

(1942) 07 CAL CK 0025
In the Calcutta High Court

The Eastern Steam Navigation Co. Ltd.	Vs	APPELLANT
The Indian Coastal Navigation Co. Ltd.		RESPONDENT

Date of Decision : 06-07-1942

Acts Referred:

Citation : AIR 1943 Cal 238

Hon'ble Judges : Blagden, J

Bench : Division Bench

Judgement

Blagden, J.—This application raises an interesting question which has been, if I may say so respectfully, very ably argued on both sides. The applicants are the Indian Coastal Navigation Co. Ltd., the owners of a steamship called the "Cossipore". On or about 10th May 1941, they let her on charter to the respondents, the Eastern Steam Navigation Co. Ltd. The charter party provided amongst other things that it was for twelve months of 30 days. Monthly rent was to be paid in advance and if not earned to be returned to the charterers. The charterers were under liability to make certain advances and it was provided that the Captain was to prosecute all voyages with utmost despatch and to render customary assistance with the ship's crew. There were provisions as to demurrage and so on, and it was provided that the steamer was not to be sent on any voyage in case of war before the owners should have been able to cover her full value against war risks and the premiums were to be refunded by the charterers to the owners. Any dispute "arising under" the charter was to be referred to arbitration.

2. Early in April 1942 the steamer was in Bombay and she would be, under the charter party, returnable about a month later to her owners in Calcutta. The respondent company was naturally desirous that she should make what was likely to be her last voyage under the charter party in freight, which would pay, rather than in ballast, and they had, apparently, got a cargo for her. But she never started on the voyage at any material time, because it seems, either the crew or the officers or both were unwilling to go to sea (for reasons which can

easily be guessed), and subsequently her proceedings were interfered with by the Maritime Department. Whatever that may be, the exact reason for what happened will have to be determined hereafter. Suffice it for the moment to say that, as one might expect, disputes arose between her owners and the charterers, all through the unfortunate detention of the vessel at Bombay. At an early stage in the discussion the following telegram passed between the present applicants and the present respondents. It is dated 22nd April and was apparently received at Bombay on the 26th.

Your telegram 21st we are not liable for what you say : we shall hold you liable under charter party till we get delivery from you in Calcutta. Stop. Vessel cannot be off charter all this seems to be a conspiracy for off charter only. Stop. We are not responsible.

3. Reading that on its face and in the light of what had happened, it seems to me that the present applicants were alleging that the attitude of the master and crew of the vessel, who were, properly speaking, the servants of the applicants and were on loan with the vessel to the respondents, was due to a conspiracy between the respondents and the applicants' servants (the crew and the master) with the object of getting the vessel off charter, so that the respondents would not have to pay rent for her or, having in fact paid rent in advance for the last month, which the charter party provided for, would be entitled to get it back. I have not the slightest idea and say nothing one way or other as to whether and if so to what extent that charge is well-founded. Without going into unnecessary detail, one finds on 22nd May, when the present applicants referred what they considered the matters in dispute to arbitration, their notice appointing an arbitrator addressed to the respondents, a copy of which was sent to a Captain Pringle the arbitrator they appointed, is headed as follows:

Re : S.S. Cossipore,

- (1) Redelivery of the vessel at Calcutta as provided for in the charter party.
- (2) Deliberate detention of the vessel at Bombay up to date.
- (3) Alleged off hire and non-payment of war risk insurance, and
- (4) Damages for loss of time and freight since 4th May 1942.

4. The rest of this notice is in usual terms I and calls for no particular comment. The respondents appointed their arbitrator (to avoid being left in the position of having to submit to the single arbitrament of the arbitrator appointed by the applicants) but they were careful to do so in terms which reserved their rights to make their claim before another tribunal; and they at once took the point that the matters in dispute as outlined by the previous communications involved a charge against their honesty which ought, if they so desired, to be publicly investigated, and either to be publicly proved or publicly disproved. However, the present applicants wrote in reply saying this:

As to the last paragraph of your letter under reply we have to state that we have placed the whole of our correspondence "(including the letter from which I have just read)" passed between ourselves from 21st April, before our arbitrator and if you so desire you may request the arbitrators to please consider and see if we were wrong to say that there was a conspiracy to put the vessel out of commission.

5. It is true that that letter, again, is written by the applicants themselves and not by their legal advisers, and I cannot help feeling that this case has illustrated the advisability of taking legal advice before - not after - it is too late. Any how this was the attitude the Indian Coastal Navigation Co. Ltd., was taking up on 3rd June, and on 11th June the present respondents commenced a suit in this Court in which they claimed refund of payments which they had made under the charter party, really as money paid for a consideration which had wholly failed owing to the fact that the vessel did not proceed to sea with their cargo. They also claimed a declaration that they had a lien on the "Cossipore" for the amount of their claim, and ancillary relief. The present application is made u/s 84, Arbitration Act. It has not been disputed that the claims made in the suit are the claims arising "under" the charter party within the meaning of the arbitration clause and I think that is quite correct. Prima facie, therefore, the applicants are entitled to have the suit stayed. But the respondents put their case in this way. They say:

Charges of fraud, or misconduct of a serious character, are made against us. We should like them proved or disproved in the course of our suit. We do not choose to have these charges investigated in the privacy of an arbitration room.

6. The principle has been often acted on that if a dispute involves a charge such as one of fraud, it ought not, if the party charged desires otherwise, to be decided by an arbitrator in privacy, perhaps the locus classicus is *Russell v. Russell* (1880) 14 Ch. D. 471 at p. 477. But the question is what, in this connexion, does the word "involves" mean? It is a question which seems to have been considered by the Lahore High Court in the case, *civil Revision No. 240 of 1937*, not officially reported but found in *Firm Jowahir Singh Sundar Singh v. Fleming Shaw & Co. Ltd.* ('37) AIR 1937 Lah. 851 and as I follow the decision on the material point the answer seems to be this : Of course if the charge of fraud is wholly outside the terms of the reference, for example, mere abuse indulged in during the squabble then there is no right to a stay of the suit on the application of either party. If, on the other hand, it is (as here) within the terms of the reference, the question arises whether the facts alleged to constitute the fraud, would, if the dispute were investigated, be in the nature of *facta probanda* or *facta probantia*. If the facts alleged to constitute the fraud or misconduct would have mere evidentiary value in the investigation of the dispute they would not in themselves be a ground for refusing the stay of a suit on the application of either party. If, on the other hand, they are matters which would be directly in issue, then if the party against whom these charges are made wants the matter to be

investigated in public he ought to be allowed this. In the present case, if one analyses what the parties are claiming, I think it would be quite possible for the applicants to get on with their claim against the respondents without making the slightest charge against their conduct. Learned Counsel for the applicants to-day said that he did not intend to proceed with it in the arbitration. In his view, as I gather and I think it is perfectly right these charges were quite unnecessarily made by his clients from the, point of view of their claim, as far as that goes. On the other hand if the claim of the respondents is investigated it is quite clear what the answer of the present applicants, on the correspondence that has been exchanged between the parties, is. It looks as though the applicants were going to confess and avoid the fact constituting the respondents' claim by saying in effect : "True it is that our ship did not proceed to sea, as she ought by the terms of our contract. But the explanation of this is that you induced our servants not to do their duty."

7. Though it is true that the respondents are a limited liability company this charge of misconduct against it is equivalent to a charge against those who manage it. Both the claim in the arbitration and the claim in the suit arise out of the same transaction. I do not see how it is possible to settle the rights of the two parties except by investigating both their claims, which are really inextricably linked; if one contention is going to be that which has been foreshadowed no complete investigation or doing of justice between the parties is possible without looking into the charge of conspiracy. I think that this ought to be publicly investigated. In my judgment, therefore, the application fails and must be dismissed. Costs are costs in the cause. The written statement is to be filed within a week. Discovery within ten days thereafter. Inspection immediately thereafter. Liberty to mention to fix a date for trial.