7 to be deemed incorporated in the Charter Party but with logical amendments i.e. freight payments etc." The telefax dated 7th November 1994 reiterates the above position. Interestingly, in the "Addendum No.1" appended to the C/P dated 5th November 1994 produced by Mr. Amitava Majumdar, the word 'end' appears after the first seven clauses and the left bottom corner of the page and the next page begins with the heading "Following Rider Clauses, as attached, are hereby deemed incorporated in this Charter Party". The rider clauses, including the crucial arbitration clause, are numbered from 16 onwards. As the correspondence between the co-brokers Portshire and Nederkoorn shows, these rider clauses were added at a later stage and without notice to Jindal.

28. The attempt by Marina to have an arbitration clause inserted in the C/P commenced much after the discharge of the cargo was completed. It is only by a message dated 30th April 1995 that Marina asked Portshire to insert such a clause and in turn Portshire wrote to Nederkoorn on 1st May 1995 in that regard. The above exchange of correspondence did not involve Jindal at all. Even the further letter dated 4th May 1995 from Nederkoorn to Portshire enclosing the C/P purportedly with the arbitration clause is not shown to have been either in consultation with or the consent of Jindal. There is no letter from Nederkoorn addressed to Marina to that effect at any point in time, even after the commencement of and during the arbitral proceedings.

29. The correspondence also shows that at the earliest opportunity Jindal asked for the copy of the C/P. However it was only on 29th June 1995 that it received a copy from NEPIA. There appears to have been confusion even at NEPIA's end as to the arbitration clause that was invoked, if at all, by Marina. NEPIA's fax message dated 5th April 1995 to Jindal referred to the "terms mentioned at line 4 of rider clause 14." As it transpired, there was no such Clause 14 at all. It was in its fax message dated 20th September 1995 to Jindal that NEPIA set out Clauses 16 and 19 of the C/P and purported to appoint an arbitrator on that basis. The above correspondence does not even *prima facie* show that Jindal had at any point in time agreed to the insertion of the above arbitration clause in the C/P.

30. Marina fails to offer any convincing explanation why after Mr. Christofides was appointed as the sole Arbitrator on 25th January 1996 no proceedings took place for more than three years thereafter. The proceedings revived on 5th April 2000 after Mr. Christofides again accepted his appointment as the sole Arbitrator. The plea that Jindal waived its objection to the jurisdiction of the Arbitrator by participating in the proceedings before the Arbitrator is contradicted by the fact that by a letter dated 18th April 2000 addressed to Mr. Christofides Jindal raised an objection to the continuation of the arbitration proceedings and to the appointment of the Arbitrator. The fact that such an objection was raised is clear from the Arbitrator's letter dated 19th April 2000 by which he informed Jindal that the proceedings would continue and that "only the court may disturb it." It is, therefore, not as if by participating in the arbitration proceedings Jindal had waived its objection to the existence or validity of the arbitration agreement.

31. Mr. Majumdar tried to persuade this Court to take judicial notice of the standard practice in the marine industry where most transactions take place through electronic means which are later ratified by the parties. He suggested that if the Court refused to accept that mere correspondence between brokers of the parties did not result in a contract that bound the parties, it may create an unwelcome 'precedent' for other similar cases. Mr. Ramji Srinivasan countered this submission by pointing out that Nederkoorn acted as Jindal's broker for a limited purpose of the fixture of the vessel and was by no means acting as Jindal's agent with authority to bind Jindal to an arbitration agreement without even seeking Jindal's consent.

32. The Court is not impressed with Mr. Majumdar's submission for the simple reason that it would be a question of fact whether in a given case the party seeking the enforcement of a foreign Award is able to establish the existence of a valid arbitration agreement between the parties. In the context of Section 7 of the Act, this could be demonstrated through contemporaneous documents which might unmistakably show the existence of such agreement. Whatever be the 'practice' of the trade, ultimately the Court must be satisfied that an arbitration agreement as known to law exists between parties. Whether the extent of authority of a broker for a specific transaction in a given case extends to that of an 'agent' with powers to bind the principal will again depend on the facts of each case. Here Marina has been unable to show that Nederkoorn was, beyond being a broker acting on behalf of Jindal for the limited purpose of the fixture of the vessel, also its agent for the purposes of agreeing on behalf of Jindal to a binding arbitration agreement. Consequently, the Court's finding in the present case that a valid arbitration agreement does not exist between Marina and Jindal cannot per se constitute a precedent

in another case, which will have to be decided on its own facts.

33. This Court is not satisfied even *prima facie* that there was, in fact, an arbitration agreement between Marina and Jindal. Neither the Award of the learned Arbitrator nor the order of the High Court of Justice making the Award a rule of the Court deals with this aspect of the matter. In as much as Marina has not even been able to *prima facie* demonstrate that there is an arbitration agreement between the parties, the requirement of Section 47 (1) (a) of the Act has not been satisfied. In the absence of an arbitration agreement between the parties, as envisaged in Section 7, there could have been no reference of the disputes to arbitration under Indian law. The ground of refusal of enforcement of the foreign Award under Section 48 (2) (a) of the Act stands attracted. Consequently, the foreign Award dated 26th September 2000 cannot be enforced under Section 44 read with Sections 47 and 48 of the Act.

34. The petition is, accordingly, dismissed with costs of Rs.25,000 which shall be paid by Marina to Jindal within four weeks.

S. MURALIDHAR, J.

FEBRUARY 28, 2012

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