

(1970) 01 CAL CK 0013
In the Calcutta High Court
Case No : Application in Suit No. 3337 of 1968

Union of India

APPELLANT

Vs

Black Sea Steam ship Co. and Another

RESPONDENT

Date of Decision : 27-01-1970

Acts Referred:

Citation : 74 CWN 803

Hon'ble Judges : Ajoy Kumar Basu, J

Bench : Single Bench

Advocate : Bimal Kumar Basak for Union of India, for the Appellant; C.R. Datta, for the Respondent

Judgement

Ajoy Kumar Basu, J.—This is an application for stay of the suit on behalf of Black Sea Steamship Co. and Chinoy Chablani and Co. the defendant Nos. 1 and 2 in the above suit. The present suit has been instituted by the plaintiff, Union of India for a decree of Rs. 13,950. 53 p. against the defendants, inter alia, for damages for short delivery of goods.

2. Shortly, the facts as stated in the petition and the affidavits are: in September 1967 the defendants received on board the Steamship S.S. "Berislav" at the port of Odessa in USSR 10, 164 bags of ammonium sulphate in good order and condition upon the terms and conditions contained in a Bill of Lading dated 30th November 1967 and the defendants agreed to deliver the said goods in good order and condition at the port of Calcutta to the order of the plaintiff, Union of India, through Regional Director of Food, Calcutta.

3. Thereafter, the said ship arrived at the port of Calcutta on the 19th December 1967 and completed discharge of its cargo on the 25th December 1967.

4. The defendants delivered to the plaintiff at the port of Calcutta the said goods carried by them less 864 bags of Ammonium Sulphate. A short lading certificate was duly issued by the Commissioner for the Port of Calcutta in respect of the said 864 bags. The plaintiff preferred a claim for the said short delivery and there

were correspondences between the parties and ultimately the present suit was filed by the plaintiff in this Hon'ble Court claiming Rs. 13,950/- including the interest for such loss and damages from the defendants as carriers and its agents.

5. The defendants-applicants pray for stay of the suit firstly on the ground that under the terms of the contract contained in the Bill of Lading "(a) all claims and disputes arising under and in connection with this Bill of Lading shall be judged in USSR (b) all questions and disputes not mentioned in this Bill of Lading shall be determined according to the Merchant Shipping Code of UJSSR" and the defendants argue that for these conditions contained in the Bill of Lading the suit should be fought in USSR. The defendants-petitioners secondly contend that for the balance of convenience USSR Court should be preferred as the convenient forum for determination of this dispute, in the circumstances of this case. The petitioners further state that the defendant No. 1 Black Sea Steamship Co. does not carry on any business in Calcutta through the defendant No. 2, and it has no business place at Calcutta. The defendant No. 2 acts as clearing shipping agent and/or for limited or specified purposes only. The petitioners further contend that in any event the said 864 bags were not actually put on the board the said vessel at the time of embarkation and that the said 864 bags were actually delivered later on to the plaintiff under Bill of Lading No. 94/A by the vessels S.S. "Djalakendre".

6. On the balance of convenience the petitioners further stated that for deciding the important issues of facts of the case the evidence will be readily available in USSR and not in Calcutta and it will be extremely inconvenient, if not impossible, to secure the attendance of witnesses in this Hon'ble Court from USSR for giving evidence about the consignment of goods shipped at Odessa which is a port in USSR.

7. On the other hand, for the Union of India, the plaintiff opposite party argues that though they agreed to the terms in the Bill of Lading but on the balance of convenience the suit should be tried in Calcutta as most of the issues of facts to be investigated in this suit would involve taking of evidence which would be more readily available at Calcutta than in USSR. According to the plaintiff the short landing certificate was issued by the Commissioners for the Port of Calcutta and the witnesses to prove such certificate of short landing are the employees of the Commissioners for the Port of Calcutta. Secondly most of the documents which are necessary to prove the case are not under the control or custody of the plaintiff and as such it will be difficult, if not almost impossible, for the plaintiff to make them available in the court in USSR. So, according to the plaintiff, it is convenient to try the suit here in Calcutta than in USSR. Then plaintiff further argues that it is possible that the suit in Russian Court has been barred by law of limitation by now and so this stay should be refused. The plaintiff's counsel cites a case reported in Shalimar Paints Ltd. Vs. Omprokash Singhania, and according to the plaintiff the suit should not be stayed.

8. The plaintiff also relied on a case of (2) Lakshminarain Ramniwas Vs. N.V. Vereenigde Nederlandsche Scheepvaartmaatschappij and Others, . In that case G.K. Mitter J. refused to stay the suit stating "It will be more convenient to have this suit tried in Calcutta than at Rotterdam or Amsterdam and therefore, the court would refuse to exercise its discretion for stay of the suit."

9. The learned counsel for the petitioners, on the other hand, cited various decisions before me. The first case cited by him was (3) Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigazione Sede in Trieste and Others, . In that case a Division Bench of this Court held: "The Court acts upon the principle that in general the Court will compel the parties to abide by their contracts. Instead of driving the defendant to a separate suit to enforce the covenant, the Court may for the purpose of preventing multiplicity of litigation enforce the contract summarily on an application made to it in the suit instituted before it. The prima facie leaning of the Court is that the contract should be enforced and the parties should be kept, to their bargain, subject to this prima facie leaning, the discretion of the Court is guided by consideration of justice (balance of convenience, fairness etc.). If on consideration of all the circumstances of the case the Court comes to the conclusion that it will be unjust and unfair to stay the suit, the Court may refuse to grant the stay asked for".

Their Lordships further held that: "The balance of convenience is not overwhelmingly in favour of the trial of the suit for damages for short delivery of goods by the shipper brought on the Original Side of the Calcutta High Court by the holder of bills of lading as against trial of the suit before the relevant judicial authority in Italy.....Undoubtedly, the appellant will suffer some inconvenience if the litigation goes on in Italy instead of its going on in the Calcutta forum. Mere inconvenience to the appellant alone however is no ground for refusing to stay the suit."

10. Another case cited by the petitioners is reported in Swedish East Asia Company Ltd. Vs. B.P. Herman and Mohatta (India) Private Ltd., , which is a Division Bench Judgment of this Hon'ble Court and the facts of that case are almost similar to the facts of the present case. That was also a suit filed in Calcutta for, inter alia, on the basis of short landing certificate and the defendant in the suit, the Swedish Co., contended as stated by their Lordships: "It was further stated that the bill of lading which constituted the contract, having provided that any dispute arising on the said bill of lading would be decided in Sweden according to the Swedish Law, the plaintiff Co. was not entitled to pursue its claim, if any, in this Court and, in any event, the suit thus brought in breach of the agreement ought to be stayed".

Thereafter the court further said: "The present suit will therefore be stayed subject to the condition that it will proceed only if the suit hereafter to be filed in Sweden is held barred by time."

11. Herein, in this case, both the parties agree that under the terms of the Bill of

Lading the suit should have been filed in USSR Court. In my view, the ratio decidendi from all these cases cited above, is that the parties ordinarily should be bound by the contract solemnly entered into by them in the Bill of Lading unless the balance of convenience is overwhelmingly against it. In this particular case, if the suit is proceeded in USSR, the plaintiff is bound to suffer certain inconveniences. Similarly, if the suit proceeds in Calcutta, the defendants will suffer. But, after considering the facts and circumstances of the case, I am of the opinion that not only the parties should be bound by their contract that the dispute should be decided in USSR, even the balance of convenience, by and large, is in favour of the proceedings being taken in USSR Court. At least I have found nothing in this case which is overwhelmingly in favour of continuing the suit in Calcutta which will entitle me to snpersede the choice of forum deliberately chosen by the parties as contained in the Bill of Lading.

12. The present suit will, therefore, be stayed subject to the condition that it will proceed only if the suit herein to be filed in USSR is held barred by law of limitation.

13. Mr. Datta appearing for the petitioners stated that his clients undertake not to take the plea of limitation in USSR Court. But I do not know what view the USSR Court will take on this undertaking. I therefore direct that if the suit to be filed in USSR is dismissed on the ground of limitation the stay will automatically stand vacated and the trial of the suit filed in this Hon''ble Court will be proceeded with.

14. Stay of the suit is granted.

15. The plaintiff should, in any event, file the suit in proper Court within a reasonable time. On the undertaking of the plaintiff that it will not proceed with the suit in this Hon''ble Court, stay of operation of this order is granted for four weeks. Costs will abide by the result of the suit.