

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

OP(C).No. 522 of 2013 (O)

AGAINST THE ORDER IN OS 9/2009 of PRINCIPAL SUB COURT,KOCHI

PETITIONER:

M/S. CARAVEL SHIPPING SERVICES PVT. LTD.
1ST FLOOR, "LEKSHMI HOUSE"
K.P.K.MENON ROAD WILLINGTON ISLAND, KOCHI-682 003
REPRESENTED BY ITS BRANCH MANAGER SRI.VIJAI VISWANATHAN
AGED 42 YEARS, SON OF SRI.P.VISWANATHAN NAIR

BY ADVS.SRI.P.GOPAKUMARAN NAIR
SRI.C.S.DIAS
SRI.N.K.SUBRAMANIAN

RESPONDENT:

M/S. PREMIER SEA FOODS EXIM PVT. LTD.
REPRESENTED BY ITS DIRECTOR SRI.AHMED AZHAR
AGED 49 YEARS, EP X/289, ERAMALLOR
ALAPPUZHA-688 548.

BY ADVS. SRI.V.M.KURIAN
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS
SRI.N.SUNIL

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 08-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) EXHIBITS :

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- EXHIBIT-P1 - COPY OF THE PLAINT IN O.S.NO.9/2009 OF SUB COURT, KOCHI
FILED BY THE RESPONDENT DATED 19-1-2009
- EXHIBIT-P2 - COPY OF IA.NO.486 OF 2009 IN O.S.NO.9/2009 OF SUB
COURT, KOCHI FILED BY THE PETITIONER DATED 20-3-2009
- EXHIBIT-P3 - COPY OF MULTIMODAL TRANSPORT DOCUMENT ISSUED BY THE
PETITIONER TO THE RESPONDENT DATED 25-10-2008.
- EXHIBIT-P4 - COPY OF THE COUNTER AFFIDAVIT IN IA.NO.486 OF 2009 IN
O.S.NO.9/2009 OF SUB COURT, KOCHI FILED BY THE
RESPONDENT DATED 22-6-2009
- EXHIBIT-P5 - COPY OF THE ORDER IN IA.NO.486 OF 2009 IN O.S.NO.9/2009
OF SUB COURT, KOCHI DATED 8-1-2013
- EXHIBIT-P6 - COPY OF THE CERTIFICATE OF REGISTRATION OF THE
PETITIONER ISSUED BY, DIRECTORATE GENERAL OF SHIPPING,
MUMBAI DATED 11-9-2009
- EXHIBIT-P7 - COPY OF THE EXTRACT OF THE MINUTES OF MEETING OF THE
BOARD OF DIRECTORS OF PETITIONER - COMPANY DATED
23-1-2013.

RESPONDENTS' EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

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SUNIL THOMAS, J.

O.P.(C) No. 522 of 2013

Dated this the 8th day of September, 2015

JUDGMENT

The defendant in O.S.9/2009 on the file of Sub Court, Kochi, impugns Ext.P5 order in IA 486/2009, by which the court below rejected the request of the defendant to refer the dispute for arbitration under Sec.8 of the Arbitration and Conciliation Act, 1996(Herein after referred to as the Arbitration Act).

2. The plaintiff company had entrusted to the defendant, a carrier, 28,000 Kgs Cargo of frozen sea food, stuffed in a container, and covered by a bill dated 25.10.2008 for delivery at Port - Bandar Abbas, Tehran, Iran. The Cargo was shipped on board from Cochin Port on the same day. On 18th November 2008, it was informed by the office of the defendant that the Cargo container got damaged and part of the Cargo perished. Consequently, the proposed buyer refused to accept the consignment. Alleging that the plaintiff sustained loss due to default of defendant, a claim for USD 53959.80 with

interest was set up, and after issuing a notice, the suit was instituted claiming Rs.26,53,593.00 with 11.5% interest. The defendant appeared and filed IA 486/2009 contending that the entrustment of cargo and its transportation were governed by Ext.P3 which was a Multimodal transport document, as provided under the Multimodal Transportation of Goods Act, 1993 (herein after referred as the "Multimodal Act"). Clause 25 of the document specifically contemplated settlement of disputes by arbitration and conciliation and the jurisdiction of Civil Courts stood ousted in view of Sec.26 of Multimodal Act. The plaintiff, in the counter affidavit disputed the above and contended that, Ext.P3 was only a unilateral receipt and was not a Multimodal transport document and there was no consensus ad-idem between the parties to enter into an agreement for arbitration. The court below negated the contention of the defendant, holding that Ext.P3 was not a Multimodal Transport document and that Sec.26 of the Multimodal Act and the Arbitration Act have no application to the facts of the case. The above order is under challenge in this original petition.

3. Mr.C.S.Dias, the learned counsel for the defendant

relied on Clause 25 of Ext.P3 to contend that the arbitration clause therein operated as a bar in instituting a Civil Suit for enforcement of rights arising therefrom. Clause 25 verbatim reads as follows:

“JURISDICTION/ARBITRATION: The contract evidenced by the Bill of Lading shall be governed by the Laws of India, and subject to the exclusive jurisdiction of Court in Chennai only. Dispute/Difference arising out of this contract and/or in connection with the interpretation of any of its clauses shall be settled by arbitration in India in accordance with the arbitration & conciliation at 1996. The No. Arbitrators shall be three, the Arbitrators shall be commercial persons. The venue for arbitration shall be Chennai.”

4. The trend of argument of learned counsel was that the defendant was a Multimodal Transport Operator as defined under the Multimodal Act, having under taken a Multimodal transportation with the plaintiff evidenced by Ext.P3 Multimodal transport contract. By virtue of Clause 25 extracted above, plaintiffs are bound by the arbitration clause in the light of Sec.26 of the Multimodal Act. Mr.Thomas K.T., the learned counsel for the plaintiff contented that Ext.P3 was only a receipt evidencing a bill of lading, there was no consensus ad-idem in relation to terms of Ext.P3 and that it did not evidence a

Multimodal contract.

5. To evaluate the above contentions, it is essential to refer to Sections 2(k), 2(l), 2(la), and 26 of the Multimodal Act. They are

S.2(k): “Multimodal transportation” means carriage of goods, by at least two different modes of transport under a multimodal transport contract, from the place of acceptance of the goods in India to a place of delivery of the goods outside India;

S.2(l) “multimodal transport contract” means a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight;

S.2(la) “multimodal transport document” means a negotiable or non-negotiable document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages permitted by applicable law;

S.26 Arbitration - (1) The parties to a multimodal transport contract may provide therein that any dispute which may arise in relation to multimodal transportation under the provisions of this Act shall be referred to arbitration.

(2) The arbitration proceeding may be instituted at such place or in accordance with such procedure as may be specified in the

multimodal transport document.

6. The learned counsel for the defendant contented that, Sec.26 above, permitted parties to enter into a clause of arbitration and accordingly they have voluntarily entered into Clause 25 of the Ext.P3. Hence parties are bound by the arbitration clause and consequently the suit was not sustainable. It was further contented that by virtue of clause 25, parties have voluntarily chosen the venue of arbitration proceedings as Chennai and that will prevail, notwithstanding the fact that no part of cause of action had arisen at Chennai. Another contention was that Sec.26(2) of Multimodal Act permitted parties to choose the venue of arbitration and the said legal provision is an exception to the general principle regarding Jurisdiction.

7. Per contra, the learned counsel for plaintiff contented that Ext.P3 was not a Multimodal contract at all. The premise was that a multimodal transport contract should involve undertaking of at least two different modes of transport, which was not involved in this case. The reply of the defendant was that the factory of the plaintiff was at Alapuzha and empty

container was delivered to the consignor, who stuffed it at Alapuzha, transported by road to Cochin Port and there after transported by sea, to Port Bandar Abbas by vessel OEL Dubai V029. Admittedly, an empty container was delivered to the consignor, which is also seen endorsed in Ext.P3, against the column of container no. According to plaintiff, they themselves stuffed the container with goods. Thereafter, it was inspected by officials of State Live Stock, marine and agri products, and thereafter by Lloyds Agency, Kochi and both issued necessary certificates. It was thereafter handed over to defendants with all records. In para 12 of the plaint, the cause of action is stated to have arisen, when the plaintiff entrusted the container to the defendant for shipment at a place within the jurisdiction of the Kochi court. Evidently, the plaintiff had specifically pleaded that though the container was transported from Alapuzha , only the part of transportation by sea alone was undertaken by Ext.P3. This pleading is not denied by the defendant.

8. Ext.P3 shows that the column of Place of Receipt is blank. However, Port of loading is shown as Cochin and place of delivery as Bandar Abbas, Iran. The entries indicate that Cargo

was shipped on board the vessel on 25th October 2008. There is absolutely no reference in Ext.P3 that either the container was entrusted at Alapuzha or that the freight charges included transportation from Alapuzha. Evidently, though the cargo moved both by road and by sea, the contract with defendant was for carriage of goods by sea alone.

9. The learned counsel for the plaintiff relying on authorities drew the attention to two terms “Shippers Load, Stow and Count” (SLAC) and “said to contain”(STC), seen in Ext.P3. The details of the container, the number of bundles, weight, measurement, the volume of the items stuffed etc. are seen recorded in Ext.P3, against the caption of SLAC and STC. The above terms conventionally used involves that in containerised cargoes, where the carrier/agents are not privy to the packing of containers and nature of cargo, the agent relies on the information provided by the shipper in terms of cargo, number of packages, weight and measurement. Such endorsement absolves the carrier of any claims relating to missing or damaged cargo that might be levied upon them by the shipper at a later stage. Hence the term “shippers Load Stow

and Count “ and “Said to Contain” are put on the bill of lading to protect the carrier from any claim that shipper might levy on them at a later stage. (Ref: **Container Corporation of India Ltd. v. Priya Dyes and Chemicals [AIR 2013 Mad 85]**). Viewed from this background, there is considerable force in the contention of the learned counsel that the endorsement of SLAC and STC on Ext.P3 proves, that stuffed container was entrusted at the Cochin Port, for shipment alone.

10. Under Section 2(l), to be a Multimodal transport contract, the Multimodal transport operator should undertake to perform or procure the performance of Multimodal transportation. Under S2(k) Multimodal transportation means carriage of goods, by at least two different modes of transport under a multimodal transport contract from the place of acceptance of goods in India to a place of delivery outside India. A co-joint reading of Section 2(k) and 2(l) undoubtedly shows that to be a Multimodal contract, the operator should undertake to transport by two modes. In other words, under the contract or by virtue of the contract, the transportation should involve two modes, from a place in India to a place of delivery

outside India. The terms “two different modes of transport” found in Sec. 2(k) does not qualify “carriage of goods” but refer to multimodal transport contract. In the instant case, though the goods were transported by two modes, only one part, that is the carriage by sea, alone was covered by Ext.P3. Consequently Ext.P3 cannot be considered as a Multimodal transport contract.

11. It is true that Ext.P3 is captioned as a Multimodal Transport document/Bill of lading. From the nature of the Caption, it could either be a Multimodal transport contract or a bill of lading. However, for the reasons stated above, it could not be treated as a Multimodal transport contract. The learned counsel for plaintiff relied on the decision reported in **Ellerman & Bucknall Steamship Co.Ltd. v. Sha Misrimal Bheraji** [AIR 1966 SC 1892] to content that Ext.P3 satisfied the ingredients of a bill of lading. In Ellerman's case, the Honourable Supreme Court held that,

“A bill of lading serves three purposes viz. (i) it is receipt for the goods shipped containing the terms on which they have been received; (ii) it is evidence of the contract for carriage of goods; and (iii) it is a document of title for the goods specified therein. The contract of the shipowners in the bill of lading is that they will

deliver the goods at their destination “in the like good order and condition” in which they were when shipped”

Evidently, from the nature of Ext.P3, it satisfies all the ingredients of a bill of lading.'

12. Yet another contention of the plaintiff was that, Ext.P3 did not evidence a binding arbitration agreement. It was argued that it was not signed by the plaintiff and that there was no consensus ad-idem to enter into an agreement of arbitration. The learned counsel for the defendant, relying on Sections 2(b) and 7 of Arbitration Act and the authoritative pronouncements in **Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corporation Ltd. [2006] 5 SCC 275**, and **M/s. Oriental Fire & General Insurance Co. Ltd. And Another v. New Suraj Transport Co.(P) Ltd. [AIR 1985 All 136], Paragraph 32,**) contended that it is not essential that the agreement should be signed by the parties, if the terms of the transaction discloses an intention to refer for arbitration and will be satisfied if the clause of arbitration on an invoice is brought to the notice of other party. It was argued by the learned counsel for the defendant that the entrustment of the

goods subject to the terms and conditions laid in Ext.P3, and by accepting a copy of the Ext.P3, by the plaintiff, statutorily constituted the creation of a valid arbitration agreement. It was further contended that under Section 7 of the Multimodal Act, a statutory liability is cast on the Multimodal operator to issue the Multimodal agreement to the consignor and by complying with that statutory liability, parties have voluntarily entered into the agreement.

13. The above contention does not appear to be sustainable. Section 7 only enables a consignor who has entered into a contract for Multimodal transportation, to issue a multimodal document, at the option of the consignor. This presupposes entering into a contract for multimodal transportation. The term contract used in the definition of “Multimodal transport contract” and “Multimodal transport document” and in other parts of the Multimodal Act has not been specifically defined. Though by Section 29 of the Multimodal Act, it shall have overriding effect over all other enactments, notwithstanding anything contained in any other law, the term contract shall by necessary implication can only have the meaning and content of

the term contract as defined under the Indian Contract Act, 1872. Hence all the essentials required for entering in a valid contract will be required for entering into a Multimodal contract. In the case at hand, apart from entering into an agreement relating to the essential terms for transportation of goods by sea and for the payment of freight charges, it does not appear that there was consensus ad-idem for entering into an arbitration agreement. There is nothing to show that Clause 25 was ever brought to the notice of plaintiff. Hence the contention of the defendant does not appear to be sustainable.

In view of the above discussion, it is evident that there was no illegality or irregularity in the application of law, or exercise of jurisdiction by the court below warranting an interference under Article 227 of the constitution of India. Hence the original petition fails and is accordingly dismissed.

Sd/-
SUNIL THOMAS, JUDGE

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