REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2008
(Arising out of S.L.P.(C) No.16109 of 2007)

M/s Shakti Bhog Foods Limited ……

Appellant

VERSUS

Kola Shipping Limited ……Respondent

J U D G M E N T

TARUN CHATTERJEE, J.

1. Leave granted.

1A. This is an appeal by special leave against the judgment and order dated 15th of June, 2007 of the High Court of Andhra Pradesh at Hyderabad in CRP No. 6618 of 2006, whereby the High Court had affirmed the order dated 30th November, 2006 of the III Additional District Judge, Kakinada in IA No. 3861 of 2005 arising out of OS No. 34 of 2005 allowing an

application filed by the respondent under Section 45 of the Arbitration and Conciliation Act, 1996 (in short, "the Act").

2. The relevant facts leading to the filing of this appeal, as emerging from the case made out by the appellant, may be summarized as follows:

3. The appellant is a company dealing in the business of manufacturing and exporting food products and cereals/grains etc. The appellant was to export sorghum (hereinafter referred to as the "cargo") to the State of Niger. The appellant thereafter negotiated with the head of the State of Niger through a lady Principal Officer for an export order. In that process, the appellant herein obtained an irrevocable letter of credit from the State Bank of India, Overseas Branch, New Delhi, on 12th of July, 2005. On 26th of July, 2005, the appellant addressed an e-mail to the respondent through its broker Brisk Marine Services. As per the contents of the mail the appellant promised to load 13,500 MT of the cargo at Kakinada Port for transportation to Cotonou. The respondent herein, issued a bill of lading. As per the terms and conditions of the Charter Party Agreement, the appellant had to load the said cargo within nine

days on or before 6th of August, 2005. The vessel M.V. Kapitan Nazarev arrived at Kakinada Port on 24th of July, 2005. The surveyor of the appellant inspected the vessel on 25th of July, 2005. For some reason or the other, the proposal of the appellant did not fortify. On 9th of August, 2005, the appellant informed the respondent that he could not get the export order from the State of Niger due to some unreasonable conditions imposed by it. As per the Charter Party Agreement, existence of which was alleged by the respondent and denied by the appellant, the appellant had to load maize to Colombo from Kakinada Port, in case he failed to get the export order from Niger. On 19th of August, 2005, the appellant addressed an e-mail to the respondent stating that he was ready to compensate the respondent for the loss suffered by it. On 24th of August, 2005, the respondent addressed an email back to the appellant stating that it was not satisfied with the demurrage amount offered to be paid by the appellant. A perusal of the facts clearly reveal that the dispute started between the appellant and the respondent with regard to the quantum of demurrage. The appellant herein loaded 1100 MT

of the cargo in the vessel from 6th of August, 2005 to 9th of August, 2005 as against 13,500 MT of the agreed cargo. On 5th of September, 2005, the appellant sent an email to the respondent requesting it to unload the cargo from the vessel. But the cargo was not unloaded from the vessel due to the ongoing disputes between the parties. The respondent initiated proceedings in the High Court of Delhi seeking interim orders in the matter of discharge of 1,100 MT of the cargo under Section 9 of the Act. The said application came to be allowed by the High Court on 28th of September, 2005. The appellant carried the matter in appeal and subsequently withdrew the same on 22nd of January, 2007. In the meantime the appellant had also filed a suit claiming damages as by the time the cargo unloaded from the ship had become unworthy of consumption. The appellant also filed an application for injunction under Order XXXIX Rules 1 and 2 of the Civil Procedure Code, seeking interim injunction directing the Port Officer, Kakinada Port, to detain the vessel of M.V. Kapitan Nazarev at Kakinada harbour till the disposal of the suit. The application came to be dismissed by the III Additional District Judge, Kakinada, by an

order dated 11th of November, 2005. The appellant thereafter unsuccessfully challenged the said order by filing an appeal before the High Court of Andhra Pradesh. The respondents then entered into appearance in O.S. No. 44 of 2005 and moved an application under Section 45 of the Act to refer the dispute between the parties to arbitration in London under the provisions of the English Arbitration Act, 1996 and stay all further proceedings in the suit pending arbitration. The Learned III Additional District Judge, Kakinada, allowed the application by an order dated 30th of November, 2006. Feeling aggrieved, the appellant filed a Civil Revision Petition before the High Court of Andhra Pradesh at Hyderabad which was dismissed on a finding that there was a Charter Party Agreement in existence and the appellant could not deny the existence of the same.

4. It is this order of the High Court, which was under challenge by way of a Special Leave Petition, which on grant of leave, was heard in presence of the learned counsel for the parties.

5. Having heard the learned counsel for the parties and after examining the impugned judgment of the High Court and also the order of the trial court, we do not find any reason to interfere with the concurrent orders of the High Court as well as of the trial court in the exercise of our discretionary power under Article 136 of the Constitution.

6. The learned counsel appearing on behalf of the appellant has contended that the trial court has not given any finding with regard to the existence of the Arbitration Agreement and without there being any positive finding with regard to the same, invocation of the provisions of Section 45 of the Act was unjustified. He has further contended that even if there is any Charter Party Agreement, it does not cover the shipment of 1,100 MT of bagged cargo and, therefore, the order passed by the trial court as well as of the High Court was not proper and legal and therefore, the same is liable to be set aside. He further contended that the respondent had not placed any record, prima facie, as to the existence of the arbitration clause and therefore, the decision of the High Court to allow the

application filed by the respondent under Section 45 of the Act cannot be sustained.

7. It was next contended that the same issue was raised before the Delhi High Court and also before the Andhra Pradesh High Court. From the record, it appears that Delhi High Court after going through the records came to the conclusion that there was a Charter Party Agreement existing between the parties and it contained a clause with regard to the arbitration and, therefore, the appellant could not be permitted to contend that there was no arbitration clause in the Charter Party Agreement. For this purpose, it is pertinent to refer to the findings of the Delhi High Court in this respect:

> "*In the written reply field by the respondent, respondent has admitted loading of 1,100 MT of Sorghum on board the petitioner's vessel. According to the respondent, they have been persistently requesting the petitioner to allow them to discharge the goods and even offered a sum of US $ 90,000 but the petitioner, in order to blackmail the respondent, came out with an unfounded, unrealistic, and illegal claim of over4.56 lac of US $ as a pre-condition for the release of the goods to which the respondent did not agree. Not only that, the petitioner has sent emails to all shipping lines warning them not to deal with the respondent without first contracting the petitioner. This, according to the respondent, amounts to defamation for which the respondent*

claims damages to the tune of US $ 3,00,000. As regards the agreement namely Charter Par, respondent's versions is that they have signed only fixture note and not any charter party agreement. Respondent has further taken a preliminary objection regarding territorial jurisdiction of this Court to entertain this petition.

When a corporation/company has its subordinate office at the place where cause of action arose, only local courts will have jurisdiction to try the suit notwithstanding the fact that the corporation/company has its registered office somewhere else, where no part of cause of action arose. In the present case, petitioner's contention that Delhi Courts have jurisdiction to try the suit is based on sub-clause 'c' and not sub-clause 'a' of section 20 of CPC. According to the petitioner Charter Party was signed at Delhi. Respondent did not deny their signatures on the first page of Charter Party, which shows that the agreement was signed at New Delhi and place of arbitration as London. Thus, a part of cause of action arose in Delhi where the principal office of the respondent is also situated. In this case there is no agreement between the parties excluding the jurisdiction of Delhi Courts. Therefore, Delhi Courts have jurisdiction to entertain the present petition."

8. The Andhra Pradesh High Court had correctly noted that it was explicit from the order passed by the Delhi High Court that the contention advanced by the appellant herein had been negatived. Against the said order the appellant had preferred an appeal but subsequently withdrew the same. Therefore, the

appellant cannot be permitted to contend that there is no arbitration clause in the Charter Party Agreement. Once there is an arbitration clause in the agreement, the matter is required to be referred to an Arbitrator. The trial court considered the materials brought on record and allowed the application filed by the respondent under Section 45 of the Act. The Andhra Pradesh High Court finding no infirmity in the order of the trial court had affirmed the same.

9. Taking all the matters into consideration and after examining all the materials on record, it is necessary to mention that all the facts regarding the existence of the Charter Party Agreement have been extensively deliberated in the courts below and the said courts have unilaterally accepted that there exists a Charter Party Agreement between the parties. No grounds have been raised in this appeal by the appellant satisfying us also that from the records, it could be said that there was no existence of any Charter Party Agreement between the parties. We, therefore, do not find any reason to interfere with the concurrent orders of the courts below.

10. In our view, we should give reasons for dismissing this appeal. We have already noted that by the Charter Party Agreement dated 18th of July, 2005 the appellant agreed to load and the respondent agreed to carry 13,500 tons of the cargo from Kakinada to the port of Cotonou. We have also observed that the said Charter Party Agreement provided for arbitration in Box 25 and Clause 19 and that the disputes pertaining to the same were to be referred to arbitration in London under the English Arbitration Act. The appellant herein has not refuted the signature on the front page of the Charter Party Agreement. We cannot entertain his claim that such a signature would not amount to a valid arbitration agreement. For this purpose, it would be relevant to quote Section 7 of the Act:

"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

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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 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."

11. Therefore, it is clear from the provisions made under Section 7 of the Act that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement. In the present case, the appellant had not denied the fact that it had signed the first page of the Charter Party Agreement. Moreover, the subsequent correspondences between the parties also lead us to conclude that there was indeed a Charter Party Agreement, which existed between the parties. We cannot accept the contention of the appellant that under Section 7 of the Act the letter/faxes or mails or any other communications will have to contain the arbitration clause in

the absence of any agreement. The expressions of Section 7 do not specify any requirement to this effect.

12. Clause 19 (a) read with Box 25 of the Charter Party Agreement between the appellant and the respondent states as follows:

"Clause 19- LAW AND ARBITRATION

(a) This charter party shall be governed and construed in accordance with the English Law and any dispute arising out of this charter party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment there of for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt of one party of the nomination in writing of the other's arbitrator, that party shall appoint their arbitrator within fourteen days. Failing which the decision of the single arbitrator appointed shall be final. For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25, the arbitration shall be conducted in accordance with the small claims procedure of the London Maritime Arbitrators Association."

13. It is clear from the above-mentioned clause that the venue of the arbitration chosen by both the parties is London in the United Kingdom and the law chosen by both the parties is

the English Law. In view of the mandatory provision of Section 45 of the Act, the Court is duty bound to stay all further proceedings in the suit and refer the matter to Arbitration as per Clause 19 of the Charter Party Agreement.

14. The appellant contended that the respondent did not file the original Charter Party Agreement in any of the proceedings before any of the lower courts. We would want to reiterate that. As far as the provision of Section 7 of the Act is concerned, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement and furthermore an arbitration is considered to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement or an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. So from the provisions of Section 7, it is clear that a Charter Party Agreement need not be in writing signed by both parties and this could as well be made out from the acts of the parties to the agreement by way of their

exchange of letters and information through fax, e-mails etc. It is clear from the records that in this case the agreement between the appellant and the respondent was entered into through Brisk Marine Services, and a letter addressed to Kola Freight for arranging a vessel for carrying the cargo of 13,500 MT from Kakinada Port to Cotonou was delivered. The appellant had vehemently contended before us that there was no Charter Party Agreement between them. Even if it is assumed that there was no such agreement between the parties, it is the responsibility of the appellant to provide a reasoning as to how did the vessel was responsible for carrying the said cargo arrived at the port of Kakinada without any agreement present between the appellant and the respondent. The appellant also needs to explain as to what was the agreement entered into upon it for which it loaded the ship with 1100 MT of the cargo instead of the promised 13500 MT. Moreover the appellant had agreed to pay compensation to the tune of US $ 90,000 to the respondent on its own initiative due to the fact that it was unable to load the requisite amount of cargo of 13,500MT on board. The appellant needs to explain as to what

were the circumstances under which it wanted to pay such compensation to the respondent. According to the explanations provided by the appellant, it had not committed any breach. Therefore, the question to be asked is why did the appellant want to pay such a huge sum of compensation for no fault of it, if there was no Charter Party Agreement to that effect between the parties. If the loading of the cargo by the appellant which commenced on 6th of August, 2005 is not under any Charter Party Agreement as contended by the appellant, but under a different agreement, then the appellant has to show the terms of the other agreement under which the loading of the cargo was done by the appellant, since the stock loaded is not of a small quantity but worth one crore and odd in terms of Indian rupees. For the loading and unloading of cargo as well as to carry it from one port to another, an agreement is certainly required and if the said agreement is not a Charter Party Agreement, then there has to be some other agreement to that effect. The appellant is supposed to provide the details of that agreement in the alternative, which it had not done. We are afraid that the

appellant has not provided any satisfactory explanations to the above-mentioned questions.

15. The learned counsel appearing on behalf of the appellant next contended that the loading of sorghum in the vessel was done under a bill of lading and except that there was no other contract between the parties. He also contended that the bill of lading is nothing but a receipt issued as to what was the cargo that was loaded in the vessel and it did not contain any terms of the agreement.

16. It is clear from the documents produced before us that as on the date of loading of the cargo into the vessel on 6th of August, 2005 there was no final cancellation of the orders from the Government of the State of Niger and that the appellant was loading the said cargo with the hope that the Government of Niger would accept the proposal. The appellant during that time was not in a position to load the total amount of the cargo as produced to the tune of 13,500 MT as the deal with the Government of Niger was not yet finalized. But then in such a situation, if the so called Charter Party Agreement, relied upon by the respondent, is absent, then there has to be some other

agreement to that effect under which, the appellant herein agreed to load the vessel with a cargo of 1,100 MT of sorghum. But such an agreement has not come to our notice.

17. The appellant contended that the loading of the sorghum was done pursuant to a fixture note. A careful perusal of the fixture note reveals that the place of arbitration has been mentioned as London. Moreover, with regard to Clause 14-19, it has been mentioned in the said fixture note that it is re-established as per the Charter Party. Thus it is clear to us that even the fixture note as pointed out to us by the appellant contains a provision as to the place of arbitration and a reference has been made to the charter party agreement.

18. We would further wish to point out that while contending against the filing of an application under Section 9 of the Act for interim measures by the respondent before the Delhi High Court in OMP No. 331 of 2005, the appellant had never raised any objection as to the existence of the Charter Party Agreement between the parties. On the contrary, the appellant contended before the Delhi High Court saying that Section 9 of the Act would not apply if the place of arbitration

was not in India. Moreover, the appellant herein had preferred an appeal against the said order of the Delhi High Court dated 28th of September, 2005 and ultimately withdrew the appeal reserving its rights only so far as to challenge the jurisdiction of the High Court of Delhi. From the judgment and order dated 28th of September, 2005 and the order dated 22nd of January, 2007, it is pellucid that the appellant had not challenged the validity of the arbitration agreement between the parties.

19. The appellant has also contended that under Section 8 of the Act it is necessary for the party making an application to refer the matter to arbitration, to provide the original arbitration agreement or a duly certified copy of the same. But this contention has no legs to stand upon in the context of the present appeal. The present appeal has been filed against the impugned judgment of the Andhra Pradesh High Court affirming the order of the trial court allowing the application filed by the respondent herein under Section 45 of the Act. We may note that Section 45 of the Act deals with matters relating to international commercial arbitrations and Section 8 of the same does not have any relevance in the present appeal.

Section 45 of the Act does not require the respondent to file the original of the Charter Party Agreement. In any event, the appellant had not questioned the authenticity of the Charter Party Agreement filed by the respondent and had in fact admitted the signature appearing on the first page of the same to have been made on its behalf. The Courts below had thoroughly examined the said Charter Party Agreement and had passed their orders after considering the clauses thereof.

20. The learned counsel appearing on behalf of the appellant had drawn our attention to the fact that the appellant had sent an email to the respondent on 26th of July, 2005 stating that it had not signed any Charter Party. We have gone through the said email. It has been clearly stated in the email that the appellant had received the Charter Party with regard to Cotonou but had not received anything for Colombo. Therefore he had not signed the same. The said portion of the email is quoted herein for convenience:

> *"I am in receipt of CP and Fixture Note for Cotonou but nothing for Colombo therefore, not signed so far."*

To this effect it can be said that the appellant had not signed the said charter party. But if we proceed towards the end of the said email sent by the appellant, we may say that there is a clear disparity as to the contention of the appellant that there was no agreement between the parties regarding the loading of the cargo. We feel it necessary to refer to the relevant portion of the email pointing out to this disparity:

> *"Above for your info. And action pls. Am trying my best to engage your vessel* ***just to honour the negotiations.*** *Let's hope for best."*

It is clear from a perusal of the above-mentioned statement that there was on going negotiations between the parties regarding the loading of the cargo and pursuant to such negotiations, 1100 MT of the cargo had been loaded. It is difficult to believe that such cargo was loaded without any agreement to the parties to that effect.

21. Further the said email clearly shows that the appellant had asked for a fixture note for the delivery of the cargo to Colombo. The appellant had subsequently accepted that he had sent the said cargo to Colombo pursuant to a fixture note. As

has already been observed before, the said fixture note reveals that the place of arbitration has been mentioned as London. Moreover, with regard to Clause 14-19 it has been mentioned in the said fixture note that it is re-established as per the Charter Party. Therefore the appellant cannot escape its liability from complying with the provisions of the Charter Party Agreement.

22. Fixtures are frequently recorded in a telex or fax recapitulating the terms finally agreed (a "recap"). Thus a recap telex or fax may constitute the "charter Party referred to in another contract. In the case of ***Welex A.G.*** *vs.* ***Rosa Maritime Ltd.*** ***(The "Elipson Rosa Case")*** **[2002] EWHC 762 (Comm),** it was decided by the Queen's Bench Division (Commercial Court) that a voyage charter party of the *Elipson Rosa* was concluded on the basis of a recap telex which incorporated by reference a standard form charter. Before any formal charter was signed, bills of lading were issued referring to the "Charter Party", without identifying it by date. It was held that the charter party referred to was the contract contained in or evidenced by the recap telex.

23. In the present case therefore, we conclude that there existed a charter party between the parties to the suit which can be identified from the correspondence between the parties to that effect as also from the fixture note and the bill of lading signed by the parties.

24. As per the provisions of the Section 45 of the Act, it is clear that at the request of one of the parties or any person claiming through or under him the court shall refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed. In the present case, there appears to be no such thing to say that the so called agreement entered into by the parties is in any way to be termed as null and void or inoperative or incapable of being performed. It is further observed by us that the claims raised by the appellant before us about the non-existence of the charter party agreement can also be raised by the same before the arbitral tribunal at London. Under the English Arbitration Act 1996, as per Sections 30 and 31 of the said Act, the arbitral tribunal may rule on its own jurisdiction and also can decide on the existence of a valid arbitration agreement. This is similar to

the provisions under Section 16 of the Act, whereby the arbitral tribunal can decide on its jurisdiction as also on the existence or validity of the arbitration agreement.

25. In the light of the discussions above-mentioned, we are convinced that there is a charter party agreement existing between the parties and, that as per the provisions of Section 45 of the Act, the High Court as well as the trial court were fully justified in allowing the application preferred by the respondent and accordingly, impugned order must be affirmed.

26. For the reasons aforesaid, we are of the view that the High Court was justified in passing the impugned judgment and there is no infirmity in the impugned order in the same for which we can interfere. The appeal is therefore dismissed. There will be no order as to costs.

…….J.
[Tarun Chatterjee]

New Delhi; **…….**
J.

September 23, 2008. **[Dalveer Bhandari]**