

(1997) 05 DEL CK 0037

In the Delhi High Court

Case No : OMP 47 of 1995 and I.A. 1837 of 1997

Hindustan Fertilizer Corporation Ltd.

APPELLANT

Vs

Great Eastern Shipping Co. Ltd.

RESPONDENT

Date of Decision : 22-05-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 19, 20
Transfer of Property Act, 1882 — Section 130

Citation : (1998) 74 DLT 82 : (1998) 46 DRJ 344 : (1998) 120 PLR 25

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Dr. S. Ghose and Mr. S. Bhaumik, for the Appellant; Mr. N.K. Kantawala, for the Respondent

Judgement

S.N. Kapoor, J.—By this petition, the petitioner a wholly owned Government Company seeks declaration about existence of a valid arbitration agreement between the petitioner, assignee under the Bill of Lading and respondent No.1 and valid reference of disputes between the parties to the two joint Arbitrators—respondent Nos.2 & 3 and in the alternative seeks reference of the disputes to the Arbitrators already appointed.

2.1 The petitioner themselves claims that petitioner Company is authorised agent of Government of India in regard to handling and distribution of imported fertilizers. The respondent is a common carrier by sea and is the owner of the merchant ship "JAGRAHAT"

2.2. Under a Charter Party Agreement dated April 22,1992 between the President of India and the respondent Company - The Great Eastern Shipping Co. Ltd., the respondent Company undertook that its vessel "m.v. JAGRAHAT" would call at one or two safe ports in U.S., Gulf, part of Tampa and there is could load full and complete cargo of 33,000 M.T. at owner's option Bulk Di-Ammonium Phosphate all under deck and carry the same to one or two safe ports, safe anchorages, West or East Coast of India and there deliver the cargo in the same good

condition as they were loaded to or to the order of the petitioner for consideration as mentioned in the Charter party.

2.3 Seminole Fertilizer Corporation Stamford, U.S.A. executed the contract for sale of 31,853.478 M/T of DAP to Government of India through its Canalising Agent MMT. M.V. Jagrahat issued a Bill of Lading dated 25th April, 1992. The Charter Party contains an arbitration clause under Rider No. 51. The petitioner is the assignee of the said Bill of Lading for it was endorsed by the Ministry of Chemical and Fertilizers, Government of India to the effect that "the cargo may be released to M/s. Hindustan Fertilizers on behalf of the Ministry of Chemical and Fertilizers." The cargo was delivered accordingly to the petitioner. During the period of loading between April 2, 1992 and April 25, 1992 there were rains on 23rd and 24th April, 1992. The vessel "m.v. Jagrahat" arrived at the port of discharge, Kakinada, India and commenced discharge on June 7, 1992, completed it on August 5, 1992. The bulk DAP cargo was found to be wet, solidified, hardened and damaged. Large portion of cargo could not be removed in the normal procedure, extra workers, crowbars and shovels were required to break the solidified cargo and thereafter the same was bagged and/or otherwise unloaded. The Marine Surveyors representing the petitioner and the respondent verified that the holds were not closed prior to every rain period and that the hardening of the cargo was due to this rain water falling in the holds and loading was almost nearing completion. Cargo to extent of 349.762 M.T.S. was damaged to such an extent that it became totally unfit for its intended purpose due to negligence of the respondent in neither covering the hatches before rain water entered into the holds and wetted the cargo and nor making any arrangement and taking any precaution to dry the cargo before further loading the same. Due to breach of agreement and breach of duty coupled with negligence on the part of the respondent the claimant/petitioner suffered loss and damage as under:

PARTICULARS F.O.B. value of 349.762 M.T. at the rate of US D 157.50 per M.T. = US D 55087.515 Rs. 17,35,257.00 Freight for 349.762 M.T. = 342.766 L.T. at the rate of Rs. 1,088/- per M.T. Rs. 3,88,307.00 Additional expenses incurred towards handling, survey and disposal of 349.762 M.T. damaged cargo Rs. 1,48,370.00 Total Rs. 22,71,934.00

2.4.1. In view of the loss suffered dispute arose. Both the parties agreed to refer the dispute to arbitration as per the Clause 51 of Chapter Party. Mr. A.K. Basu and Dr. S.N. Sanklecha were appointed as Arbitrators under the Chapter Party Agreement. The petitioner filed a statement of claim claiming inter alias Rs. 24,19,438.62 plus further interest at the rate of 21.25% per annum from 1.10.1993 till the date of the award.

2.4.2. The respondent No.1 filed a counter statement raising the dispute that the petitioner having acted as the agent of the disclosed principal and as such under the provisions of Section 230 of the Contract Act is not entitled to sue. Since no arbitration agreement exists between the claimant/petitioner and respondent No.1 herein the learned arbitrators had no jurisdiction to enter into the claim of

the petitioner. Counter statement was filed on 31.1.94.

2.4.3. The petitioner filed rejoinder to the counter statement submitting that the counter claim was not filed within the time granted and extended. Further the time was granted by the arbitrators to file the counter statement. The petitioner in their rejoinder claimed that the Chapter Party Agreement and the bill of lading is a single set of document and complementary to each other and all the terms and conditions contained in the Chapter Party Agreement that have been operative through the bill of lading. Since the said bill of lading was endorsed by Ministry of Chemicals and Fertilizers in favor of the petitioner the owner of the goods, as endorsee, the petitioner was holding a right, title or interest over the said cargo under the terms of carriage following High Sea Sale by the Government of India through the said instrument the Bill of Lading u/s 130 of the Transfer of Property Act, 1882.

2.4.4. Several arbitration sittings took place. On 29th March, 1994 the learned Arbitrator issued directions to the petitioner to the effect that point of existence of arbitration agreement should be got decided through Courts. The present petition has been filed accordingly seeking aforementioned reliefs.

3. This petition is being contested by the opposite party mainly on two grounds. Firstly this Court has not territorial jurisdiction to decide and entertain the questions involved in this petition. Secondly there is no valid arbitration agreement in between the parties.

4. I have heard the parties Counsel at length and gone through the record.

5. In this case following are undisputed facts: (i) there is no dispute about the fact that on 22nd April, 1992 the agreement between Great Eastern Shipping Company Ltd., Hongkong and the President of India, New Delhi was entered at Bombay; (ii) under the Chapter Party Agreement the cargo was to be delivered at the Port of Kakinada; (ii) none of the respondents have their residence or registered office within the jurisdiction of this Court; and (iv) the endorsement of the Competent Authority has been executed in Delhi by the Government of India.

6. Territorial Jurisdiction

6.1 The petitioner claims in para 33 of the petition that the Head Office of the petitioner is situated at 55, Nehru Place, New Delhi - 110019. So cause of action has arisen within the jurisdiction of this Court. The petitioner also relies on Annexure "C-1". It is very much apparent that the following endorsement dated 11th March, 1992 was made at New Delhi "the cargo may be released to M/s. HFC on behalf of M/Chemicals & Fertilizers".

6.2 As claimed by the petitioner there are three grounds for conferring territorial jurisdiction on this Court, (i) above said endorsement; (ii) the petitioner is having its Head Quarter at Delhi; and (iii) the Arbitrators have issued directions (Annexure "F") dated 29th March, 1995. Directions of the Arbitrator in this regard do not appear to be material. Sections 19 & 20(a) and (b) of CPC do not

allow the petitioner to confer territorial jurisdiction on this Court simply on the ground that the petitioner is living in Delhi. Section 19, CPC gives option to choose one out of the two Courts if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another. It does not give option to choose this Court for no wrong was committed by the defendant within jurisdiction of this Court nor defendant No.1 resides or carries on business in Delhi. Defendant Nos. 2 & 3 also do not reside in Delhi.

6.3. Now the question is whether aforesaid endorsement made in favor of the petitioner-Hindustan Fertilizer Corporation Ltd. would lead to arising of cause of action against the defendants and would confer any jurisdiction on this Court under Clause (c) of Section 20, C.P.C. The fact that the head office of the Ministry of Chemicals and Fertilizers of the Union of India is located in Delhi, plaintiff itself carried on its business in Delhi would not be sufficient to confer jurisdiction on this Court.

6.4 In this regard one may refer to Section 19 of CPC which may read as under;

"19. Suits for compensation for wrongs to persons movables. - Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts."

The wrong was done at the loading Port and the defendant carries on business or works for gain within the local limits of jurisdiction at Bombay. Since the wrong was done to the movable cargo and it was delivered at Kakinada. Kakinada Court may also have jurisdiction but it does not appear that the suit by any stretch of imagination could have been filed in Delhi either by over stretching of Section or Section 20 of CPC. Supposing for the sake of argument that endorsement in favor of the petitioner gives the cause of action against Union of India and in favor of the petitioner then this does not confer any right on the petitioner to sue respondent Nos. 1, 2 or 3 in Delhi for no cause of action arises against the respondent in Delhi and neither UOI is a party to the suit nor any leave has been sought to sue either of the defendants.

7. Right of the plaintiff to sue: Principal or agent.

7.1 In this regard Counsel for the petitioner referred to Section 1 of Indian Bills of Lading Act, 1856 which reads as under:

" 1. Rights under Bills of Lading to vest in consignee or endorsee. - Every consignee of goods named in a Bill of Lading and every endorsee of a Bill of Lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of

such goods as if the contract contained in the Bill of Lading had been made with himself."

7.2 Learned Counsel for the plaintiff relies upon the case of A.M. Mair and Co. Vs. Gordhandass Sagarmull, and made specific reference to para 9 which reads as under:-

"If, Therefore, we come to the conclusion that both the disputes raised by the respondents fall within the scope of the arbitration clause, then there is an end of the matter, for the Arbitrators would have jurisdiction to adjudicate on the disputes, and we are not concerned with any error of law or fact committed by them or any omission on their part to consider any of the matters. In this view, it would not be for us to determine the true construction of the contract and find out whether the respondents' contention is correct or not. Once the dispute is found to be within the scope of the arbitration clause, it is not part of the province of the Court to enter into the merits of the dispute."

7.2.2. Learned counsel for the plaintiff also referred the case of Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another, , and made specific reference to paras 7 and 10 which reads as under:

"We may at first deal with the appeal preferred by the appellant NAFED relating to the first contract. The question is whether by Clause 11 in the first contract, the arbitration clause in FOSFA 20 contract can be said to have been incorporated into the contract. It is now well established that the arbitration clause of an earlier contract can, by reference, be incorporated into a later contract provided, however, it is not repugnant to or inconsistent with the terms of the contract in which it is incorporated. Mr. G. Ramaswamy, learned Additional Solicitor General appearing on behalf of the appellant, has strenuously urged that the High Court was wrong in holding that the arbitration clause in the FOSFA-20 contract was incorporated into the first contract by virtue of the incorporation clause. He has drawn our attention to the second illustration at page 46 of Russell on Arbitration. Twentieth Edition, The illustration refers to the decision of Lord Esher M.R. in Hamilton & Co. Vs. Mackie & Sons, (1989) 5 TLR 677, we have looked into that decision as much reliance has been placed thereon on behalf of NAFED. In that case a bill of lading contained the words "all other terms and conditions as per charter-party". The charter party contained an arbitration clause. It was contended on behalf of the ship-owners that the arbitration clause in the charter-party was incorporated into the Bill of Lading. In overruling the said contention Lords Esher M.R. observed:

"Where there was in a Bill of Lading such a condition as this, "all other conditions as per charter-party", it had been decided that the conditions of the charter-party must be read verbatim into the Bill of Lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charter-party on being so read were inconsistent with the Bill of Lading they were insensible, and must be disregarded. The Bill of Lading referred to the charter-

party, and Therefore, when the condition was read in."All disputes under this charter shall be referred to arbitration, "it was clear that that condition did not refer to disputes arising under the Bill of Lading, but to disputes arising under the charter-party. The condition Therefore was insensible, and had no application to the present dispute, which arose under the Bill of Lading."

"10. In our opinion, Harries, C.J., had taken a very reasonable and sensible view. It is true, as pointed out by Lord Esher M.R., that the expression "all disputes under this charter", if incorporated into the Bill of Lading, would be quite insensible. But if the clause had been "any dispute under this contract" then after incorporation into the Bill of Lading the words "this contract" would only mean the Bill of Lading into which it had been incorporated. In the instant case, as has been already noticed, the arbitration clause in the FOSFA-20 contract provides "any dispute arising out of the contract" and, as such, there is no difficulty in the incorporation of the arbitration clause into the first contract, for the words "this contract" would mean the first contract into which it has been incorporated. Such incorporation would be quite intelligible and not inconsistent with the terms of the first contract. There is, Therefore, no substance in the contention made on behalf of the appellant on the basis of the decision in *Hamilton & Co. Vs. Mackie & Sons* 1889 5 TLR 677 (supra).

7.2.3. Learned Counsel for the petitioner also relies upon the case of *Vaddadi Venkataswami Vs. Hanura Noor Muhamad Beegum and Another* .

"Apart from the over whelming authority, my opinion seems to be strengthened by the very provisions of the Negotiable Instruments Act. In my opinion, Sec. 46 provides for only one mode of transfer, that is, by negotiating the instrument by means of endorsement and delivery. This does not mean that there is no other method of assignment of a promissory note.

If the contention of Mr. Venkatesam that the only way of assigning a Bill of Exchange is by endorsing it, is to be accepted, the assignment by operation of law, also cannot take effect. I have already referred to the statement in *Virappa Andandaneppa Manvi Vs. Mahadevappa Basappa Katti*, which negatives such theory. It was not seriously disputed by Mr. Venkatesam that a person claiming the Bill of Exchange by operation of law has a right to maintain an action on the promissory note.

That apart, there is authority for this position in *Ramanadhan Chetty Vs. Katha Velan* AIR 1918 Mad 482. The support for this theory can be found in Secs. 43 and 118, Negotiable Instruments Act. Section 43 enacts that a negotiable instrument made, drawn, accepted, endorsed or transferred" without consideration or for a consideration which fails, creates no obligation of payment between the parties to the transaction. In my judgment, the two expressions "endorsed" and "transferred" contemplates two modes of transfer of a promissory note.

It could not be assumed that the Legislature used the expression "transferred"

by way of redundancy. If meaning is to be given to both the expressions, it means the negotiable instrument could be assigned either by endorsement or by other way i.e., other modes of transfer are recognised.

7.2.4. On the other hand in support of his contention the respondent relies upon the case of Singamsetti Ramarao Vs. The Union of India (UOI), . In this case the Andhra Pradesh High Court held that a cause of action cannot be said to have arisen in favor of the endorsee at the place of endorsement. In that case an endorsee of a Railway Receipt sued the Railway Authorities through UOI for damage caused to the goods. The plaintiff in this case sought to confer jurisdiction on a Court where the alleged endorsement had taken place. The Andhra Pradesh High Court further held as under;

"...the right to sue the Railway Administration would be only governed by the contract as between the original consignor and the Railway, and if under the contract between the consignor and the Railway the places where the cause of action could be said to have arisen could only be a place where the goods were consigned or where the short delivery was alleged to be made or damage occurred, that alone could furnish a cause of action...."

It further held that:

"...That is to say, if a Railway Receipt has been endorsed in favor of five persons consecutively, it would amount to this that the first endorsees would be in a position to file a suit at any of the places where the previous endorsements took place or at the places where the goods were consigned or the breach of contract occurred. Obviously that is not the policy of the act as envisaged by Section 80 of the Railways Act. For all these reasons I am inclined to adopt the view taken by the Calcutta High Court and the view adopted in the case of Union of India Vs. Adam Hajee. In the result this C.R.P. is dismissed with costs."

7.2.5. From the above it can be easily concluded that since neither of the respondents ordinarily resides or Carries on Trades in Delhi nor any part of cause of action has arisen in Delhi this Court will not have any territorial jurisdiction to try and entertain the present petition.

7.2.6. Before it is said that the cause of action arose in Delhi or not it is further required to be examined whether the endorsement of this kind gives any cause of action against the respondents. It may certainly give a cause of action against the Union of India. But the Union of India is not a party to the suit.

7.2.7. According to Section 1 of the Indian Bills of Lading Act, A Bill of Lading is a document of title signed by the ship-owner or by the master or other agent of the ship-owner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. It is a well known mercantile document of title which is transferred in the business world by endorsement passing in the endorsee good title to the goods covered by such Bill of Lading.

However the property does not pass by the mere fact of endorsement on the Bills of Lading for the contract and the context in which the endorsement is made must always be taken into consideration to see for and seeking the purpose for which the endorsement was made. The endorsement is effected either by the Shippers or the consignee writing his name on the back of the Bill of Lading which is called "endorsement in Blank", in which case Bill of Lading may pass from hand to hand by mere delivery. Holders of Bill of Lading are entitled to sue for shortage of goods delivered and are not disentitled by condition of Bill of Lading to rely on admissions regarding the packing of goods. The above said endorsement may be sufficient to indicate that the title in the cargo had been transferred to the endorsee but there could be a simple endorsement to receive the delivery of the goods just as an agent or servant or contractors to receive the delivery of the goods just as an agent or servant or contractors acting on behalf of owner of the property, who would not become entitle to file a suit simply on the ground that the endorsement has been made in their names (see Bengal Enamel Works Ltd. Vs. Apejay Private Ltd., (170) Cal. 459. If neither the endorsement indicates that value has been received by the owner nor there is any other corroborative piece of evidence then in that case it will be difficult to accept that the title passes with this kind of endorsement. The things become worse when neither the words "endorsement blank" is written nor it is mentioned that the endorsement is made for value received and instead it is mentioned that "the cargo may be released to M/s. Hindustan Fertilizer Corporation on behalf of Ministry of Chemicals and Fertilizers". It would certainly not be sufficient to confer title on the present petitioner to sue in its own name. It may further be mentioned that in rejoinder at page 43 it is virtually admitted to the petitioner that the claimant may be an agent for handling and distribution of imported fertilizer but that does not preclude it from the making him as "assignee" of Bill of Lading or a Receiver of the goods covered by the Bill of Lading and Charter Party.

8. Since the property in the cargo/goods was not intended to pass to the petitioner Section 1 of the Indian Bills of Lading Act would not be of any help to the petitioner. Since the petitioner claim to be the agent of a disclosed principal no suit or proceeding would lie in the name of the agent and the same would be hit by Section 130 of the Transfer of Property Act which reads as under:

"130. (1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transfer or his duly authorised agent, shall be complete and effectual upon the execution such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not."

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such

instrument or transfer as aforesaid, have been entitled to recover or endorse such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against the transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party thereto.

Exception. - Nothing in this section applies to the transfer of a marine or fire policy of insurance or effects the provisions of Section 38 of the Insurance Act, 1938 (IV of 1938)".

8.2 Here in this case no instrument has been got executed to say that case of the petitioner is covered by Section 130 of Transfer of Property Act and to indicate that property in the cargo passed in favor of the petitioner. The question again depends upon the transfer of title in the cargo followed by title in claim in favor of the petitioner. Since it is apparent that neither title in the cargo nor in the claim has been transferred by the endorsement made on behalf of Union of India, the petitioner could not take shelter u/s 130 of the Transfer of Property Act for the position of petitioner is just of an agent who could not sue in his own name.

9. The petitioner in its own name cannot maintain the present petitioner for referring the dispute to the Arbitrator as it is not a party to the arbitration agreement either in the Charter Party or under the Bill of Lading. There appears lot of force in the submission of the learned Counsel for the respondent that it is settled law that when the words "on the behalf of the principal" is added on the body of the endorsement and contract in that case it does not mean that there is an endorsement for the purpose of transferring title in property in favor of the endorsee. It just means that person is acting on behalf of the principal and not on his own behalf. Consequently he can neither sue nor can be sued in this own name.

10. As a matter of the fact this Court need not have gone into the question of endorsement in favor of the petitioner in Bill of Lading for it is a matter of interpretation which is required to be left to the Arbitrator but it has to be looked into from the point of view of consideration of the question of territorial jurisdiction only. If the endorsement could confer a substantive right of title in the cargo/goods on the petitioner and Government of India was made a party to the suit then it would have been difficult to say that this Court have no jurisdiction. But the moment it is held to be a case of only authorising HFC to act as an agent on behalf of Government of India without impleading Government of India, then the question becomes totally different. In that case no cause of action accrues in favor of the petitioner in Delhi.

11. It may be mentioned that by just issuing notices from one's own head office

nobody can confer any jurisdiction on any Court which is not otherwise having jurisdiction over the matter.

12. Since in this matter, (i) agreement had not been entered into at Delhi, (ii) the contract was entered into at Bombay, and (iii) cargo was to be delivered at Kakinada, only Bombay and Kakinada Courts would have territorial jurisdiction.

13. Since it is apparent that this Court has neither territorial jurisdiction nor the petitioner has any cause of action to sue in its own name, the petition is liable to be dismissed. It is dismissed accordingly. However, in the peculiar facts and circumstances, the parties are left to bear their own costs.