

(1995) 09 DEL CK 0006

In the Delhi High Court

Case No : First Appeal No. 71 of 1995

Bharat Starch Industries Ltd.

APPELLANT

Vs

Prudent International Shipping and Trading Co. Ltd. and
Others

RESPONDENT

Date of Decision : 15-09-1995

Acts Referred:

Contract Act, 1872 — Section 182
Evidence Act, 1872 — Section 101

Citation : (1995) 34 DRJ 72

Hon'ble Judges : M. Jagannadha Rao, C.J.;A.D. Singh, J

Bench : Division Bench

Advocate : Suruchi Aggarwal, Shankar Ghosh, Vikash Dhawan, A.M. Singhvi and Nisha Banerji, for the Appellant;

Judgement

M. Jagannandha Rao, C.J.

(1) This is an appeal filed by the plaintiff (M/s. Bharat Starch Industries Ltd., New Delhi) against the order of the learned Single Judge dated 24-2-1995 in I.A. 10655194 in Suit 2788194. by trial order the learned Single Judge granted stay of the proceedings in title suit and refused to stay action under the arbitration clause contained in the Charter Party which has resulted in the proposed arbitration by the 3rd and 4th defendants at London.

(2) The appellant, who filed the suit sought a declaration in its favor and against the defendants declaring that there was no private of contract between the appellant and the 1st defendant (M/s. Prudent International Shipping & Training Company Ltd., Bahamas) and or a declaration that there did not exist any arbitration clause between the appellant and the 1st defendant or the 3rd defendant and that the defendants 3 & 4 could not have any jurisdiction to entertain any arbitration proceedings. A permanent injunction was sought against defendants 1, 3 & 4 proceeding with the arbitration. M/s.Andargro Services Ltd, New Delhi was imploded as the 2nd defendant as it was claiming to

be an agent of the appellant and it was claiming to be entitled to sign the Charter Party which contained the arbitration clause. The case of the appellant was that the 2nd defendant was not entitled to sign the Charter Party on behalf of the appellant.

(3) Pending suit, the appellant sought a temporary injunction to restrain defendants 1, 3 & 4 from enforcing the Charter Party dated 22-4-1994 and Clause 29 thereof containing the arbitration clause, and for restraining the defendants 1, 3 & 4 from proceeding with the arbitration pending disposal of the suit. The learned Single Judge dismissed the application of the appellant-plaintiff.

(4) The question is whether the plaintiff-appellant which transported goods from Kakinada Port in Andhra Pradesh on board the ship of the 1st defendant could be said to be a party to the Charter Party containing the arbitration clause so that the question of the liability of the appellant/plaintiff for demurrage could be subject matter of arbitration at London as per Clause 29 in the Charter Party. For the purpose of deciding whether the appellant was a party to the Charter Party, it becomes necessary to decide whether the 2nd defendant (Andagro Services Pvt. Ltd. New Delhi) and in particular its employee, Mr. Paul McGowan signed the Charter Party as the agent of the appellant. In case, there is prima facie proof that the said defendant was an agent of the appellant, the appellant will be bound by the Charter Party and the arbitration clause would be attracted, and in that event, the question whether the appellant will become liable for demurrage has to be decided in the arbitration proceedings at London.

(5) The learned Single Judge, on an exhaustive consideration of the documents and correspondence exchanged between the parties came to the conclusion that the appellant, by its conduct, had accepted that it was the charterer, that Mr. Paul McGowan of the 2nd defendant was its agent and, Therefore, the latter was entitled to sign the Charter Party and bind the appellant. The learned Single Judge, therefore, held that the arbitration clause applied to the case and that the appellant could not seek stay of the arbitration proceedings.

(6) In this appeal, learned counsel for the appellant, Mr. Suruchi Aggaiwal, placed before us various facts and circumstances to show that appellant was not a party to the Charter Party. She contended that appellant did not sign the Charter Party with the 1st defendant. She contended that 2nd defendant and its employee, Mr. Paul McGowan had no authority to sign the Charter Party as the agent of the appellant had not also signed the Mou with 2nd defendant and Therefore any admission in the Mou that the appellant was Charterer of the Ship, was not binding on appellant.

(7) On the other hand, Dr. Shankar Ghosh, Sr. Counsel appearing for the 1st defendant, relied on documentary evidence to show that the appellant accepted that it was the "charterer, that the appellant treated the 2nd defendant and its employee Paul McGowan as its agent and, Therefore, the latter was entitled to sign the Charter Party to bind the appellant. He also contended that there was an

MOU. which though not signed by the appellant, was also accepted by the appellant later and it contained a clear admission that appellant was the charterer. Dr. A. M. Singhvi, Sr. counsel appearing for the 2nd defendant, contended that his clients acted as agents of the appellant and. Therefore, the appellant was bound by the arbitration clause. He too relied upon the Mou which contained an admission that appellant was the charterer.

(8) The point that arises for consideration in this appeal is whether the appellant was the charter of the ship and whether the 2nd defendant and its employee, Mr. Paul McGowan were treated or accepted as agent by the appellant and whether the Charter Party(which contained the arbitration clause) signed by the 2nd defendant through its employee, Mr. Paul McGowan was binding on the appellant ? Question also is whether the Mou signed by 2nd defendant, which contained an admission that appellant was the Charterer-though it was not signed by appellant was accepted by appellant in subsequent correspondence ".Shipping and Trading Co, Ltd., & Ors.

(9) Before referring to the relevant documents it is necessary to refer to some facts.

(10) The appellant plaintiff company was carrying on business of manufacturing starch and allied products. The 1st defendant is a shipping company incorporated in Nassau, Bahamas. The 2nd defendant is a trading company having its office at Delhi and a branch at Bombay. The 3rd defendant is the Maritime Arbitrators Association incorporated in London. The 4th defendant is a member of the 3rd defendant Association and is said to have been approached by the 1st defendant for appointment of an Arbitrator. On 3-3-1994 the 2nd defendant placed a purchase order on the plaintiff company for supply of 10,400 M.T. of Yellow Maize in bulk shipment from India ,and at the same time, the 2nd defendant contracted with one Baktaran Danesh & Co. in Iran for purchase of this shipment. The appellant was informed that the product was to be shipped on the ship belonging to the 1st defendant (owner of the ship) when the later come to the port of Kakinada in Andhra Pradesh. From Kakinada, the product was to be transhipped to the concerned port in Iran. On 25-8-1994 the 1st defendant served a notice on the plaintiff stating that the Charter Party dated 22-4-1994 was chartered for a voyage by the appellant from Kakinada to Iran and, Therefore, the appellant as well as the 2nd defendant were liable to pay the demurrage charges of U.S. \$ 77,479.50 with interest thereon. A further notice dated 15-11-1994 was given to the appellant on behalf of the 1st defendant by their Solicitors in London referring to the Charter Party dated 22-4-1994 stating that they had been appointed to commence arbitration proceedings under clause 29 of the Charter Party, and the appellants were invited to appoint an Arbitrator from the members of the London Maritime Arbitrators Association within 3 days. There was a further telex on 24-11-1994 from them appointing the 4th defendant, who is a member of the above Association, as Arbitrator on behalf of the 1st defendant and 7 days time was given to the appellant to appoint its Arbitrator. Inasmuch as the

appellant contended that it had not entered into any Charter Party dated 22-4-1994, it sent a message on 29-11-1994 to the 1st defendant that the appellant had not signed any Charter Party agreement and it did not even have a copy of the said Charter Party. It was also contended that the 2nd defendant was a purchaser and not an agent, and that the 2nd defendant had entered into an independent contract with the purchasers in Iran and, Therefore, the claim for demurrage should be met by the 2nd defendant and not by the appellant. Thereafter, the appellant appears to have forwarded a copy of this letter to the 4th defendant. The 4th defendant then sent a Fax message to the appellant dated 6-12-94 that he had entered into the reference and the appellant sent a reply on 8-12-1994 and then filed the "present suit for declaration and permanent injunction-

(11) Before analysing the evidence, we shall briefly refer to certain basic legal principles. The test of agency for the purpose of Section 182 of the Contract Act is whether a person is purporting to enter into a transaction on behalf of the principal or not. In order to constitute an agency, it is not necessary to have a formal agreement, (*Babulal Swarupchand Shah vs. S. S. (Fixed Delivery) Merchants, Assam* (AIR 1960 Bombay 548)). Under Sections 101 to 104 of the Evidence Act, if a person claims to be an agent of another, the burden of proof is on the person so claiming. But at the same time u/s 109 of the Evidence Act when the question is whether the persons are in the relationship of principal and agent, and it had been shown that they had been acting as such, the burden of proving that they do not stand or have ceased to stand to each other in that relationship, is on the person, who affirms it. Further where a person allows another to hold himself out as agent of the former, he will be bound by whatever agreement was entered into by such an agent. (*Walsh v. Griffith Jones* (1978) 2 All E.R. 1002. u/s 186 of the Contract Act the authority of an agent may be expressed or implied. Section 187 of the Contract Act states that an authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case. Things spoken or words written or the ordinary course of dealing, and circumstances of the case could be taken into account for deciding whether there was agency. Further if a person by words or conduct holds out another as having authority to act on his behalf, he is bound as regards third parties by the acts of such other as if he were his agent. (*Union of India v. Motilal* AIR 1962 A.P. 384. *Shearson Lehman Bros. Inc. v. Machine Watson and Co. Ltd.* (No. 2) 1988 1 W.L.R. 16 (28).

(12) Bearing the above principles in mind, we shall now refer to the various documents. Firstly we shall deal with the documents concerning the Charter Party and then with documents concerning the Mou between the appellant and the second defendant.

(13) On the question of the Charter Party, apart from the 2nd defendant who claims to have signed the Charter Party as agent of appellant, we have another

company called Babko Shipping Services, Kakinada which was appointed by appellant as stevedores and for other services. The said company also figures in this correspondence. On 23-4-1994 Babko Shipping Services Kakinada wrote a letter to the ship-owner i.e. addressed to the latter's agent (Parekh Marine Agencies Pvt. Ltd., Kakinada) informing them as follows :-"We take pleasure in informing you that we have been appointed as Charters Agents and Stevedores by our Shipping and Trading Co. Ltd., & Ors. Principals M/s. Bharat Starch Industries Ltd. who are the Charterers of the vessel as well shippers of the cargo. All the correspondence may be directed to us. C.C. to M/s. Bharat Starch Industries Ltd., New Delhi". The above document would show that the appellant's stevedores described themselves not only as charterers agents, but also described the appellant Bharat Starch Industries Ltd., New Delhi as Charterers of the vessel as well as the shippers of the cargo. The appellant was sent a copy of this letter by Babko Services, their own stevedoring agents and inspire of that, the appellant did not disown the said relation ship. Babko Shipping Services wrote another letter dated 21-5-1994 to Parekh Marine Agencies Pvt. Ltd. agent of the shipper i.e. 1st defendant (at Kakinada) as follows :--"Please refer to our proposed remarks rough sheet sent to you. We have received now the authentic charter party with some changes. In the light of it, the remarks are to be amended. You are requested not to incorporate the rough sheet remarks in statement of facts till further advise. "Thanking you, Yours faithfully, for Bobko Shipping SERVICES.Sd/-CAPT. Brtj M. Talwar (MG. PARTNER) (CHARTERER Agents ONLY)C.C. to : M/s. Bharat Starch Industries Ltd., New Delhi E.C. to ; M/s. And agro Services Pvt. Ltd. Bombay". This would again show that the appellant stevedores informed that they had received a copy of the authentic Charter Party with some changes, and a copy of this letter was also sent to the appellant. But there was no objection by the appellant as to why Babko should have received a copy of the Charter Party. It is also significant that Babko Services sent a copy of their letter to the 2nd defendant. Andagro Services Pvt Ltd. through their branch in Bombay.

(14) The appellant, through their Marketing Manager, Mehra sent a telex to Mr. Nirmal Somya of the 1st defendant stating that with reference to the latter's Fax dated 23-4-1994 the appellants were thankful for arranging M. V. Prudent Voyager for shipment of maize to Iran. It was further stated "Pl. note we will be in a position to accept the vessel.....".

(15) On 25-4-1994 the 2nd defendant stated by letter that charterers would like the notice to be given to M/S. Babko Shipping services. This letter was signed by Mr. Paul McGowan of the 2nd defendant and a copy of this Fax was sent to the appellant as is clear from same document. The sentence "The charterers could like the notices to be given to M/s. Babko Shipping Services" would obviously mean that the 2nd defendant, who is the author of file letter was not treating itself as the charterer, but was treating the persons, who appointed them as Stevedores, i.e. the appellant as charterers. Appellant again accepted the copy and did not object to its being treated as character.

(16) Babko Shipping Services wrote another letter to the 1st defendant's agent, Parekh Marine Agencies on 29-4-1994. The relevant portion of which reads as follows :__

".....WE have been advised by our principals to accept N.O.R (Notice of Readiness) of 25th April and lay time from 0800 hours on 27th April, 94 under protest. However, we are planning to commence loading of your good vessel from 2nd May 94."

(17) A copy of this letter was sent to both Mr. P. R. Mehra and Mr. S. L. Chopra of the appellant company. Copies were also sent to the 2nd. defendant and its employee Mr. Paul McGowan.

(18) We have then a "Statement of Facts" relating to loading of maize in the ship under the heading "Subject to terms, condition"" provisions and exceptions of the relative charter party dated 20-4 1994" signed by Babko Shipping Services as "Charterer's" Agents. It was also signed on behalf of the 1st defendant by the Master of the Ship as well as by an employee of Parekh Marine Agencies for the 1st defendant, owner of the ship.

(19) Learned counsel for the appellant wanted to argue that Babko Services signed this document not as this agent of the appellant but agent of of 2nd defendant but we are unable to accept this submission having regard to the earlier correspondence mentioned above wherein Babko Shipping Services had clearly mentioned that the appellants were the charterers. In fact, para 19 of the above Statement of Facts shows that dead freight has to be paid by charterers as per difference between joint survey quantity and 10.000MTs (agreed minimum quantity to be loaded).Shipping and Trading Co. Ltd., & Ors.

(20) There is an annexure to the above document under the heading "Charterer's Agents Remarks". That annexure shows that there was a strike from 5-5-94 to 7-5-94 and then from 8-5-94 to 10-5-94. It is stated that the time from 1700 hours on 10-5-94 to 0800 hours on 12-5-94 was not to count as lay time as vessel was anchored far away and Pool Office refused to allot Boats. The vessel did not shift till 0841 hours on 12-5-94 and after vessel's shifting only the Pool Officers allotted Cargo Boats. All time lost, expenses for idle time etc. would be on Ships Accounts. It was also stated that on 18-5-94 from 2000 hours to 1045 hours on 19-5-94 work stopped due to gale winds and heavy seas and swell. The cargo boats left the ship at 2100 hours on 18-5-94 for safety of men on board and cargo. The cargo boats could only be placed again at 1045 hours on 19-5-1994 after sea and swell subsiding and tide timings. Therefore, time was not to count from 2000 hours on 18-5-94 to 1045 hours on 19-5-94. Thereafter, the entire cargo was loaded under supervision and direction of the Master.

(21) The above annexure would, Therefore, show that there was delay in loading in the ship on account of various factors mentioned above. This annexure is again signed by Babko Shipping Services as Charterer's Agent" only. It is also signed by the Master of the Ship, and the 1st defendant's agents M/s. Parekh

Marine Agencies Pvt. Ltd.

(22) The appellant then sent a Fax message to the 2nd defendant on 2-6-1994 as follows :-"We thankfully acknowledge title receipt of your Fax Meg. No. BBY/ / /9411735 dated 1/06/1994 and have to inform you that the freight against 1st Bill of Ladings being arranged by us and the payment against 2nd Bill of Lading dated 20/05/1904 will be arranged within 2 or 3 days from the receipt of B/L. We have so far not received the statement of facts, As such as the demurrage payment would be calculated and paid on getting the statement of facts and computation of lay time. Kindly complete all formalities of the Bill of Lading at the earliest." This was signed by Mr. B. L. Chopra of the appellant company This document, in fact, has been relied upon by the respondents to the extent this document implies that the appellants were the charterers, it goes against the appellant. Whether this document also contains any admission of liability for demurrage is a matter to be decided by the Arbitrator.

(23) The above documents in our view, clearly show that the appellant was clearly put on notice in the it was the charterer and it was on that basis that the appellant's stevedores, Babko Shipping Services at Kakinada and also M/s. Andagro Service Pvt. Ltd. Delhi and Bombay were dealing with the appellant the appellant never disputed that character, In view of the above conduct, appellant cannot raise any contention that the Charter Party was not binding on it. That would mean that though the appellant was not a signatory to the Charter Party, it accepted the position by its conduct as disclosed from the correspondence Therefore, it must be held that appellant accepted that 2nd defendant's Paul Me Gowan signed the Charter Party as appellant's agent.

(24) We should not here be understood as deciding any question of liability of the appellant for the demurrage. That would, in fact be a matter for the Arbitrators to decide.

(25) The above conclusion is fully reinforced by the following further correspondence relating to the Mou between appellant and 2nd defendant, M/s. Andagro Services. We shall Therefore now deal with the documents concerning the said Memorandum of Understanding (MOU). The Mou appears to have come into being in connection with a mode of accounting contemplated by appellant and 2nd defendant so that the transportation would not involve any deduction of Tds out of monies payable to 2nd defendant.

(26) The 2nd defendant prepared a Memorandum of Understanding dated 14-4-1994 and communicated the same to the appellant. It stated that the 2nd defendant would procure an order for 10,400 Mt of Yellow Maize for the appellant for shipment to Iran on various terms. It also said that arrangements would be made for shipment prior to arrival of the vessel at the load port and the cost of Fumigation and Pre-and Post-shipment inspection was to the account of the appellant. The 2nd defendant, was to arrange the Letter of Credit in favor of the appellant. As per clause (c) of this Mou : "Mis. Andagro Services (P) Ltd. will

charter the vessel on behalf of M/s. Bharat Starch and the entire responsibility of performing as per the charter party will be on M/s. Bharat Starch. M/s. Andagro Services will not be responsible for any dead freight, demurrage and or any other cost and consequences as per the charter party. Demurrage, dead freight etc. if any, will be settled by Bharat Starch directly with the shipping company."

(27) This Mou Therefore contains a clear admission that the appellant was the Charterer. No doubt this Mou was signed only by the 2nd defendant. M/s. Andagro Services (P) Ltd. and it was Shipping and Trading Co. Ltd., & Ors. of been signed by the appellant. M/s. Bharat Starch Industries Ltd But the sequent correspondence shows that the appellant accepted the MOU. We shall now refer to the said correspondence.

(28) The appellant sent a telex message to the 2nd defendant on 30-7-1994 and the relevant portion thereof reads as under :--."With reference to our memorandum of understanding and your debit note dated 36th July, 94 for R.s. 36,93,508.4?you are requested to arrange remittance of our commission service charges as detailed in our debit note. Since the matter already has been over-delayed, please arrange our commission/service charges immediately enabling us to square up your account. We may add that you may deduct Tds @ 2% as per prevailing Tax structure and furnish us the Tds certificate of the similar amount "It is clear from the above Mou and letter of appellant that during the course of manufacture, a question of payment" of Income tax and tax deduction at source arose, and the appellant on the one hand and the 2nd. defendant on the other hand were trying to arrange their transactions in such a manner that there was no liability to deduct tax at source. Unfortunately for the appellant, our MOU, which the appellant described as "our MOU" also refers to the fact that the appellant is the charterer. The appellant wants to take advantage of the fact that the Mou was not signed by it, the words in the above said Fax message dated 30-7-1994 wherein the appellant had used the words "our memorandum" of understanding show that appellant accepted the MOU. In our view, the appellant cannot consider itself not bound by the Mou on the ground, that it did not sign the same. The appellant must be taken to have accepted the Mou in spite of its not specifically signing the same. If the MOU is to be treated as a document binding on the appellant, it is clear that therein the appellant accepted that it was that Charterer. Charterer .

(29) We also have another letter from the appellant written to its own employee, Mr. P. R. Mehra in connection with the MOU about the Income Tax arrangement. This letter dated 4-8-1994 is signed, by Mr. S. K. Jain on behalf of the appellant and addressed to its employee, Mr. P. R. Mehra. The relevant portion of that letter reads as follows :--"M/s. Andagro Services had only provided services to locate the buyer of Maize and arranged the FLC in favor of BSIL. The remuneration for providing such services as per the memorandum of understanding dated 14-4-1994 between M/s. Andagro services and BSIL is payable to M/s. Andagro and Services at the rate of US\$ 37.00 per tonne after deducting certain

expenses incurred by BSU. on their behalf. Kindly take up the matter with M/s. Andagro Service on the above lines immediately and inform us accordingly."

(30) There is yet another letter dated 10-5-1994 by the appellant through, its employee, v. herein there is again an admission and reliance on the Mou dated .14-4-1994. These two letters also shew that the appellant had clearly accepted the Mou which contains an admission that the appellant was the charterer.

(31) In the light of the above documents, we are clearly of the opinion that the appellant treated itself as die charterer of the vessel. The appellant was so informed, and it had not objected to this. The signing of the Charter Party by the 2nd defendant, through its employee Mr. Paul McGowan, who negotiated the same, can only mean that the said person signed the Charter Party on behalf of the appellant. The acceptance of the Mou also leads to the inference that the appellant admitted that it was the Charterer.

(32) There was an argument for the appellant as to why, in some places, the Charter Party was described as bearing the date of 20-4-1994 and in some other places as bearing the date,22-4-1994. This point has been explained by the respondents. The Charter Party was initially dated 20-4-1994, but it was only finalised by 22-4-1994 and that was why it was described as Charter Party dated 22-4-1994. in fact, in the additional affidavit of the 2nddefendant dated 25-1-1995 filed in 1. A. 10665/94 it was fairly explained as under :--The Draft Charter Party was dated 20-4-1994 and the final Charter Party was dated 22-4-1994. I say that there were hardly any material alterations in it, Unfortunately, the draft Charter Party's date 20-4-1994,was due to a typographical errors found its way into the Bill of Lading etc. In fact, the draft Charter Party are both with the plaintiff and it is prayed that they be requested, to produce the same The fact that the plaintiff has made no grievance about the Charter Party earlier shows that both these documents were known to them."

(33) One of the submissions for the appellant before us was that the learned Single Judge had not decided the question whether the Shipping and Trading Co. Ltd., & Ors.2nd defendant was a purchaser or an agent of the appellant and that without deciding the said question, it would not be possible to decide whether the 2nd defendant acted as an agent for signing the Charter Party on behalf of the appellant. We are unable to agree with this contention. The question whether the 2nd, defendant was a buyer himself or was only an agent of the appellant depends upon the substance of the transaction between the parties. That is a separate issue and need not be decided by us, at this stage, for the purpose of finding out the limited question as to whether the appellant was the charter. We are, Therefore, of the view that the learned Single Judge was light in not deciding this issue.

(34) Incidentally in the above discussion, we have already covered two other aspects argued by the learned counsel for the appellant, namely, that the

appellant had itself not signed the Charter Party and that the appellant had itself not signed the; MOU. We need not reiterate the reasons as to why this contention is liable to be rejected.

(35) An argument was also sought to be raised on the basis of the debit note raised by the 2nd defendant. But as stated earlier, the debit note was prepared as part of an arrangement under the Mou and does not override what is expressly admitted in the earlier correspondence between the appellant and the 2nd defendant.

(36) For the aforesaid reasons, we are of the view that the" appellant was the Charter, that it accepted the Charter Party in its correspondence and Therefore the arbitration clause, (Clause 29)is binding on the appellant. The learned Single Judge was, Therefore, right in coming to the conclusion that the dispute was to be settled by the Arbitrators at London.

(37) The appeal, Therefore, fails and is dismissed. Nothing said in this order or the order of the learned Single Judge should be treated as expression of any opinion on the merits of the liability of the appellant towards demurrage etc.