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Arb.OP.(comdiv) No.321 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2023

CORAM

THE HONOURABLE **MR.JUSTICE ABDUL QUDDHOSE**

Arb.O.P.(Comm.Div.) No.321 of 2023

Well Trans Logistics India Pvt. Ltd.,
Rep. By the Assistant Manager/Authorised signatory
Mr.Sh.Ravish Chand Srivastava,
Flat No.306, 3rd floor, Real Enclave Building,
No.43/22, Josier Street, Nungambakkam,
Chennai – 600 034.

.. Petitioner

-VS-

Mr.S.U.Sirajdeen,
Proprietor of M/s.Gravity Ventures,
No.96-A, First floor, Sri Ganapathy complex,
A.K.Nagar, Saibaba Colony,
Coimbatore – 641 011.

.. Respondent

Petition under Section 34 of the Arbitration and Conciliation Act, 1996, has been filed seeking to set aside the arbitral award dated 24.02.2023 bearing Arbitration Case No.1 of 2022 passed by the learned Sole Arbitrator (Shri.M.V.Swaroop) in its entirety.



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For Petitioner : Mr.T.V.Suresh Kumar

For Respondent : Ms.S.P.Sri Harini

for Mr.Hari Radhakrishnan

ORDER

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, (in short “the Act”) challenging the impugned arbitral award dated 24.02.2023 passed in Arbitration Case No.1 of 2022.

2. The petitioner is a clearing and forwarding agent. The respondent is an importer. The petitioner had imported cargo from Vietnam for delivery at the port of Chennai. The petitioner's agent at Hai Phong Port, Vietnam issued the House Bill of Lading dated 11.03.2020 disclosing the respondent as the consignee of the cargo. Since the cargo which arrived at Chennai port was detained by the customs authorities, there was a delay in the delivery of the cargo to the respondent. Pursuant to the orders passed by this Court in a writ petition filed by the respondent, the respondent has also taken delivery of the cargo after the issuance of delivery order by the petitioner. Since there was a delay, M/s.COSCO-the ocean liner had



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demanded demurrage. Since the cargo was lying in the CFS (container freight station) for quite some time, in view of the claim made by M/s.COSCO against the respondent, the respondent initiated arbitration in accordance with the clauses contained in the House Bill of Lading dated 11.03.2020 issued by the petitioner to the respondent.

3. Since there was no consensus with regard to the arbitration, the respondent had filed an application under Section 11 of the Act seeking for appointment of an arbitrator. By orders of this Court, a sole arbitrator was appointed to adjudicate the dispute between the petitioner and the respondent. Before the arbitrator, the petitioner had raised the following grounds:-

(a) They have questioned the existence of the arbitration agreement between the parties;

(b) They have categorically stated that they are not an agent of M/s.COSCO and therefore, they are not liable to compensate the respondent for demurrage claim made by M/s.COSCO.



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4. However, as seen from the impugned arbitral award, the sole arbitrator appointed by this Court under Section 11 of the Act, has rejected the contentions of the petitioner by holding that in case the petitioner fails to deliver the cargo to the respondent, the petitioner may be called upon to pay the value of the goods amounting to Rs.14,97,850/- along with interest. Aggrieved by the said finding, the petitioner has challenged the impugned arbitral award under Section 34 of the Act.

5. The learned counsel for the petitioner drew the attention of this Court to the House Bill of Lading dated 11.03.2020 issued by the agent of the petitioner at Vietnam, namely, M/s.STT Logistics Company Limited. In particular, he drew the attention of the Court to Clause 2 of the reverse side of the Bill of Lading dated 11.03.2020 and would submit that the clauses contained in the reverse side of the Bill of Lading has no applicability to the present contract. According to him, only in case where two or more modes of transport from the place of acceptance of the goods in India to a place of delivery of goods outside India exists, the clauses found in the reverse side of the Bill of Lading are applicable. According to him, the present dispute



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arises out of a shipment made from Vietnam for delivery at Chennai by a single mode of transport, namely, “by sea” and therefore, the clauses found in the reverse side of the Bill of Lading has no applicability. The reverse side of the Bill of Lading contains an arbitration clause, which is found at Clause 25. According to the petitioner, the arbitration clause is not applicable due to the reasons stated supra.

6. He would also submit that M/s.COSCO is not an agent of the petitioner. However, according to him, under the impugned arbitral award, by total non application of mind, the arbitrator has observed that M/s.COSCO is an agent of the petitioner. He would also submit that neither the petitioner nor the respondent in support of their claim have stated that M/s.COSCO is an agent of the petitioner. Therefore, according to him, without any pleading by any of the parties, arbitrarily and by total non application of mind, the arbitrator has observed that M/s.COSCO is an agent of the petitioner. Therefore, he would submit that the impugned arbitral award is patently illegal as the award has been passed by giving perverse findings. Hence, he would submit that the impugned arbitral award is liable



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to be set aside under Section 34 of the Act.

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6. Per contra, the learned counsel for the respondent would rely upon the clauses contained in the reverse side of the Bill of Lading dated 11.03.2020. In particular, she drew the attention of the Court to clause 3(2)(c) of the reverse side of the Bill of Lading and would submit that the petitioner has accepted the responsibility for the acts and omissions of any other person, whose services he uses for the performance of the contract evidenced by the multimodal transport documents i.e., the House Bill of Lading. According to her, having accepted the responsibility, the petitioner cannot escape its liability to pay demurrage charges, if at all any claim for demurrage is made by M/s.COSCO for the shipment imported by the respondent.

7. The learned counsel for the respondent also drew the attention of the Court to a judgment of the Hon'ble Supreme Court in the case of *M/s.Caravel Shipping Services Private Limited Vs. M/s.Premier Sea Foods Exim Private Limited [Civil Appeal Nos.10800 and 10801 of 2018,*



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dated 29.10.2018], and in particular, referred to the paragraph No.11 of the said judgment, which is extracted hereunder:-

“11. The fact that the stage of the present suit is that a particular witness is being examined would not come in the way of the Section 8(3) application being allowed inasmuch as the Section 8(3) application was filed in the same year as that of the suit. We may also add that we have not gone into the Multimodal Transportation of Goods Act, 1993 for the reason that whether the present Bill of Lading is governed by the provisions of the Act (Section 26 in particular) or not would not make any difference to the position that an arbitration clause forms part of an agreement between the parties, and would, therefore, be governed by Section 7 of the Arbitration Act.”

8. She would also submit that when an arbitration clause forms part of an agreement between the parties, it can be inferred that there is a valid arbitration agreement as per section 7 of the Act. Hence, the present dispute between the parties is an arbitrable dispute. According to her, only in



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accordance with the terms and conditions of the Bill of Lading dated 11.03.2020, the arbitrator has passed the impugned arbitral award, as the petitioner has accepted its liability to pay any claim that arises out of the shipment from any party, whom the petitioner has engaged. Therefore, according to her, the claim of M/s.COSCO, if any, will have to be paid only by the petitioner and not by the respondent.

DISCUSSION:

9. Admittedly, the shipment has been effected not through Multimodal Transportation. Admittedly, only one mode of transport was involved i.e., through sea. The cargo was shipped at a port in Vietnam for delivery at a port in Chennai. It is an undisputed fact that the customs had earlier detained the cargo. It is also an undisputed fact that aggrieved by the said detention, the respondent had filed a writ petition seeking for release of the said cargo. Only pursuant to the orders passed by this Court in the writ petition, the petitioner has issued delivery order to enable the respondent to take delivery of the cargo. In accordance with the delivery order, the cargo was also delivered to the respondent.



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10. M/s.COSCO is the ocean liner, which has carried the cargo from a port in Vietnam to a port in Chennai, India. Several correspondence have also been exchanged by the respondent with M/s.COSCO directly with regard to demurrage claim made by M/s.COSCO in respect of the shipment imported by the respondent. The respondent is also aware that the petitioner is not an agent of M/s.COSCO, which is also admitted by the learned counsel for the respondent during the course of her submissions. However, the arbitrator, by total non-application of mind, has observed in the impugned arbitral award that the petitioner is an agent of M/s.COSCO. The petitioner is only a clearing and forwarding agent, who consolidates the cargo from various importers/exporters and thereafter delivers the same to the actual carrier. The container in which the shipment arrived at the port of Chennai does not belong to the petitioner and it belongs to the ocean liner, namely, M/s.COSCO.

11. It is also not established before the arbitrator that the demurrage claim had arisen only due to the fault of the petitioner. The only reliance



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made by the respondent for making the petitioner liable is the clause found in the House Bill of Lading dated 11.03.2020, wherein the petitioner has accepted that they will be responsible for any claim made by any of the parties whom they have engaged for the subject shipment. As observed earlier, the petitioner is not an agent of M/s.COSCO, but, is an independent business entity/service provider. They receive the cargo from various clients and thereafter, on instructions of the clients, they arrange for the export/import on behalf of their respective clients. They collect freight charges from their customers and out of such freight charges received from their customers, they pay the freight charges to the ocean liners. Therefore, the petitioner cannot be held liable for the demurrage, that may be payable by the importer to the ocean liner, who, in the instant case, is M/s.COSCO.

12. Further, the arbitrator has also not applied his mind to the fact that the present shipment is not through Multimodal transport, but, is only through a single transport, namely, through sea. As seen from Clause 2 of the reverse side of the Bill of Lading dated 11.03.2020, it has been made clear that the provisions set out and referred to in this Multimodal Transport



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Document shall apply, if the transport as described on the face of the document is by two or more modes of transport from the place of acceptance of the goods in India to the place of delivery of the goods outside India. In the case on hand, admittedly, the goods have been shipped at a port in Vietnam for delivery at a port in Chennai. Therefore, it is clear that the conditions contained in the reverse side of the Bill of Lading dated 11.03.2020, which contains an arbitration clause in clause 25, has no applicability for the subject shipment. The petitioner has categorically disputed the existence of the arbitration clause in its additional written submission filed before the arbitrator. Despite the same, the arbitrator has not given due consideration to the same in the impugned arbitral award.

13. For the foregoing reasons, this Court is of the considered view that the observation made by the arbitrator in the impugned arbitral award that the petitioner may be called upon to pay the value of the goods in case M/s.COSCO refuses to release the cargo on account of non-payment of demurrage, is an absolute perverse observation. By total non-application of mind, the arbitrator has made the aforesaid observation based on his



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erroneous finding that the petitioner is an agent of M/s.COSCO, which is absolutely incorrect. Infact, subsequent to the detention order passed by the customs authorities, the respondent has also taken delivery of the cargo by virtue of the order passed by this Court in the writ petition filed by the respondent. Therefore, the aforesaid observations of the arbitrator may not be applicable now. In view of the perverse findings of the arbitrator and the impugned arbitral award being patently illegal, the impugned arbitral award has to be set aside and accordingly, it is set aside. In the result, this petition is allowed. No Costs.

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ABDUL QUDDHOSE, J.

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