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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ C.R.P. No.181/2017 & CM No.29326/2017 (for stay).
DCP SYNTHETICS PVT LTD (NOW DCP INDIA PVT LTD)
& ORS Petitioners

Through: Mr. Rajesh Gupta with Mr. Vishrut
Raj, Advs. for P-1,2&3.

versus

ZIM INTEGRATED SERVICES
(INDIA) PVT LTD. & ORS. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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18.08.2017

CM No.29327/2017 (for exemption).

- 1 Allowed, subject to just exceptions.
2. The application stands disposed of.

C.R.P. No.181/2017 & CM No.29326/2017 (for stay).

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 19th April, 2017 in CivDJ/613417/2016 of the Court of Additional District Judge-05 (West), Tis Hazari Courts, Delhi) of dismissal of the application under Order VII Rule 11 of the CPC filed by the three petitioners / defendants for rejection of the plaint in the suit filed by the respondent no.1 / plaintiff against the petitioners / defendants and against the respondents no.2&3 / defendants for recovery of Rs.92,81,725/-. Though vide the same order a similar application filed by the respondents no.2&3 / defendants was also dismissed, but the respondents no.2&3 / defendants have not challenged that part of the order.

4. The counsel for the petitioners / defendants has been heard.
5. The respondent no.1 / plaintiff instituted the suit from which this petition arises pleading (i) that it was 100% subsidiary of Zim Integrated Shipping Services Limited, a Company incorporated in Israel and having its registered office at 9, Andrei Sakharov Street, P.O.B-1723, Haifa - 31016 in Israel; (ii) that the respondent no.1 / plaintiff was running its business as general steamer agents in India of its Principals Zim Integrated Shipping Services Limited; (iii) that the petitioner no.1 Company, and of which the petitioners no.2&3 / defendants are Directors, carrying on business as exporters and importers of goods had, through the respondent no.2 / defendant Transamerica Logistics (India) Pvt. Ltd. of which the respondent no.3 / defendant Pradeep Berry is Director, booked consignment of Raw Buckwheat on a 'said to contain' basis with the respondent no.1 / plaintiff for shipment to Russia; (iv) that the said goods were not accepted by the consignee at Russia; (v) that the petitioners and respondents no.2&3 / defendants asked the respondent no.1 / plaintiff to hold the said goods at the port of delivery while they found another purchaser thereof; and, (vi) that the suit amount was due towards carriage and demurrage charges.
6. The petitioners / defendants sought rejection of the plaint relying upon the Clause 24 in the Bill of Lading filed by the respondent no.1 / plaintiff with the plaint.
7. Though the counsel for the petitioners / defendants has not filed the copy of the Bill of Lading but has drawn attention to the said Clause 24 in another pleading filed as annexure to the suit and which is as under:-

“CLAUSE NO.24: LAW AND JURISDICTION

All and any claims and/or disputes arising under this Bill of Lading or in connection therewith shall be brought before and determined by the courts and in accordance with the law at:

a) The place where the Carrier has its head office, namely Haifa, Israel, or

b) If the cargo originates in / or is destined for the U.S.A., by the United States District Court for the Southern District of New York, N.Y., U.S.A.

Each of the above courts, respectively, shall have exclusive jurisdiction, therefore, no proceedings shall be brought before any other courts.”

8. Relying upon the aforesaid Clause, it was contended that the Courts at Delhi have no territorial jurisdiction.

9. Though in the application and before the learned Additional District Judge certain other grounds were also taken but the counsel for the petitioners / defendants has before this Court not pressed the same.

10. The learned Additional District Judge has dismissed the application *inter alia* holding that the petitioners / defendants having disputed the Bill of Lading, could not seek rejection of the plaint on the basis thereof.

11. I have enquired from the counsel for the petitioners / defendants whether the petitioners / defendants are bound by the Bill of Lading and the terms thereof.

12. The counsel for the petitioners / defendants states that it is the plea of the petitioners / defendants that the Bill of Lading being of Zim Integrated Shipping Services Limited, the respondent no.1 / plaintiff cannot sue thereon.

13. That being the plea of the petitioners / defendants, the petitioners / defendants are not entitled to have the plaint in the suit instituted by the respondent no.1 / plaintiff, and who, according to the petitioners/ defendants is not a party to the said Bill of Lading, rejected. The Clause in the Bill of Lading would bind the parties thereto only and would not bind the non-party thereto. The said Clause would have been applicable if the claim had been filed by Zim Integrated Shipping Services Limited and which is not the case.

14. The counsel for the petitioners / defendants has also argued that for the purpose of Order VII Rule 11 of the CPC, only the plaint is to be seen.

15. Undoubtedly so; but at the same time it cannot be forgotten that per Order VII Rule 13 CPC, rejection of a plaint does not bar / preclude institution of another suit on the same cause of action. When rejection of plaint is sought on the ground of the Court not having territorial jurisdiction to entertain the suit for the reason of the parties having agreed to exclusive jurisdiction of another Court, the party seeking such rejection cannot after succeeding in having the plaint rejected, when the plaintiff institutes the suit in the Court on the ground of exclusive jurisdiction whereof rejection of plaint was earlier obtained, then contest the jurisdiction of that Court also. The principle of estoppel and a litigant before the Court being not entitled to blow hot and cold, would clearly apply. The petitioners / defendants cannot take ambiguous stand while filing an application under Order VII Rule 11 of the CPC and which stand can be changed for the subsequent suit if any filed.

16. There is another aspect of the matter.

17. Clauses in the contract restricting the territorial jurisdiction to one of the Courts where the cause of action may have been accrued are not a matter

of public policy but a matter of contract between the parties and a party which has insisted upon such a Clause is always entitled to waive the said Clause and sue the defendants on the place of residence of the defendants and which qua the petitioners / defendants is Delhi. It would have been a different matter if the petitioners / defendants had sued Zim Integrated Shipping Services Limited and in which case Zim Integrated Shipping Services Limited could have relied upon the aforesaid Clause having been incorporated by them in their standard form of Bill of Lading.

18. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 18, 2017

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