
(1995) 02 DEL CK 0057

In the Delhi High Court

Case No : Interim Application No. 10655 of 1994, Suit No. 2788 of 1994 and Original Miscellaneous Petition No. 13 of 1995

Bharat Starch Industries Ltd.

APPELLANT

Vs

Prudent International Shipping and Trading Ltd.

Prudent International Shipping and Trading Ltd. Vs Bharat
Starch Industries Ltd.

RESPONDENT

Date of Decision : 24-02-1995

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3

Citation : (1995) 58 DLT 107

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : Mukul Rohatagi, Suruchi Aggarwal, Shankar Ghosh, Anjali Vohra,
Vikash Dhawan, Abhishek Singh and M. Sethna, for the Appellant;

Judgement

Devinder Gupta, J.

(1) M/S Bharat Starch Industries Ltd. (hereinafter referred to as the "plaintiff") has preferred a suit, being suit No.2788/94, against four defendants. The first two defendants are M/s Prudent International Shipping and Trading Company Ltd., and M/s Andagro Services Pvt. Ltd. (hereinafter referred to as "defendants 1 & 2" respectively). The other two are the London Maritime Arbitrators Association and Mr. J.A. Schofield, the arbitrator. Decree for declaration prayed for by the plaintiff in the suit is to the effect that there is no privity of contract between the plaintiff and defendant No.1 and consequently there does not exist any arbitration agreement between the plaintiff and defendant No.1. As a consequence to this it is prayed that defendant No.3 has no jurisdiction to entertain any arbitration proceedings and award, if any rendered by defendant No.4 would be illegal and nullity. Decree for injunction has been claimed restraining defendants 3 & 4 from proceeding against the plaintiff on the basis of the alleged agreement between the plaintiff and defendant No.1. Decree for

injunction is also claimed against defendant No.1 not to go ahead with the arbitration proceedings stated to have been commenced before defendants 3 & 4.

(2) Along with the suit, the plaintiff filed an application under Order 39 Rules 11 & 2 of the CPC (IA 10655/94) claiming ad interim injunction restraining defendant No.1 from enforcing the arbitration agreement and against defendant No.4 from proceeding further with the arbitration or to pronounce any award in pursuance thereto.

(3) Summons in the suit and notice in is 10655/94 were issued against the defendants for 16.1.1995 on which date a statement was made on behalf of defendant No.1 that defendant No.1 intends to move an application u/s 3 of the Foreign Award (Recognition and Enforcement) Act, 1961 (Act 45 of 1961) (hereinafter referred to as the "Act".) On 24.1.1995, a petition u/s 3 of the Act (OMP No.13/95) was moved by defendant No.1 praying for staying the proceedings in the suit. plaintiff and defendants 1 & 2 have exchanged their affidavits in is 10655/94 and in Omp 13/95 and have also placed on record number of documents. Counsel for the parties were heard at length by me on the question whether proceedings in the suit, in terms of Section 3. of the Act are or are not liable to be stayed and on the question whether the plaintiff is entitled to the grant of temporary injunction during the pendency of the suit.

(4) plaintiff's case is that defendant No.2 placed a purchase order on the plaintiff for supply of 10400 M. Tonnes (10% more or less) Indian yellow maize in bulk shipment from India at Us \$ 128 per M. Tonne. Defendant No.2 had contracted with one Bakhtaran Danesh and Co. in Iran to supply the same product at Us \$ 165 per M. Tonne. plaintiff, thus, supplied to Bakhtaran Danesh & Co. on account of defendant No.2 by shipment from India to Bandar Imam Khomeinci and received the sale price from Bakhtaran Danesh and Co. at Us \$165 per M. Tonne. Defendant No.2 raised a debit note on plaintiff for reimbursement of the difference between the contracted price and the selling price. Thus, on the one hand there was a contract of purchase and sale between the plaintiff and defendant No.2 and on the other hand between defendant No.2 and Bakhtaran Danesh and Co. There was no privity of contract between the plaintiff and Bakhtaran Danesh and Co. For and on behalf of defendant No.2 the plaintiff made supply to Bakhtaran Danesh and Co. Defendant No.2 informed the plaintiff that the supply had to be shipped on a ship known as "Prudent Voyager", belonging to defendant No.1. There was also no privity of contract between the plaintiff and defendant No.1. A notice dated 25.8.1994 was served on the plaintiff on behalf of defendant No.1 by which the plaintiff was called upon to pay demurrage with interest thereupon stating that the ship M.V. Prudent Voyager had been chartered for a voyage from Kakinada, Andhra Pradesh, to Bandar Imam Khomeinci Iran for carriage of cargo of Indian yellow maize. Subsequently another notice was received by the plaintiff from Zaiwalla & Co., London, served on behalf of defendant No. 1, referring to a charter party dated 22.4.1994 stating therein that they had been appointed to commence arbitration proceedings in

terms of Clause 29 of the charter party. The plaintiff was invited to appoint an arbitrator from amongst the members of the London Maritime Arbitrators Association within three days. Another fax message dated 23.2.1994 was received by the plaintiff informing that Johan A. Schofield, a member of London Maritime Association, has been appointed as an arbitrator by defendant No.1. The plaintiff was given seven days' time to nominate its arbitrator failing which it was stated in the notice that arbitration proceedings would proceed ex parte. In this background, the plaintiff claimed the decree aforementioned alleging that there has been no privity of contract between the plaintiff and defendant No. 1 and, thus, there is no question of any arbitration between the plaintiff and defendant No. 1. No charter party has been signed, between the plaintiff and defendant No.1 or by any person on behalf of the plaintiff. The proceedings for arbitration are without any basis and are without jurisdiction.

(5) Case of defendant No.2 in Omp 13/95 is that the ship M.V. Prudent Voyager was chartered for carriage of male in bulk from Kakinada to Bandar Imam Khomeinci in Iran on the basis of a charter party dated 22.4.1994 which was negotiated and signed for and on behalf of the plaintiff by defendant No.2 who was the plaintiff's agent and was authorised to sign the charter party. In pursuance to the charter party, ship owned by defendant No.1 had proceeded to Kakinada and loaded 9751.950 M. Tonnes of yellow male and proceeded to Bandar Imam Khomeinci Iran where the cargo was duly discharged. It was completed on 13.7.1994. Demurrage in terms of clause 25 of the charter party was to be settled within 20 days after completion of discharge and it was the plaintiff, under the terms of the charter party, who was fully responsible for settlement of demurrage. Defendant No. 1 on 15.7.1994 duly informed defendant No.2, who had negotiated and signed the charter party, for and on behalf of the plaintiff and acted on plaintiff's behalf as an agent for the claim for demurrage. A request was made to arrange for the payment. On failure and neglect on the part of the plaintiff to make payment, defendant No.1 through their London Solicitor Zaiwalla & Co. invoked the arbitration clause 29 contained in charter party through their fax message dated 15.11.1994 and also appointed J.A. Schofield as their arbitrator of which notice was duly served upon the plaintiff calling upon the plaintiff to either appoint its arbitrator or agree to the arbitrator appointed by defendant No.1 as the sole arbitrator. On failure of the plaintiff to appoint any other arbitrator, J.A. Schofield has entered upon the reference and defendant No.1 has also submitted its points of claim before the sole arbitrator. Plaintiff through its fax message dated 29.11.1994 falsely laid a claim that it had not signed the charter party agreement and, Therefore, the arbitration proceedings were not binding upon the plaintiff. Defendant No.1 in its petition has narrated facts and circumstances on the basis of which it is claimed that the plaintiff is a party to the arbitration agreement and is bound by the same. Plaintiff is also bound by clause 29 of the charter party, which contains an arbitration agreement and since suit has been filed in respect of matters agreed to be referred to arbitration, in terms of arbitration clause, proceedings in the

suit are liable to be stayed.

(6) It is not in dispute that there is nothing in the general law of arbitration, either English or Indian, which prevents the arbitrators or an umpire from deciding questions of their own jurisdiction provisionally or tentatively and to proceed to make their awards on that basis. Such a provisional or tentative decision on questions of their own jurisdiction would be subject to the final determination by the Court and if the Court takes a contrary view, their award will not be given effect to. In *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, while considering the scheme of the Act vis-a-vis Arbitration Act, 1940, it was held that Sections 3 and 7 of the Act read together disclose a scheme that so far as the question of existence, validity and effect (scope) of the arbitration agreement are concerned, the determination thereof by the Arbitrators is also subject to the decision of the court. This decision of the court can be had either before the Arbitration proceedings commence or during their pendency. If an occasion to decide the question of arbitrator's jurisdiction arises at an earlier stage, namely, in a petition u/s 3 of the Act, the court has to decide it before granting stay of the legal proceedings and such a decision of the court on that question will be conclusive and binding upon the arbitrator. It was held:

"ON a combined reading of Ss. 3 and 7 of the Foreign Awards Act clearly contemplates that questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where such agreement is wide enough to include within its ambit such questions, may be decided by the arbitrators initially but their determination is subject to the decision of the Court and such decision of the Court can be had either before the arbitration proceedings commence or during their pendency, if the matter is decided in a Section 3 petition or can be had under S.7 after the award is made and filed in the Court and is sought to be enforced by a party thereto. In the face of such scheme envisaged by the Foreign Awards Act which governs this case it will be difficult to accept the contention that the arbitrators will have no jurisdiction to decide questions regarding the existence, validity or effect (scope) of the arbitration agreement. In fact the scheme makes for avoidance of dilatory tactics on the part of any party to such agreement by merely raising a plea of lack of arbitrator's competence and a frivolous plea at that and enable the arbitrator to determine the plea one way or the other and if negatived or proceed to make his award with the further safeguard that the Court would be in a position to entertain and decide the same plea finally when the award is sought to be enforced. All that condition (iii) of S.3 requires is that the legal proceedings must be in respect of a matter "agreed to be referred to the arbitration "and there is no warrant to add further words, namely, "agree to be referred to the arbitration for final determination". Obviously if the occasion to decide the question of arbitrator's jurisdiction arises at an earlier stage, namely, in a Section 3 petition the Court has to decide it before granting stay of the legal proceedings and such decision of the Court on that question will be conclusive and binding on the

arbitrator and the question before him will then become academic. It is thus clear that under the scheme questions of existence, validity or effect (scope) of the arbitration agreement itself, in cases where the arbitration clause embraces within the Court in a Section 3 petition) could be initially determined by the arbitrators, which would be subject to the final decision of the Court"

SINCE defendant No.1 in this case has moved a petition for stay of the suit, which petition has been made before filing written statement or taking any other step in the legal proceedings, it has become necessary to adjudicate upon the existence, validity or effect (scope) of the arbitration agreement, which is also the main scope of the suit. Unlike Section 34 of the Arbitration Act, 1940, there is no discretion upon the court, Once conditions as are contained in Section 3 of the Act are fulfilled, it is obligatory on the part of the court to order stay of the proceedings commenced by a party to the agreement in respect of the matters agreed to be referred to arbitration. The conditions which are required to be fulfilled for invoking Section 3 of the Act as noticed in Renusagar's case (supra) are:

"(I)there must be an agreement to which Article Ii of the Convention set forth in the Schedule applies;

(II)a party to that agreement must commence legal proceedings against another party thereto;

(III)the legal proceedings must be "in respect of any matter agreed to be referred to arbitration" in such agreement;

(IV)the application for stay must be made before filing the written statement or taking any other step in the legal proceedings;

(V)the Court has to be satisfied that the agreement is valid, operative and capable of being performed; this relates to the satisfaction about the "existence and validity" of the arbitration agreement; and . .

(VI)the Court has to be satisfied that there are disputes between the parties with regard to the matters agreed to be referred; this relates to effect (scope) of the arbitration agreement touching the issue of arbitrability of the claims."

IN the instant case, adjudication is required by the parties on the first and fifth conditions. Other conditions are not in dispute.

(7) As noticed above, the plaintiffs case is that the charter party has neither been signed by it nor by any other person on its behalf whereas the case of the defendant No.1 is that the charter party has been signed by defendant No.2 on behalf of the plaintiff. Existence of charter party is not in dispute. In order to appreciate the respective contentions, reference will have to be made to a number of documents on which reliance has been placed by the parties.