

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on: May 31, 2013*

+ Arb.P.No.95/2013

SCHENKER INDIA PVT LTD Petitioner

Through Mr.Ashutosh Dubey, Adv. with
Mr.Abhishek Chauhan, Adv.

versus

SEARIR TRANSPORT SYSTEM Respondent

Through Mr.Rakesh K.Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of sole Arbitrator. The facts as per the petition read as under:-

- (i) The petitioner and the respondent entered into a Cargo Sales Agency Agreement dated 1st February, 1999 for facilitating business transactions, pertaining to ocean import, ocean export and air import shipments, wherein the respondent Company was to be acting for the petitioner in the State of Punjab.
- (ii) The agreement was terminated by mutual consensus vide e-mail dated 12th May, 2011, thereby stating the date of termination as 31st May, 2011.
- (iii) Both the parties to the agreement had a monthly reconciliation process, whereby a complete statement of monthly transactions and accounts, including balances were issued by the petitioner

and were reconciled and confirmed by the respondent. The statement of accounts was mutually reconciled till 31st March, 2011 which is an undisputed and admitted fact.

- (iv) The respondent defaulted in making payments after 2nd May, 2011. Various e-mails were exchanged between the petitioner and the respondent, wherein the petitioner has reminded the respondent time and again to make the payments that are due. However, the respondent continued to dodge the payment citing clarification of accounts, seeking statement of accounts for entire period from 1st January, 2006, even though the account for the same had already been duly settled.

2. The contention of the petitioner is that the respondent has failed to pay the outstanding amount of ₹1,02,63,726/- as well as the amount of ₹13,42,199/- towards the TDS till 31st March, 2011. As the said amount is not paid by the respondent as per the statement of account for the period 1st January, 2006 to 31st October, 2011, the details of which were handed over for reconciliation, through letters dated 4th November, 2011 and 5th November, 2011. But dispute arose between the parties and a legal notice dated 21st June, 2012 was issued by the petitioner to the respondent in order to invoke the arbitration clause. The respondent failed to take any step to nominate the Arbitrator within a month from the receipt of the said notice, rather the respondent denied the liability and disputed the petitioner's claim. Therefore, the petitioner left with no option but to file the present petition.

3. The petitioner has referred Clause 15 of the agreement dated 1st February, 1999. The same reads as under:-

“15. In case of any difference or dispute arising out of the meaning of interpretation between conditions of

agreement the same would be referred to arbitration as provided under the Indian Arbitration Act, 1940 with modifications and amendments up to date at Delhi only.”

4. Upon filing of the present petition, notice was issued to the respondent, who appeared in the Court on 26th April, 2013. Preliminary objection was raised by the learned counsel for the respondent that the petition is not maintainable in view of the letter dated 6th March, 1999 issued by the petitioner who had admitted that the agreement stood cancelled and *void ab-initio*. It is stated that since no fresh agreement between the parties was executed thereafter, the present petition is not maintainable in the absence of Arbitration agreement.

5. Learned counsel for the respondent has also referred para 6 of the reply dated 25th July, 2012 sent by the respondent to the legal notice of the petitioner dated 21st June, 2012 wherein it was categorically mentioned that there is no agreement between the parties which contains the arbitration clause to refer the dispute to arbitration, nor there exists any agreement to any terms and conditions for referring a dispute to arbitration and hence the dispute raised by the petitioner is not arbitrable. On merit it was stated in the reply that the said notice sent by the petitioner was totally false and frivolous as nothing is recoverable from the respondent rather the respondent has to receive payments from the petitioner for which the respondent reserves its right to take separate criminal action for fraud, cheating, illegal claim as well as to receive the balance amount from the petitioner.

6. The respondent was allowed to file the original documents i.e. original letter dated 20th October, 1998, appointing the respondent as Sales Representative for the territory of Punjab to carry out business activities

related in the field of cargo for exports/imports both by air and sea and letter dated 6th March, 1999 addressed by the General Manager of the petitioner company to the respondent informing that the agency agreement dated 1st February, 1999 stood cancelled and *void ab-initio*.

7. It is not denied by the respondent's counsel about the execution and signing of the agreement dated 1st February, 1999 which contained arbitration clause. However, he submits that the said agreement was already cancelled and declared as *void ab-initio* by the petitioner itself by letter dated 6th March, 1999 and no fresh agreement was executed between the parties after the issuance of the said letter dated 6th March, 1999. It is not denied by the respondent that business relations between the parties continued till the year 2011 and according to him accounts have been reconciled by the parties.

8. The respondent's simple case is that as far as the arbitration proceedings are concerned after declaring the agreement *void ab-initio*, the present petition is not maintainable. Counsel submits that in fact, the petitioner has misled the Court by not disclosing the letter dated 6th March, 1999 which was issued after signing of the agreement dated 1st February, 1999.

9. After having gone through the petition and documents placed by the parties, I am of the considered view that the present petition is not maintainable as there is no arbitration agreement between the parties. The petitioner could not invoke the arbitration clause of the agreement dated 1st February, 1999 which was cancelled by the petitioner itself by letter dated 6th March, 1999. The extracts of the said letter dated 6th March, 1999 read as under:-

“Sub.: Agency agreement

Sir,

Further to discussions in our office at Delhi with our M.D., F.Motka and subsequent telecom that the agency agreement with effect from 1st Feb, 1999 has not been signed by you. Since, Seair Transport Systems is your proprietorship firm, hence, the agency agreement must be signed by the proprietor himself.

The agreement was mistakenly sent showing Hari Om Jindal as Director and wrongly signed by him. Hence, the agreement stands cancelled and “void ab initio”. Please return all the copies in your possession of the agreement, including photocopy if any as the agreement is null and void.

We are in the process of preparing a fresh agreement, which will be sent shortly and it must be signed by you (Sh. Sudarshan Kumar Jindal) as proprietor.

Meanwhile, you are requested to continue the business based on your appointment as the Sales Representatives for Punjab as our agents issued on 20/10/1998 on mutually agreed terms and conditions, till a fresh agreement is sent to you and signed.

Yours truly,
SCHENKER INTERNATIONAL PVT. LTD

Sd/-
Rajeev Kant
General Manager”

10. When the said letter was brought into the notice of the Court on 26th April, 2013, learned counsel for the petitioner sought time to take the instructions from his client. The matter was adjourned to 13th May, 2013, on which date the petitioner filed an affidavit of one Mr.Ashok Kumar Mishra (Authorized Representative of the petitioner Company).

11. In the affidavit it was admitted by the petitioner that Rajeev Kant was the General Manager of the petitioner company on the said date i.e. 6th

March, 2009. Another letter dated 20th October, 1998 for appointment of respondent as agent is also signed by said Mr.Rajeev Kant. In para 3 of the affidavit, the statement has been made that the subsequent agreement must have been signed by the respondent. In para 5 of the affidavit, it is stated that the signature on the document dated 6th March, 1999 is forged and fabricated and in case, it is found that the signature on the said letter is genuine, the petitioner will not pursue the present petition and shall take its recourse in accordance with law.

12. Both the original letters are placed on record by the respondents. The conduct of the petitioner is apparent doubtful from the statement made in paras 3 and 5 of the affidavit wherein it is stated that in case, the letter of cancellation of agreement is signed by the General Manager, the subsequent agreement must have been signed by the respondent. It appears to the Court that the statement made in the affidavit is not specific and certain and it definitely creates doubts in the mind of the Court that the petition is false and frivolous.

13. In view of the letter dated 6th March, 1999 issued by the petitioner, it is evident that the agreement dated 1st February, 1999 was signed by Hari Om Jindal as a Director, though he was the proprietor of the proprietorship firm. Therefore, it was mentioned in the agreement that the agreement stood cancelled and *void ab-initio*. Not only that, the respondent was asked to return all the documents and the petitioner was under the process of preparing a fresh agreement. According to the respondent, no fresh agreement was executed between the parties, nor any copy of the same has been filed. Therefore, it is clear that after the cancellation of the agreement dated 1st February, 1999, there is no fresh arbitration agreement between the parties, therefore, the petitioner is not entitled to invoke the arbitration

clause in the absence thereof.

14. It appears to the Court that the petitioner has filed the present petition with malafide intention. The same is misconceived and is dismissed with cost of ₹20,000/- which shall be deposited by the petitioner with the Delhi High Court Advocates' Welfare Fund within four weeks from today.

(MANMOHAN SINGH)
JUDGE

MAY 31, 2013/ka