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Arb.O.P (Com.Div.) No.124 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.07.2023

CORAM

THE HON'BLE Mr. JUSTICE ABDUL QUDDHOSE

Arb.O.P (Com.Div.) No.124 of 2023

M/s.Caravel Logistics Pvt. Ltd.,
No.511, 5th Floor, BSEL Tech Park,
Plot Nos.39/5 & 39/5A, Sector-30A,
Vashi, Navi Mumbai – 400 703.

... Petitioner

Versus

1.INI Farms Pvt. Ltd.,
A-102, Boomerang Building,
Chandivali Farm Road,
Chandivali, Andheri (East),
Mumbai – 400 072.

2.Intercont Agencies,
Agent of INI Farms Pvt. Ltd.,
C/o.Gopalkrishnan,
205, 2nd Floor, M.K.Bhavan,
300, Shahid Bhagat Singh Road,
Fort. Mumbai – 400 001.

... Respondents

Prayer: Arbitration Original Petition (Commercial Division) filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Amended) to appoint a sole Arbitrator to adjudicate upon the dispute arisen between the petitioner and the respondents.



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For Petitioner : Ms.Abitha Banu

For respondent-1 : Mr.Adarsh Ramanujam

For respondent-2 : No appearance

ORDER

The issue that arises for consideration is whether a Consignee under a Bill of Lading who has not taken delivery of the goods due to a dispute with the Shipper is bound by the Arbitration Clause contained in the Bill of Lading. The petitioner claiming to be the Carrier which has issued the Bill of Lading to the Shipper at Iran is claiming demurrage against the respondents, who is a Consignee under the Bill of Lading but has admittedly, not taken delivery of the Cargo due to a dispute with the Shipper in Iran. It is also an admitted fact that the original Bill of Lading was never delivered by the Shipper to the Consignee due to the dispute and transfer of title of the cargo in favour of the Consignee never took place.

2.Based on an Arbitration Clause contained in the terms and conditions of the Bill of Lading, this petition has been filed under Section 11



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of the Arbitration and Conciliation Act seeking for appointment of an Arbitrator by this Court.

3.The dispute between the parties arises out of a Bill of Lading dated 14.03.2021. According to the petitioner, the demurrage charges arising out of the said Bill of Lading has not been paid by the respondents. According to the petitioner, since there is an Arbitration clause in the Bill of Lading dated 14.03.2021, the present petition is maintainable. The petitioner has also invoked Arbitration in accordance with the Arbitration clause by sending a notice to the respondents on 14.02.2022. The said notice has also been replied by the respondents disputing the applicability of the Arbitration clause to the respondents. In the Bill of Lading dated 14.03.2021, the first respondent has been disclosed as Consignee and also as the Notify Party. In the Bill of Lading dated 14.03.2021, the shipper is Saeid Sahebolzamani, Iran. The first respondent has contended that due to poor quality of cargo which had arrived by the subject vessel named in the Bill of Lading dated 14.03.2021, the first respondent did not take delivery of the cargo and further it is their contention that the original Bill of Lading was never given



to them by the shipper and they are not aware of the terms and conditions of the Bill of Lading, which includes the Arbitration clause. The respondents also contend that since the transfer of title of the cargo has not taken place, they are not bound by the terms and conditions of the Bill of Lading, which includes the Arbitration Clause.

4. Apart from raising the contention that there is no valid Arbitration agreement, the first respondent has also questioned the maintainability of this petition filed by the petitioner as they claim that they are only an agent of a Foreign Disclosed Principal. According to them, if the foreign disclosed principal is the party making the claim, the present petition under Section 11 of the Arbitration and Conciliation Act is not maintainable, as the dispute will amount to an International Commercial Arbitration and therefore, this Court will not have jurisdiction and only the Hon'ble Supreme Court will have jurisdiction to entertain an application seeking for appointment of an Arbitrator. The first respondent has also questioned the territorial jurisdiction of this Court as the place of delivery of cargo under the Bill of



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Lading dated 14.03.2021 is Nhava Sheva and therefore, according to them,

Mumbai Courts alone will have the jurisdiction to entertain this petition.

5.In respect of the second and third objections raised by the first respondent, namely, a)jurisdiction of this Court and b)claim made by an agent of a Foreign Disclosed Principal which amounts to International Commercial Arbitration are concerned, the said objections may not require this Court's consideration if the respondents are able to establish that there is no Arbitration Agreement between them and the petitioner.

6.Learned counsel for the petitioner drew the attention of this Court to the Bill of Lading dated 14.03.2021 and pointed out that the first respondent has been shown as the Consignee in the said Bill of Lading and she would also submit that it is the responsibility of the respondents to empty the containers and return it back to the petitioner at discharge Port, namely, the Port of Nhava Sheva. Learned counsel for the petitioner also drew the attention of this Court to the Arbitration clause contained in the terms and conditions of the Bill of Lading, which is extracted hereunder:



“21. Jurisdiction and Law Clause

The contract evidenced by or contained in this Bill of Lading is governed by Law of Hong Kong / Law of India and any claim or dispute arising hereunder or in connection herewith shall be determined by the Courts in Hong Kong / Chennai, India and no other Courts. The jurisdiction and Law will be decided by the Carrier. The Merchant waives its right to decide the jurisdiction and completely submits to the jurisdiction opted by the Carrier.

Dispute / differences arising out of the contract and / or in connection with the interpretation of its clauses shall be settled by reference to a sole arbitrator appointed by the Carrier whose decision will be binding on the both the parties according to the Arbitration and Conciliation Act, 1996.”

7.Relying upon the Arbitration clause and upon the contents of the Bill of Lading, the learned counsel for the petitioner would submit that the respondents are bound by the Arbitration Clause as per Clause 21 of the terms and conditions of the Bill of Lading dated 14.03.2021. She would also submit that the petitioner denies that it is an agent of a Foreign Disclosed Principal, as according to her the claim is payable only to the petitioner and not to the Foreign Disclosed Principal.



8.The learned counsel for the petitioner drew the attention of this

Court to a judgment of the Hon'ble Supreme Court in the case of *Caravel Shipping Services Private Limited Vs. Premier Sea Foods Exim Private Limited* reported in *(2019) 11 SCC 461*, in particular, she referred to paragraphs 7 and 8 of the said judgment. According to her, as seen from the said judgment, it is clear that an arbitration agreement need not be signed by the respondents, since the name of the first respondent is disclosed in the Bill of Lading and the first respondent had also paid the initial freight amount to the petitioner, which will infer that the respondents are bound by the arbitration clause contained in the Bill of Lading.

9.However, the submission of the learned counsel for the petitioner was disputed by the learned counsel for the first respondent, who would submit that the aforesaid Hon'ble Supreme Court judgment is not applicable to the facts of the instant case, as in that decision, the dispute was between a Shipper and a Carrier and not between a Consignee and a Carrier. Learned counsel for the first respondent has also relied upon the following



authorities in support of his submission that there is no arbitration agreement between the petitioner and the respondents:

- (i) ***NTPC Ltd. vs. M/s.SPML Infra Ltd.*** (Civil Appeal No.4778 of 2022).
- (ii) ***Interglobe Aviation Limited vs. N.Satchidanand*** reported in ***(2011) 7 SCC 463***
- (iii) ***Ravi Ranjan Developers Pvt. Ltd. vs. Aditya Kumar Chatterjee*** reported in ***2022 SCC OnLine SC 568***
- (iv) Judgment of Delhi High Court in the case of ***Aarka Sports Management Pvt. Ltd. vs. Kalsi Buildcon Pvt. Ltd.*** (Arb.P.662 of 2019)
- (v) Bill of Lading Law Lexicon extract
- (vi) ***Owners and Parties Interested in the Vessel M.V.Polaris Galaxy vs. Banque Cantonale De Geneve*** reported in ***2022 SCC OnLine SC 1293***

10.Amongst the aforesaid decisions, in particular, he relied upon a judgment of the Hon'ble Supreme Court in the case of ***Owners and Parties Interested in the Vessel M.V.Polaris Galaxy vs. Banque Cantonale De Geneve*** reported in ***2022 SCC OnLine SC 1293***. In the aforesaid decision, in particular, relying upon paragraphs 38 and 45, he would submit that it is



clear that the contract of Bill of Lading serves as an evidence of the terms of the contract of affreightment only between the immediate parties to the contract, namely the carrier and the shipper and it is also clear that only on the delivery the original Bill of Lading to the consignee (respondents herein), the respondents are bound by the terms and conditions of Bill of Lading dated 14.03.2021. He would submit that since the original Bill of Lading was never delivered to the respondents, as there was a dispute between the respondents and the shipper, the Arbitration clause found in the Bill of Lading is not binding on the respondents.

Discussion:

The following are the undisputed facts:

(a) the original Bill of Lading dated 14.03.2021 was never received by the respondents from the shipper, namely, Saeid Sahebolzamani, Iran.

(b) There is a dispute between the respondents and the shipper with regard to the cargo, which is the subject matter of the Bill of Lading dated 14.03.2021.



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(c) There was no transfer of title of the cargo in favour of the respondents as the original Bill of Lading dated 14.03.2021 was never delivered to them by the Shipper due to the dispute.

(d) The respondents never took delivery of the cargo which is the subject matter of the Bill of Lading dated 14.03.2021 from the carrier (petitioner).

11. Section 7 of the Arbitration and Conciliation Act, 1996 defines an arbitration agreement and the same reads as follows:

“Section 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 [including communication



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through electronic means] 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.”

12. In the instant case, admittedly, the respondents have not taken delivery of the cargo and were never in receipt of the original Bill of Lading. Unless and until the arbitration clause contained in the Bill of Lading was made known to the respondents by the petitioner in explicit terms which was agreed upon by them, the question of binding the respondents to the arbitration clause will not arise. Section 7 of the Arbitration and Conciliation Act, 1996, which defines Arbitration Agreement also makes it clear that there must be an agreement to submit for Arbitration. There must be *consensus ad idem* between the parties for arbitration. In the instant case, it is not so, as admittedly, the respondents have not received the original Bill of Lading and they have also not taken delivery of cargo from the petitioner.



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Therefore, the contention of the petitioner that there was a valid arbitration agreement between the petitioner and the respondents under the Bill of Lading has to be rejected by this Court, as it does not satisfy the requirements of Section 7 of the Arbitration and Conciliation Act, 1996. The decision relied upon by the learned counsel for the petitioner in the case of ***Caravel Shipping Services Private Limited Vs. Premier Sea Foods Exim Private Limited*** does not apply to the facts of the instant case as the said decision arises out of a case involving a shipper, who has received the Bill of Lading from the carrier, whereas the case on hand involves a claim made by the carrier (petitioner) against the Consignee (first respondent), who has not received the original Bill of Lading from the shipper and has also not taken delivery of the cargo due to a dispute with the Shipper.

13.In the decision relied upon by the learned counsel for the first respondent in the case of ***Owners and Parties Interested in the Vessel M.V.Polaris Galaxy vs. Banque Cantonale De Geneve*** reported in ***2022 SCC OnLine SC 1293***, the Hon'ble Supreme Court has held in paragraph 38 that the Bill of Lading serves as an evidence of the terms of the contract of



affreightment. It has held as follows:

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“38. A Bill of Lading serves also as evidence of the terms of the contract of affreightment. As between the immediate parties to that contract, namely the carrier and the shipper, the evidence provided by the bill is not conclusive and may be supplemented or even overridden by extraneous evidence. Once the bill has been transferred however, the bill provides conclusive evidence as between the carrier and the new holder, as to the terms of the contract of affreightment. In this sense the bill may be said to “contain” the contract.

45. Delivery of goods covered by a Bill of Lading are ordinarily to be made on presentation of the bill. The carrier may be liable to the person lawfully in possession of such a Bill, if he wrongly delivers the goods to anyone else. Whether the delivery of the goods to anyone other than the holder of the Bill of Lading, is wrongful or not, would depend on the facts and circumstances of the case.”

14. Admittedly, the respondents can take delivery of cargo from the carrier (petitioner) only on presentation of the original Bill of Lading, which contains the terms and conditions of the contract of affreightment. When the respondents are not in possession of the original Bill of Lading, which contains the terms and conditions of the contract of affreightment, the



respondents cannot take delivery of the cargo from the carrier (petitioner) as per the Bill of Lading dated 14.03.2021. The Hon'ble Supreme Court has also made it clear that as between the immediate parties to the Bill of Lading, namely, the carrier and the shipper, the evidence provided by the Bill of Lading is not conclusive and may be supplemented or even overridden by extraneous evidence. In the case on hand, when it is an admitted position that the respondents have not received the original Bill of Lading from the shipper and they have not taken delivery of the cargo and there has been no transfer of title of the cargo in favour of the respondents, the respondents cannot be bound by the arbitration clause contained in the Bill of Lading. They are neither the immediate parties to the Bill of Lading nor parties in whose favour the Bill of Lading has been endorsed by way of transfer of title of the cargo by the Shipper.

15. Since there is no Arbitration Agreement between the petitioner and the respondents, this Court is of the considered view that this petition is not maintainable. If at all the petitioner is having a claim arising out of the Bill of Lading dated 14.03.2021 for non payment of freight and demurrage by the respondents, the petitioner will have to seek redressal by filing a Civil



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Suit.

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16.Since this Court has held that the Arbitration Clause in the Bill of Lading dated 14.03.2021 is not binding on the respondents, there is no necessity for this Court to adjudicate the other objections raised by the respondents with regard to the maintainability of this petition on the grounds of a)claim filed by the petitioner is not maintainable as they claim that they are an agent of a foreign disclosed principal; and b)lack of jurisdiction of this Court to decide this petition, since the place of delivery of the cargo is at Nhava Sheva, Mumbai and the Courts at Mumbai alone has got jurisdiction.

17.For the forgoing reasons, there is no merit in this petition and accordingly this petition is dismissed. No costs.

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Index:Yes/No
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