**(2009) 09 DEL CK 0413**

**Delhi High Court**

**Case No:** IA No. 12342 of 2009 in OMP 312 of 2009

| | | |
|---|---|---|
| A.K.G. Exim Pvt. Ltd. | | APPELLANT |
| | Vs | |
| Efesan Demir Sanayi Ve Ticaret A.S. and Another | | RESPONDENT |

**Date of Decision:** Sept. 23, 2009

**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 9
- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10(2), 151

**Citation:** (2009) 164 DLT 341 : (2010) 8 RCR(Civil) 1029

**Hon'ble Judges:** S.N. Dhingra, J

**Bench:** Single Bench

**Advocate:** Sandeep Kumar and Pawan Upadhya, for the Appellant; Anuradha Dutt, Divya Kesar and Kuber Dewan for Applicant/R-2, for the Respondent

**Judgement**

Shiv Narayan Dhingra, J.

This application under Order 1 Rule 10(2) read with Section 151 of the CPC has been made by the applicant/ respondent No. 2 for modification of order dated 29th May, 2009 passed by this Court. The applicant has prayed that the name of the applicant/ respondent No. 2 be deleted from the array of respondent as it was not a necessary party being not a party to the agreement between petitioner and respondent No. 1. It is also prayed that the petitioner be asked to give security to the tune of US $ 155000 which was the value of the shipment to come with security for demurrage and detention charges accrued in relation to the subject shipment.

2. It is submitted in the application that the applicant was neither a carrier of export/ import shipment in its own right nor the applicant had any role to play or responsibility in accordance with the transactions between petitioner and respondent No. 1 i.e. in regard to the shipment carriage of which was governed by a particular bill of lading or multi-modal transport document. No role or responsibility

whatsoever existed insofar as applicant was concerned in relation to shipment which was the subject matter of the petition. It is submitted that cargo was being shipped from Turkey to Mauritius. On 14th March, 2009 six containers were delivered by the first respondent to respondent No. 2 through their local agent at Turkey and thereafter these containers were loaded on board vessel Maersk Dryden. at Ambarli Port in Istanbul, Turkey for transportation by sea to Mauritius. On or about 15th May, 2009, a legal notice dated 15th May, 2009 was issued by petitioner''s advocate to Safmarine Mauritius with a copy endorsed to Safmarine (India) informing that a quality dispute was there between the petitioner and respondent No. 1 as a result of which US$ 31000 had been forfeited by respondent No. 1. Respondent No. 2 was requested not to ship or re-export the container back to Turkey. In response to this notice, the applicant gave a without prejudice reply stating therein that the applicant had nothing to do with the quality dispute arisen between petitioner and respondent No. 1 regarding consignment and since the consignment delivered was outside India, it was outside the applicant''s purview/domain/regional jurisdiction. Respondent No. 1 vide letter dated 20th May, 2009 to the local Mauritius agent of applicant told applicant that the petitioner had failed to pay US $ 124116 representing 80% of the value of cargo due to quality dispute as such respondent No. 1 was seeking re-export of cargo back to Turkey. The applicant further received a legal notice from petitioner''s advocate intimating the order dated 29th May, 2009 passed by this Court and asking Safmarine Mauritius to maintain status quo in respect of the said consignment. Though the notice was addressed to Safmarine Mauritius but a copy thereof was endorsed to Safmarine India also. Thereafter, the petitioner''s advocate sent a legal notice intimating that contempt of court proceedings shall be initiated for violation of the order.

3. It is submitted by counsel for applicant that applicant was not concerned with the dispute and was neither a proper party or necessary party in this petition u/s 9 of the Arbitration & Conciliation Act, 1996. The applicant being in shipping business has to incur heavy demurrage charges if the ship is not unloaded at the port of its destination and the ship remains lodged at the port. No security was being provided by the petitioner or respondent No. 1 for the demurrage being suffered by the applicant. Since the dispute was between petitioner and respondent No. 1, the issue of demurrage suffered by respondent No. 2 would never arise as there was no contract between petitioner and respondent No. 2 in respect of the shipment. The petitioner would therefore in any case escape the liability of payment of demurrage to applicant and respondent No. 1 would not take the responsibility of payment of demurrage or charges to respondent No. 2 since there was no instruction from respondent No. 1 to keep the ship lodged at the port or not to unload the cargo.

4. This Court vide order dated 29th May, 2009 had observed, on the basis of petitioner''s pleadings, that the consignment sent by respondent No. 1 did not qualify for quality test [MIL Test] and for this reason the petitioner did not pay rest

of 80% of the charges for the consignment. The petitioner had asked to refund the amount of 20% paid for the charges or to replace the material. The Court referred to the correspondence between petitioner and respondent. This correspondence is between petitioner and respondent No. 1and respondent No. 2 is not concerned either with the transaction between the petitioner and respondent No. 1 or with the quality of goods. Respondent No. 2 being a shipping company has no liability towards petitioner. Moreover, petitioner has made M/s Safmarine India as a party though Safmarine India had not shipped the material from Turkey to Mauritius. It is Safmarine Mauritius who had shipped the material from Turkey to Mauritius.

5. It is obvious that respondent No. 2 was not concerned either with the contract between the parties or with the quality control. It was merely a carrier of the shipment at the instance of respondent No. 1. A ship cannot stay at the port for the time more than needed to do loading and unloading. Parking of the ship at the port costs heavy amount to the ship. The order of this Court was meant only for respondent No. 1 who had contract with the petitioner and it was not meant for respondent No. 2 who had no contract with the petitioner. Moreover, respondent No. 2 cannot put at disadvantage without securing interest of respondent No. 2.

6. It is submitted by counsel for petitioner that respondent No. 2 can be made a party to the petition u/s 9. He relied upon Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., wherein the Supreme Court while analyzing Section 9 observed that the qualification for the person who invokes jurisdiction of the Court u/s 9 is that he must be a party to arbitration agreement. A person not a party to the arbitration agreement cannot enter court for protection u/s 9. But this has nothing to do with the relief which is sought from the Court or the right which is sought to be canvassed in support of the relief and the Court is conferred with the same power for specifying the order as it has for the purpose of and in relation to any proceedings before it. He submits that there was no precondition that the respondent also must be a party to the arbitration agreement and a person who is not a party to the arbitration agreement can be made a respondent if it is necessary in order to seek relief against the party to the arbitration and the Court can issue injunction restraining third party from doing the act.

7. Whenever a Court passes an injunction, the Court has to keep in mind the principle of natural justice and the principles of commercial transactions between the parties. Where a shipping company is made a party only because the cargo was sent through that shipping company and injunction is issued against the shipping company from unloading the cargo, it is obvious that the order of the Court puts heavy burden upon the shipping company without protecting the rights of the shipping company. If the ship is made to stand/ lodge/ parked at the port, for each day the shipping company has to pay few thousand dollars as demurrage charges and these demurrage charges are to be borne by the ship owner. Moreover by issuance of restrain order of not moving the ship from one port, the contract of

other parties who have cargo on the ship may also be affected. The Court while passing injunction order has to keep all these things in mind.

8. I, therefore, consider that where an injunction order is passed against a shipping company restraining it from leaving the port or maintaining status quo, the Court must sufficiently protect the shipping company and ask the petitioner to furnish the security for the demurrage charges which the shipping company may have to incur.

9. In the present case, the amount of the petitioner involved is hardly US$ 32000. The demurrage charges itself may run into more than the US$ 1,00,000. I, therefore, consider that it is not in the interest of justice that the respondent No. 2 should be asked to keep its ship lodged or parked on any particular port without there being any security for the demurrage charges being given by the petitioner as the petitioner was not agreeable to furnish any security for payment of demurrage to respondent No. 2. Under these circumstances, the order of status quo passed by the Court would not be applicable on respondent No. 2.

10. In my view, respondent No. 2 is also not a necessary party in this case. The petitioner has already rejected the goods which are in the ship of respondent No. 2. Once the petitioner rejected the goods and has refused to take the delivery, the goods belong to respondent No. 1. The petitioner''s claim is also against respondent No. 1 and not against respondent No. 2. Respondent No. 2 is not in any way connected with the transaction, therefore, respondent No. 2 cannot be made to hold the goods belonging to respondent No. 1 on behalf of petitioner and incur heavy losses. I, therefore, allow this application of respondent No. 2. The name of respondent No. 2 be struck off from array of parties.

11. The application stands disposed of.