IN THE HIGH COURT AT CALCUTTA
Admiralty Jurisdiction
ORIGINAL SIDE
[Commercial Division]

IA NO. GA/1/2022
In AS/4/2022
COMMODITY CULTURE PTE LTD.
Vs
THE OWNERS AND PARTIES INTERESTED IN THE VESSEL
M. T. SEA GULL 9 (IMO NO. 9175092)

IA NO. GA/2/2022
In AS/4/2022

COMMODITY CULTURE PTE LTD.
Vs
THE OWNERS AND PARTIES INTERESTED IN THE VESSEL
M. T. SEA GULL 9 (IMO NO. 9175092)

IA NO. GA/3/2022
In AS/4/2022

COMMODITY CULTURE PTE LTD.
Vs
THE OWNERS AND PARTIES INTERESTED IN THE VESSEL
M. T. SEA GULL 9 (IMO NO. 9175092)

BEFORE:
The Hon'ble JUSTICE RAVI KRISHAN KAPUR
Date : 27th April, 2023

Appearance:

Mr. Prathamesh Kamat, Adv.
Mr. Ratul Das, Adv.
Mr. Dwipraj Basu, Adv.
Mr. S. Iyer, Adv.
Mr. A. Datta, Adv.
..for the plaintiff

Mr. K. Thaker, Adv.
Mr. Amitava Majumdar, Adv.
Mr. S. Mitra, Adv.
Mr. S. Kundu, Adv.
..for the Owners

The Court:-

1. This suit has been filed by the plaintiff charterer claiming a decree of USD 905,000/- (Rs.7,14,50,565/-) for losses and damages suffered by the plaintiff caused due to the wrongful repudiation of

the charterparty by the Owners of the defendant vessel and also claiming an additional USD 30,000/- (Rs. 23,68,527) as legal costs.

2. Upon filing of the suit, the plaintiff had sought for an order of arrest of the defendant vessel which was docked at Haldia Port. By an order dated 7 July, 2022, this Court had initially directed arrest of the vessel. Thereafter, the Owners of the defendant vessel had entered appearance and had without prejudice to their rights and contentions as to the maintainability of the suit furnished security for the entire sum of INR Rs.7,38,19,092/-, whereupon by orders dated 14 July, 2022 and 18 July, 2022 respectively, the defendant vessel stood released.

3. The agreement between the parties is evidenced by a clean fixture recap for carriage of crude palm oil on board the defendant vessel. By an e-mail dated 23 May, 2022, the parties agreed that the "Special Conditions" providing for "ATTACHED CHRTR RIDER CLS WITH AMENDMENT TO APPLY". Thus, the arbitration clause in the Vegoilvoy charterparty form stood modified. The arbitration agreement reads as follows:

> "32. *General Average/ Arbitration*
> *General Average and Arbitration, if any, to be in Singapore with English law to apply. York/Antwerp rules 1974 as amended 1994 to apply.*"

4. It is contended by the defendant that on the basis of clause 32, there is a valid and binding arbitration between the parties in respect of the matters raised in this suit and the parties be referred to arbitration under section 45 of the Arbitration and Conciliation Act, 1996 (the Act).

5. On behalf of the plaintiff it is submitted that, the use of the words “if any” in Clause 32 renders the same vague and unenforceable and indicates only a possibility of referring the parties to arbitration in the future. It is also contended that the subject matter of the disputes between the parties are not arbitrable.

6. Section 45 of the Act provides as follows:

> ***Power of judicial authority to refer parties to arbitration.***- *Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

7. The question which arises for consideration is whether the use of the word "if any" in Clause 32 above detracts in any manner from the fact that there is a valid, binding and enforceable arbitration agreement between the parties or not.

8. The crux of any arbitration clause is an agreement to refer the disputes or differences to arbitration which is expressly or impliedly spelt out from the arbitration clause. What is of essence and requires to be ascertained is the intention of the parties to settle their disputes through arbitration. A contract ought to be interpreted in a manner so as to give effect to the agreement of the parties rather than invalidate it. A chaterparty being a commercial document should be interpreted as commercial men would have intended and should not be nullified nor thwarted by a pedantic or

legalistic interpretation. No party can be allowed to take advantage of inartistic drafting of an arbitration clause in any agreement.

9. I find that the parties have consciously agreed to incorporate a specific clause providing for arbitration in Singapore with English Law to apply. The clause must be read in the context of an international transaction for sale of oil. The words “if any” are at best to be treated as surplusage or as a short form for the words "if any dispute arises". Mere brevity in terminology used in the clause cannot be a ground for refusing a reference to arbitration. There is nothing which makes the clause optional i.e., an option for either of the parties to decide if they wish to refer the matter to arbitration or not. The clause does not require or contemplate any fresh consent. The parties have agreed for reference to arbitration in Singapore with English law to apply. The clear contractual intention of the parties was to refer future disputes to arbitration. Any other meaning would be contrary to the presumed intention of the parties of having agreed to go to arbitration and would lead to absurdity. The parties had made it quite clear that they are choosing arbitration as the appropriate form of dispute resolution rather than resort to the Courts. (*Mangistaumunaigaz Oil vs. United World Trade (1995) 1 Lloyd’s Law Reports 617).* In such circumstances, the arbitration agreement is neither null nor void nor inoperative nor incapable of being performed.

10. The decision cited on behalf of the plaintiff reported in *Sara International Ltd. vs. Golden Agri International PTE Ltd. & Anr. (2010) 118 DRJ 471* is inapposite to the facts of this case. In the said

decision, the Court found that there was no binding obligation to go to arbitration. The clause was held to be vague and could not form the basis for arbitration. Similarly, the reliance placed on the decision in *Jagdish Chander vs. Ramesh Chander (2007) 5 SCC 719* is also inapplicable. In the said decision, the arbitration clause read as follows: "*the parties shall be referred for arbitration if the parties so determined*". Thus, the parties were found not to have entered into a valid arbitration clause. Similarly, in *Gajulapalli Chenchu Reddy vs. Koyyana Jaya Lakshmi 2009 (4) Arb L R 119*, the Court found that the words *"they so desire"* and *"should consider"* made the arbitration clause inconclusive and uncertain.

11. It has also been contended that since this is an action *in rem*, the arbitration clause cannot be invoked and the disputes between the parties are not arbitrable. This argument is also untenable. The Owners have entered appearance and furnished security to the satisfaction of the Court. Thereafter, the vessel stood released from arrest. Thus, the action ceases to be an action *in rem* and becomes an action "*in personam*" against the Owners. The Owners having entered appearance and provided security in terms of the orders of Court, the right *in rem* is preserved and the right of the plaintiff to satisfy its claim is retained and made available in the *in personam* proceedings whether by way of arbitration or Court. Significantly, the full security in the suit had been furnished in terms of the orders of Court. In such circumstances, there is no merit in the argument that full security has not been furnished and the action continues to be an action *in rem*.

12. In *M.V. Elisabeth vs. Harwan Investment and Trading (P) Ltd., 1993 Supp (2) SCC 433 at page 474*, it has been held as follows:

> ***"82.*** *The admiralty jurisdiction of the High Court is dependent on the presence of the foreign ship in Indian waters and founded on the arrest of that ship. This jurisdiction can be assumed by the High Court concerned, whether or not the defendant resides or carries on business, or the cause of action arose wholly or in part, within the local limits of its jurisdiction. Once a foreign ship is arrested within the local limits of the jurisdiction of the High Court, and the owner of the ship has entered appearance and furnished security to the satisfaction of the High Court for the release of the ship, the proceedings continue as a personal action."*

13. In this context, the judgments in *Siem Offshore Redri AS vs. Altus Uber (2018) SCC Online Bom 2730* and *Owners and Parties Interested in the Vessel M.V. Polaris Galaxy vs. Banque Cantonale De Geneve (2022) SCC OnLine SC 1293* also do not advance the case of the plaintiff. The decision cited in *Angsley Investments Limited vs. Jupiter Denizcilik Tasimacilik Mumessillik San. Ve Ticaret Limited Sirketi 2023 SCC OnLine Bom 559* is also distinguishable. In this decision, the defendant vessel had neither entered appearance nor furnished security nor submitted to the jurisdiction of Court. The vessel had not only jumped arrest and escaped from the port of Kandla but had also failed to furnish security in terms of the orders of Court. Accordingly, this decision is inapposite.

14. In such circumstances, the application stands allowed. There shall be an order in terms of prayers (a), (b) and (c) of the application. It is clarified that prayer (c) stands modified to the extent that both parties shall be at liberty to seek modification of the security amount which may be directed to be furnished by the defendant

Owner before the Arbitral Tribunal. The security furnished by the defendant Owner pursuant to orders passed in this suit shall abide by and be dealt with in accordance with any order which may be passed by the Arbitral Tribunal.

15. Liberty is granted to both parties to make an appropriate application before this Court if the circumstances so warrant in respect of the security amount lying with the Registrar, Original Side.

16. With the aforesaid directions, GA/3/2022 stands disposed of.

GA/1/2022

The orders dated 14 July, 2022 and 18 July, 2022 respectively providing security stands confirmed subject to any order which may be ultimately passed by the Arbitral Tribunal.

In view of the order passed in GA/3/2022 granting liberty to both the parties to approach the Arbitral Tribunal, nothing survives in this application.

GA 1 of 2022 stands disposed of as infructuous.

GA/2/2022

In view of the liberty granted to both the parties in terms of the order passed in GA 3 of 2022 to approach the Arbitral Tribunal, nothing remains in this application.

GA 2 of 2022 stands disposed of as infructuous.

(Ravi Krishan Kapur, J.)

D.Ghosh