Hyosung (HK) Ltd v Owners of the Ship or Vessel `Hilal I`
[2000] SGHC 268

Case Number : Adm in Rem 221/1998

Decision Date : 07 December 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Srivathsan Rajagopalan and Subashini Narayanasamy (Haridass Ho & Partners) for the plaintiffs; Ian Koh and Bryan Tan Kuan Ho (Drew & Napier) for the defendants

Parties : Hyosung (HK) Ltd — Owners of the Ship or Vessel `Hilal I`

Admiralty and Shipping – Admiralty jurisdiction and arrest – Stay of proceedings in favour of arbitration -Whether arbitration clause in charterparty incorporated into bill of lading – s 6 International Arbitration Act (Cap 143A)

Admiralty and Shipping – Admiralty jurisdiction and arrest – Release of arrested vessel following stay of proceedings – Relevant considerations

: The plaintiffs commenced this admiralty action-in-rem against the defendants for breach of duty in contract and tort in respect of 9,000 metric tons of urea from a shipment of 28,000 metric tons on board the defendants` vessel. The plaintiffs claimed under a bill of lading dated 24 February 1997. The writ was filed on 30 March 1998.

The plaintiffs arrested the defendants` vessel the `Hilal I` on 14 October 2000. The action was brought under s 4(4)(a) of the High Court (Admiralty Jurisdiction) Act (Cap 123) in respect of a claim falling under s 3(1)(g) and (h) of the Act.

The defendants applied to stay the action in favour of arbitration in London pursuant to an express arbitration clause. By the same summons-in-chambers the defendants also prayed that the `Hilal I` be released and the arrest set aside.

The assistant registrar granted an order for the stay of proceedings but made no order on the defendants` application for the release of the vessel, the effect of which, effectively, was to refuse the application. The plaintiffs appealed against the order for stay of proceedings and the defendants appealed against the refusal to order a release of the vessel. The defendants also, unnecessarily in my view, filed a further summons-in-chambers praying afresh for the release of the vessel.

Mr Srivathsan appeared for the plaintiffs and submitted that the defendants had no grounds for supposing that there was an express arbitration clause. His submission was as follows. The clause relied upon by the defendants is found in the bill of lading and it provided that `all terms, conditions, exceptions and clauses [including] arbitration clause as per charterparty dated 7 February 1997`. The relevant clause in the charterparty provided as follows:

> *Any dispute arising under this charterparty to be referred to arbitration in London and English Law and the LMAA Rules shall apply ...*

Mr Srivathsan pointed out that the charterparty in which the above clause was found was dated 6 February 1997. It was not the document dated 7 February 1997 referred to in the bill of lading. Counsel referred me to **The Merak** [1965] 1 All ER 230 and **The Annefield** [1971] P 168 both

authorities I had considered in my decision in **L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd** [2000] 4 SLR 441 . Mr Srivathsan`s point was that only a clear and error free clause will suffice to incorporate an arbitration clause from a charterparty into the bill of lading.

Mr Koh, counsel for the defendants, relied on **The Nerano** [1996] 1 Lloyd`s Rep 1, argued that they, like the parties in ***The Nerano*** , have not merely used general words of incorporation. They had expressly referred to the incorporation of the arbitration clause itself into the bill of lading. The only issue, it seemed, was whether the reference to the charterparty as `the charterparty dated 7 February 1997` invalidated the incorporation on account that a different document was contemplated. Mr Koh referred to the affidavit of Mr Bryan Tan filed on 31 October 2000 on behalf of the defendants whereby a letter dated 26 October 2000 was exhibited. It was a letter faxed by the solicitors for the charterers stating that the charterers confirm that there was only one charterparty in question that was the one dated 6 February 1997. It also acknowledged the error of referring to it as the `Charter Party dated 7 February 1997`.

No affidavit was filed on behalf of the plaintiffs challenging Mr Tan`s affidavit. In this case I am satisfied that the error was a typographical one which I would have granted leave to the defendants to rectify, especially in the absence of any evidence to the contrary intention of the parties concerned that the charterparty referred to was that of 6 February 1997.

In the ***L & M*** case the letter of award referred to a document called `Standard Conditions of Sub-Contract`, a document that was neither signed nor given to the defendants in that case. There was no reference to arbitration in the letter of award. The arbitration clause, however, was found in another contract entitled `Standard Sub-Contract (Domestic) For Labour And Materials`. That was also an unsigned document. In that case I found that there was insufficient identification of the document containing the arbitration clause. In the present case, there was only one charterparty so far as the affidavits have shown and as the error appeared to be typographical in nature, I am of the view that the arbitration clause was adequately set out and must apply by reason of the express wording of s 6 of the International Arbitration Act. That provision has been dealt with in like terms in **The ICL Raja Mahendra** [1999] 1 SLR 329 . Accordingly, the plaintiffs` appeal against the stay of proceedings failed before me and was dismissed.

Mr Srivathsan then submitted that the `Hilal I` should nonetheless be restrained from leaving port, or alternatively, be released upon the provision of suitable security by the defendants, and further, that the vessel be released upon the defendants being restrained or otherwise waiving any right to a defence of limitation. This directly opposed Mr Koh`s appeal in respect of his application to release the vessel. Mr Koh was of the view that if the plaintiffs wanted to restrain the `Hilal I` they ought to have made an application to that effect. He pointed out that his firm had written to the plaintiffs` solicitors, shortly after the order for stay was granted, inviting the plaintiffs to apply under s 6 of the International Arbitration Act to keep the vessel under arrest as security. He invited me to dismiss Mr Srivathsan`s oral application. I would not do so on this ground. Section 7 of the Act provides a discretionary power on the court as an ancillary matter to an application under s 6. In this context, the court can hear an oral application under s 7 in the course of determining an application to stay proceedings. It is not necessary to make a separate formal application.

Mr Srivathsan`s unadorned argument that the plaintiffs had lawfully arrested a vessel and that arrest had not been set aside was a forceful one. Section 7 of the International Arbitration Act (Cap 143A) provided as follows:

> *(1) where a court stays Admiralty proceedings under section 6, the court may, if in those proceedings property had been arrested or bail or other security has*

been given to prevent or obtain release from arrest, order -

(a) that the property arrested be retained as security for the satisfaction of any award made on the arbitration; or

(b) that the stay be conditional on the provision of equivalent security for the satisfaction of any such award.

He took the view that the court could maintain the arrest or impose an order for security notwithstanding that an order for a stay of proceedings was made. This was the clear wording of s 7.

Counsel also referred to ***The Raja Mahendra*** and submitted that the facts there were different. Indeed they were. In that case, the plaintiffs there arrested the defendants` vessel. The defendants offered security but the plaintiffs wanted the security to be couched in much wider terms. The issue then was whether the offer of the defendants were reasonable and, if so, the vessel ought to be released. I found that the offer by the defendants there adequately satisfied the security needs of the plaintiffs and allowed the appeal.

In the present case, the question was a far more fundamental one. Were the plaintiffs entitled to maintain the arrest or alternatively, to obtain reasonable security in lieu. The International Arbitration Act envisages that a stay order may be made in respect of a local admiralty action in favour of arbitration (wherever that may be). It is in that context that s 7 of the Act gives the court a discretion to order that the arrested vessel be detained as security or grant a stay on terms.

In that respect, the order for a stay of proceedings is a different matter from the order retaining the vessel under arrest. It does not follow that the vessel must be released upon a stay order being given. Neither does it follow that the vessel must remain under arrest. What considerations must I then take into account in determining whether the ship stays arrested? The plaintiffs did not file any affidavit in support of any of the positions taken by their counsel. I accept that in most, if not all, of Mr Srivathsan`s submission the absence of deposition evidence was not critical given that the arguments were on law, of which Mr Srivathsan had made very able submissions. However, when the court has to exercise its discretion whether to order the continued detention of the vessel, depositions of the parties may be useful. In this regard, I had been assisted by the affidavits of Mr Bryan Tan filed on behalf of the defendants. He asserted that the plaintiffs had commenced action in the wrong forum, against an express arbitration clause. But I note that this was not an important factor in itself. He also asserted on behalf of the defendants that the plaintiffs failed to collect the cargo, which consisted of 28,000 metric tons of urea, in good time. Most of the urea were disposed of by the port authorities after six months.

The defendants questioned whether the plaintiffs had title in the bill of lading to claim the 9,000 metric tons. The defendants assert, in support, that the charterers had sold the cargo to a company called Right Bliss Enterprise Pte Ltd and the plaintiffs in turn bought the cargo from Right Bliss Enterprise Pte Ltd, and re-sold it to a company called Metrich HK who further sold it to a party in Fangcheng, China where the urea were discharged but no delivery taken.

I accept, in the absence of any evidence or submissions to the contrary, that the plaintiffs` claim had no connection with this forum. The only factors I need to consider in the plaintiffs` favour are, first, the fact that the arrest was lawfully made. However, in itself this does not count for much as the arrest would be set aside in any event were it not so. Secondly, as the order sought was very

much a discretionary matter, I would loathe to interfere with the discretion exercised by the assistant registrar below, but no grounds were available to me as to how that discretion was exercised. In the circumstances, I would like to assume that she had taken all the relevant factors into account. Blindly accepting her decision would be no more than an exercise in judicial camaraderie instead of judicial discretion. So, although I give strong weight to the decision below, I must also note that from the notes of evidence, the arguments presented below were not as full as that before me. Consequently, I had to consider the application afresh, and for my part, I saw no reason to continue the arrest of the `Hilal I` and so ordered her release.

Outcome:

Plaintiffs` appeal dismissed; defendants` appeal allowed.