

Stephen Commerce Pvt. Ltd. Vs. the Owners and Parties Interested in the Vessel M.V. wise King

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Court : Kolkata

Decided On : Jul-29-2004

Reported in : 2004(3)ARBLR574(Cal),(2004)3CALLT211(HC)

Judge : Ashim Kumar Banerjee, J.

Acts : [Arbitration and Conciliation Act, 1996](#)

Appeal No. : A.S. No. 3 of 2000 and G.A. No. 1792 of 2001

Appellant : Stephen Commerce Pvt. Ltd.

Respondent : The Owners and Parties Interested in the Vessel M.V. "wise King"

Advocate for Def. : Sudipto Sarkar, ;Tilok Bose and ;Asit De, Advs.

Advocate for Pet/Ap. : S.N. Mukherjee and ;Ratnanko Banerjee, Advs.

Disposition : Application allowed

Judgement :

A.K. Banerjee, J.

1. The plaintiff purchased 20,000 MT of Sugar on high seas sale contract on the basis of diverse bills of lading issued by Cargill International S.A. for and on behalf

of Master of the vessel M.V. 'Wise King'. When the ship arrived at sandheads on 23rd November, 1999 at Kolkata on a survey it transpired that the goods had been damaged to the extent of 926.05 MT valued at Rs. 1,38,90,750.00. There had been short delivery to the extent of 300 MT valued at Rs.45.00 lacs. The plaintiff therefore filed the above suit claiming a decree for Rs. 1,83,90,750.00 for loss and damage as against the vessel M.V. 'Wise King' and applied for arrest. The vessel was initially arrested. M/s. Wise King Meritime Limited and Unwise Company INC claiming to be the owner and disponent owner of the vessel M.V. Wise King applied for release of the vessel and the vessel was released on a guarantee being furnished for the claim of the plaintiff. Such guarantee was furnished in favour of The Registrar, Original Side, High Court. The suit was filed on or about 21st January, 2000. The ship was arrested by an order dated January 24, 2000. The order of release was passed on January 31, 2000.

2. The present application was made by M/s. Wise King Meritime Ltd. and Uniwise Company INC on 9th May, 2001 inter alia praying for reference of the disputes involved in the suit to arbitration in terms of the arbitration clause contained in the charter party which was binding upon the parties by way of an incorporation clause embodied in the bills of lading. This application was kept pending since then after completion of affidavits. The matter thereafter appeared before the Court when the same was brought along with other pending matters at the instance of the Court.

3. The said application was heard by me on the adjourned dates.

4. Mr. Sudipta Sarkar, (with Mr. Tilak Bose) learned counsel appearing on behalf of the petitioner contended that in accordance with the provisions of [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as the 'said Act, 96') the Court was bound to refer the disputes being the subject matter of the suit to arbitration in view of the arbitration agreement stipulated in the charter party. Mr. Tilak Bose, learned counsel, drew my attention to various bills of lading on the basis of which the plaintiff made this claim. The bills of lading stipulated incorporation clause of the charter party. According to Mr. Bose, since the sugar charter party referred to in the application contained arbitration clause, the same should be applicable in the instant case. He also drew my attention to the various paragraphs of the plaint

wherein the plaintiff themselves relied on the bills of lading. It further appears from the bills of lading that the subject consignment was the subject matter of the sugar charter party under which the bills of lading were issued. It was also submitted on behalf of the applicant that if one looks to preamble of the 1996 Act it would appear that it was enacted following Uncirral Law.

5. Mr. S. N. Mukherjee, learned counsel appearing on behalf of the plaintiff/respondent contended as follows :-

(i) The bills of lading did not contain any arbitration clause. The charter party mentioned in the bills of lading was not identifiable. According to him, since particular charter party was not mentioned in the bills of lading it should refer to head charter meaning thereby the charter party between the owner and the charterer. Since the said charter party was not disclosed there could not be any arbitration clause identifiable for which this Court could refer the disputes to arbitration.

(ii) The subject matter of disputes could not be referred to arbitration assuming there was any arbitration clause as the said clause was inoperative and incapable of being performed.

(iii) The Hague Rules provided one year limitation. The suit was filed within the period of limitation. As of date if the dispute was referred to arbitration this would become an inoperative situation in view of the limitation clause.

6. Mr. Mukherjee also referred to the bills of lading and pointed out various anomalies including that the master did not sign the bills of lading. The agent who signed the bills of lading was not authorised by the master.

7. In reply, Mr. Sarkar contended that all the pleas which Mr. Mukherjee raised on the issue of bills of lading were not tenable in view of the fact that the plaintiff themselves sued the vessel on the basis of the said bills of lading. On the issue of charter party Mr. Sarkar referred to Clause 6 of the charter party which authorised others to sign. He also referred to paragraph 2 of the plaint wherein the plaintiff themselves contended that the bills of lading were signed on behalf of the master.

Mr. Sarkar also referred to paragraph 12 of the plaint wherein the plaintiff themselves referred to the bills of lading for the consignment of sugar weighted about 19700 MT which was the exact figure mentioned in the sugar charter party. According to Mr. Sarkar if the plaintiffs relied on the bills of lading they would have to accept the incorporation clause by which the arbitration clause stipulated in the sugar charter party was made an integral part of the bills of lading.

Parties cited the following decisions :-

(1) The Princes, 70 LT 388

(2) 1988 Vol-I, Lloyd's Law Report, Page 452 (Navigazione Alta Italia SpA v. Svenska Petroleum AB),

(3) : [1960]3SCR820 (East & West Steamship Company v. S.K. Ramalingam Chettiar)

(4) 1997, Vol-I, Lloyd's Law Report, Page 334 (Aries Tanker Corporation v. Total Transport Ltd.)

(5) 2000, Vol-I, Lloyd's Law Report, Page 1 (Baghlaf Al Zafer Factory Co. v. Pakistan National Shipping Co. & Anr.)

(6) : AIR 2001 SC3381 (Owners and Parties Interested in the vessel M.V. 'Baltic Confidence' & Another v. State Trading Corporation of India Ltd. & Anr.)

(7) 2000, Vol-2, Lloyd's Law Report, Page 243 (Thyssen Inc. v. Calypso Shipping Corporation S.A.)

(8) AIR 1999, Bombay, Page 173 (Ospey Underwriting Agencies Ltd. & Others v. Oil & Natural Gas Corporation Ltd. & Ors.)

(9) 1983, Vol-2, Lloyd's Law Report, Page 640 (Seateam & Co. v. Iraq National Oil Company & Ors.)

(10) : AIR 2003 SC2881 (Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums)

(11) 2001(VII), Supreme Court Cases, Page 728 (Smita Conductors Ltd. v. Euro Alloys Ltd.)

Parties cited the following passages :-

(1) Voyage Charter Party by Cooke, Kimball, Young, Martowski, Taylor and Lambert, 2nd Edition, 2001, LLP, Page-488.

(2) Law and Practice of International Commercial Arbitration by Redfern and Hunter-3rd Edition, 1999, Sweet & Maxwell, Page 173-174.

(3) Scrutton on Charter Parties, 20th Edition, Page 76-77

(4) Redfern & Hunter, Paragraph 403 to 405.

8. Let me first deal with the cases cited by the parties.

(i) : AIR 2001 SC3381 (Owners and Parties interested in the vessel M.V. Baltic Confidence & Another v. State Trading Corporation of India & Anr.) : This decision of the Apex Court had considered the earlier decisions of the English Court as well as Indian Courts on the subject including those cases cited before me by the parties referred to above. Before the Apex Court the identical issue was involved. The Apex Court held that whether the arbitration clause in a charter party agreement was incorporated by reference in the bill of lading, the principal question is what was the intention of the parties to the bills of lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause provided in the charter party is to be read in the manner provided in incorporation clause of the bills of lading.

Identical issue was raised before me by the plaintiff on the issue of vagueness of the arbitration clause and/or incorporation clause and the infirmities in the bills of lading. Those were negated by the Apex Court. According to the Apex Court the intention of the parties to the bills of lading would be the only governing factor and once the party to the bills of lading agreed to have the arbitration clause of the charter party agreement to be read with the bills of lading the said clause is binding upon the parties. Paragraphs 19 and 20 of the said judgment being relevant herein

is quoted below :-

'19. From the conspectus of the views expressed by courts in England and as in India, it is clear that in considering the question, whether the arbitration clause in a Charter Party Agreement was incorporated by reference in the bill of Lading, the principal question is, what was the intention of the parties to the Bill of Lading? For this purpose the primary document is the Bill of Lading into which the arbitration clause in the Charter party Agreement is to be read in the manner provided in the incorporation clause of the Bill of Lading. Hil ascertaining the intention of the parties, attempt should be made to give meaning to the incorporation clause and to give effect to the same and not to invalidate or frustrate it giving a literal, pedantic and technical reading of the clause. If on a construction of the arbitration clause of the Charter Party Agreement as incorporated in the Bill of Lading it does not lead to inconsistency or insensibility or absurdity then effect should be given to the intention of the parties and the arbitration clause as agreed should be made binding on parties to the Bill of Lading. If the parties to the Bill of Lading being aware of the arbitration clause in the Charter Party Agreement have specifically incorporated the same in the condition of Bill of Lading then the intention of the parties to abide by the arbitration clause is clear. Whether a particular dispute arising between the parties comes within the purview of the arbitration clause as incorporated in the Bill of Lading is a matter to be decided by the arbitrator or the Court. But that does not mean that despite incorporation of the arbitration clause in the Bill of Lading by specific reference the parties had not intended that the dispute arising on the Bill of Lading should be resolved by an Arbitrator.

20. Coming to the case on hand, it is to be kept in mind that while incorporating the condition of the Charter Party Agreement in the Bill of Lading, specific reference has been made to the arbitration clause by use of the expression 'including the law and arbitration clause'. Therefore, the parties have taken care not to couch the interpretation clause in the Bill of Lading in general terms but have made their intention clear that the disputes arising thereunder should be resolved by arbitration according to the clause in the Charter Party Agreement. On a fair reading of Clause 62 of the Charter Party Agreement (arbitration clause) and Condition 1 of the Bill of Lading (incorporation clause), there is no manifest

inconsistency or insensibility. Such was not the case of the parties in the suit nor any such finding recorded in the judgment of the High Court (single Judge or by the Division Bench). It was also not contended before us that if the arbitration clause in the Charter Party Agreement is implemented in relation to disputes arising on the Bill of Lading, it would give rise to an absurd/unworkable situation. It was also not urged before us that the condition in the Bill of Lading incorporating the arbitration clause of the Charter Party Agreement was null and void, being incapable of being performed. The main ground on which it was contended that the clause is inoperative is that the expression 'Charter Party' in Clause 62 of the Charter Party Agreement was not changed to 'Bill of Lading' while incorporating the same in the latter. This contention, we are constrained to observe, cannot be accepted since it goes against the clear intention of the parties as evident from the incorporation clause.'

(ii) : AIR 2001 SC3381 (Smita Conductors Ltd. v. Euro Alloys Ltd.) : Here the Apex Court defined the words 'agreement in writing' while dealing with the question of reference to arbitration. The Apex Court came to the conclusion that it can be a contract containing an arbitration clause signed by the parties or an arbitration agreement signed by the parties or an arbitral clause in a contract exchanged by letters and/or telegrams or an arbitral agreement contained in exchange of letters of telegrams. If any one of these factors are established the arbitration clause can be invoked. In the instant case the bills of lading contained the incorporation clause of the charter party, the sugar charter party contained the arbitration clause. Hence, the same can be invoked and Mr. Mukherjee's contention that it must be an agreement in writing and cannot be by way of incorporation clause which is unidentifiable, is not tenable.

(iii) : AIR 2003 SC2881 (Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums) : In this case, the Apex Court held that once the agreement between the particulars incorporating a clause for arbitration is established it is mandatory for the civil Court to refer the disputes to arbitration.

Unreported decision of Mr. Justice Girish Chandra Gupta delivered on 1st October, 2002 in the case of Praksun Mercantiles Put. Ltd. v. The Owners and

Parties Interested in the Vessel in the M.T. Anax Puma : In this case His Lordship dismissed an application for reference to arbitration. His Lordship held that the defendant waived their right to ask for a reference to arbitration as they allowed the application for stay to remain pending for three years. His Lordship heavily relied on the Hague Rules and found that it would be unjust to the plaintiff to refer the disputes for arbitration after expiry of the period of the limitation.

9. Considering the above decisions and specially in the case of Baltic Confidence (supra) I am of the view that the arguments made by the parties except the plea of limitation were all identical to the case before the Apex Court in Baltic Confidence (supra). Hence, such decision of the Apex Court being binding upon me. I hold the disputes must be referred to arbitration.

10. However, it would not be out of place to mention that the present application was made after 1 and 1/2 years of filing the suit and the said application was also kept pending till the matter was placed in the list at my instance for hearing. However, application was not heard since 2001. The party cannot be blamed for that. The Court because of its preoccupation could not hear the same on an earlier date. Hence pendency of the application cannot be a relevant factor in the instant case.

11. Mr. Mukherjee, learned counsel, also raised the plea that the admiralty action could not be referred to arbitration. I am not separately discussing the issue in view of the Apex Court decision referred to above.

12. Let me now come to the issue of limitation. This was a new point which was not urged before the Apex Court. Although from the Apex Court judgment it would appear that the reference was made ultimately by the Apex Court much after the prescribed period of limitation of one year.

13. Mr. Mukherjee on this issue cited the Apex Court decision in the case of East and West Steamship Company (supra) as well as two English Courtdecisions The Aries (supra) and Baghlaf Al Zafer Factory (supra). Mr. Mukherjee also relied on passages from International and Commercial Arbitration to show that the prescribed period of limitation was one year. Paragraph 25 of the judgment in the

case of East and West (supra) held that the Hague Rules had an international character and once the liability is extinguished after one year there is no space for any acknowledgement of liability thereafter meaning thereby the period of limitation of one year cannot be extended by any other means including what is provided in the Indian Limitation Act.

14. In the case *The Aries* (supra) the English Court considering the Hague Rules on the subject came to a finding that the time bar stipulated in the rules is a time bar of a special kind that is one which extinguishes the claim and not one like limitation law which bars the remedy while leaving the claim itself in existence.

15. In. case of *Baghalf* (supra) the suit filed by the plaintiff was initially not entertained on the plea of a forum selection clause. Subsequently the same was withdrawn because of plea of limitation taken by the defendant before the Pakistan Court on the basis of Hague Rules.

16. If I have to follow *Baltic Confidence* (supra) which I am bound I have no other alternative but to refer the disputes for arbitration. Mr. Sarkar in reply argued that once the plaintiff knowing that there had been an arbitration clause filed a suit the plaintiff could not resist reference to arbitration on the plea of limitation. In my view, if a suit is filed within the prescribed period of limitation by the plaintiff so long the defendant does not take the plea of arbitration the suit is competent to be tried by this Court. Here on or about 24th January, 2000 the suit was filed and the order of arrest was passed. The vessel was released by an order dated January 31, 2000 at the instance of the applicants wherein the applicants got the vessel released upon furnishing of security. The instant application was made on 9th May, 2001 after about one year 4 months from the date of filing of the suit. If I pass an order of reference as of date without any protection to the plaintiff it would be an unjust treatment to the plaintiff. It is true that relying on *Baltic Confidence* (supra) I have no other alternative but to refer the disputes to arbitration since I am unable to accept the view of Gupta, J. as discussed above. At the same time I should see that such arbitration is not rendered fruitless and/or infructuous because of the plea of limitation.

17. I, therefore, allow the application. There would be an order of reference directing the parties to refer the disputes being the subject matter of the instant suit to arbitration in terms of the arbitration clause contained in the sugar charter party. The suit being Admiralty Suit No. 3 of 2000 is permanently stayed.

18. The applicants are, however, directed to file affidavit giving an undertaking that they would not raise the plea of limitation under the Hague Rules before the Arbitrator.

19. In case such affidavit is not filed within the period of 4(four) weeks from date the order of reference would stand revoked and the suit would stand revived to be heard by this Court.

20. In case, the undertaking is given and the disputes are not referred by the parties to arbitration within a period of six weeks from the date of communication of the filing of the undertaking the suit would stand dismissed and the undertaking would stand discharged.

21. The bank guarantee furnished by the defendant be kept renewed for satisfaction of the award, if any, to be made in the proposed arbitration proceeding.

There would be an order of stay of operation of the judgment and order for a period of 2(two) weeks from date.

Urgent Xerox certified copy of the order would be given to the parties, if applied for.