

(1973) 01 CAL CK 0027
In the Calcutta High Court
Case No : Matter No. 507 of 1971

Union of India (UOI) and Another

APPELLANT

Vs

Navigation Maritime Bulgare

RESPONDENT

Date of Decision : 25-01-1973

Acts Referred:

Contract Act, 1872 — Section 28

Citation : AIR 1973 Cal 526

Hon'ble Judges : Sabyasachi Mukharji, J

Bench : Single Bench

Judgement

Sabyasachi Mukharji, J.—This is an application for a stay of a suit. The petitioner is a company incorporated under the laws of Bulgaria and carries on business as a carrier of goods by sea. The petitioner is registered in Bulgaria. It is stated that on the 17th August, 1970 by a charter party entered into at Sofia, Bulgaria the petitioner chartered its vessel to Messrs. Chimiport of Sofia for carrying 10,000 metric tonnes, 5 per cent, more or less, of urea in bags from the Bulgarian Port of Bourgas to 1/2 Ports in India under the terms and conditions contained in the said charter party. In pursuance of the said charter party, it is alleged by the petitioner that the petitioner delivered in September, 1970 the said vessel to the charter at the Port of Bourgas where a quantity of urea in bags stated by the charterer-shipper to be 1,97,000 in number was shipped on board for carriage to India. A bill of lading dated 26th September, 1970 covering the said shipment was issued by the petitioner at Bourgas to the shipper. In the said bill of lading the number of bags shipped on board the vessel as aforesaid was declared by the shipper to be 1,97,000 and their weight as 9,850 metric tonnes. The petitioner further alleges that the petitioner does not admit the correctness of the declarations and the said bill of lading did not contain any acknowledgment or admission. The said bill of lading, inter alia, contained the following clauses:

"Clause 1 "Paramount clause.-- All the terms, provisions and conditions of the Rules contained in the International Convention for the Unification of Certain

Rules relating to Bill of Lading dated Brussels the 25-8-1924, (the "Hague Rules") shall apply to the contract in the Bill of Lading, but if in the country of shipment or delivery of the goods any special law has been enacted incorporating the rules of the said convention, then all the terms, provisions and conditions, if any, as are imposed by such special law shall apply. Nothing herein contained shall be deemed to be a surrender by the Carrier of any of his rights or immunities or an increase of any of these responsibilities under the said Rules or Enactments. The Carrier is to be entitled to the benefit of all such privileges, rights and immunities as are contained in the said Rules or Enactments as if the same were herein specifically set out, and if anything herein contained be inconsistent with the said Rules or Enactments it shall to the extent of such inconsistency and no further be null and void."

"Clause 2. Jurisdiction-- Any dispute arising under this Bill of Lading to be decided in Bulgaria according to Bulgarian law.

"Clause 14. Settlement and Assessment of Claim, (a) Notice of claim arising under this Bill of Lading or legal claims must be lodged not later than defined in the Hague Rules the Carrier shall not be liable to pay any compensation of the price or value of the goods which has been wilfully misstated.

(b) The ship's protest and/or a true copy of the ship's log shall be deemed conclusive evidence of the facts and circumstances stated herein. In case of total loss of the ship and/ or the cargo and also in case of absence of tidings it is assumed, unless the contrary is proved that the loss of the ship and/or cargo has not been caused by unseaworthiness; or by actual fault or privity of the Carrier; or by the fault or neglect of the agents or servant of the Carrier.

(c) Any claim for loss or damage under this Bill of Lading to be adjusted on the basis in invoice value of the goods at the Port and time of shipment (with insurance expenses and freight added thereto) or a due proportion thereof; or on declared value of the goods, whichever shall be less; provided also that the ship in no case be held liable for goods of any description exceeding in value one hundred pounds sterling per package or unit; unless declared with value of this Bill of Lading and extra freight as may be agreed upon; be paid nor in any case for any commission; profit; interest; duty; stowage; warehouse; landing or other similar charges; not for any loss or damage; however caused, capable of being covered by insurers. Ship to have the option of replacing any loss or damaged goods at all times."

2. The said vessel arrived at the port of Vishakhapatnam on or about 20th November, 1970 and a part of the cargo covered by the said bill of lading was discharged at the Port by the Food Corporation of India. It is stated that the officers of the said vessel kept a tally of the number of bags that were discharged from the vessel at Visakhapatnam. From Visakhapatnam the said vessel came to the Port of Calcutta on or about 9th December, 1970 and there discharged the balance of her cargo which was taken delivery of by the said Food

Corporation of India. On of about 14th December, 1971, the plaintiffs being the Union of India and Food Corporation of India instituted a suit against the petitioner for the sum of Rs. 1,76,425.78 paise for the alleged failure to deliver some of the cargo as stated in the plaint. The plaintiff Union of India claims to be the owner of the said goods and the plaintiff No. 2, Food Corporation of India the endorsee of the bill of lading. There was correspondence prior to the institution of the suit. It appears that the main dispute between the parties, as alleged by the petitioner, is that while it was alleged in the bill of lading that 1,97,000 jute bags had been shipped at the port of shipment, actually it was 1,500 bags short shipped of the aforesaid quantity. The main point of dispute is as to what quantity was discharged at the port. It is alleged that 245 metric tonnes have been short delivered and discharged to the plaintiffs in the suit. Upon the suit being filed the defendant being the petitioner herein was served with Writ of Summons in March, 1972 and it has made the instant application in August, 1972 for the stay of the suit.

3. It is not necessary for me to refer to the numerous decisions on this aspect of the matter. The principles are now well-settled. In the case of *Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others*, it was held that the principles upon which the Court should exercise its power and jurisdiction in cases of this type were that the Clauses excluding the jurisdiction or vesting the jurisdiction on a particular forum did not oust the jurisdiction of this Court if this Court had otherwise jurisdiction. The jurisdiction of the Court to try such a suit was vested in it by the Letters Patent and by the Constitution. Parties could not by a private agreement, whether such agreement had been entered into in India or outside India, take away a jurisdiction which was vested in this Court to try the suit just as the parties could not by such agreement confer upon it jurisdiction to try the case which it had otherwise no jurisdiction to try. In general the Court would compel the parties to abide by then- contracts. But in such a case when the attention of the Court was drawn to the contractual stipulation of this kind the Court might in the exercise of its discretion stay its hand and refuse to try the suit until the competent judicial authority to whose decision the parties had agreed to submit their disputes had pronounced its decision. In those circumstances the Court acted upon the principle that the Court would compel the parties to abide by then- contracts and if on a consideration of the circumstances of the case the Court came to the conclusion that it would be unjust or unfair to stay the suit, it might refuse to grant the stay asked for but not otherwise. Therefore the principle seems to be that the parties are bound by the contract. But if taking into consideration the entire facts and circumstances of the case it appears to the Court that it would be unfair or unjust to stay a suit because of the contract the Court would refuse to grant a stay. Similar principle was reiterated in the case of *Swedish East Asia Company Ltd. Vs. B.P. Herman and Mohatta (India) Private Ltd.*, . Counsel for the respondent contended before me that the clauses in those cases were different from the clauses in the instant case excluding the jurisdiction of this Court. So

far as the decision in the case of Lakhinarayan Ramniwas Vs. Lloyd Triestino Societa Per Azinni Di Navigaziene Sede in Triesta and Others, is concerned it is apparent that the clause was different in the sense that the clause in that case was more exhaustively worded to the extent that the clause excluded the jurisdiction of this Court. That part of the clause has to be ignored being a bargain which is illegal. So if that part of the clause of agreement is ignored there in so far as the agreement of the parties stipulated to have the dispute agitated before the Bulgarian forum is concerned both the cases are the same. In this case, therefore, I have to consider what will be the proper law of contract in this case and what is the nature of the dispute and what is the evidence necessary and where such evidence is available and the respective convenience and inconvenience of the parties. It appears that the dispute is mainly on two points, namely, what was the actual quantity shipped and what was the actual quantity landed at Visakhapatnam. In respect of the dispute as to what was the quantity shipped in Bulgaria, the evidence of the Master, the Chief Officer and the other records will all be available in Bulgaria. As to the quantity actually delivered or discharged at Visakhapatnam though no evidence would be available at Calcutta, a part of the evidence would be available at Visakhapatnam; but the other part, namely, the tally is available in Bulgaria. Parties have chosen Bulgaria to be the forum. It appears to me that part of the dispute will have to be decided according to the Bulgarian law and part according to the Hague Rules and when there is a conflict between the two, it would be a matter of interpretation. After all the Court in judging a case of this type should also consider the present trend of the international trade and in this connection it would be relevant to refer to the recent decision of the United States Supreme Court in the case of Zapata Off-Shore Co. v. The "Bremen" and Unterweser Reederei G. M. B. H. (The "Chaparral"), reported in 1972 (2) Lloyd's Law Reports at page 315 where the Chief Justice Burger observed at page 318 as follows:

"We hold, with the six dissenting members of the Court of Appeals, that far too little weight and effect was given to the forum clause in resolving this controversy. For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our Courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the Carbon Black case have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and

commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our Courts.

Forum selection clauses have historically not been favoured by American Courts. Many Courts, Federal and State, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the Court. Although this view apparently still has considerable acceptance, other Courts are tending to adopt a more hospitable attitude toward forum selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances."

4. Counsel for the respondent contended that the petitioners as shippers had agents all over the world; but it would be difficult for the plaintiff to prosecute the suit in Bulgaria. In this case we have to remember that unlike the other cases here Union of India is the party and in that view it is not possible to accept the aforesaid contention. There is no question of any difficulty of any foreign exchange in the case of Government. It is true that some foreign exchange might be required to be spent in litigation in Bulgaria but when this is the chosen forum between the parties that by itself would not be a compelling circumstance in the facts and circumstances of this case which can induce this Court to come to the conclusion that it would be unfair not to stay the suit. Having regard to the principles mentioned before and in view of the facts and circumstances of the case in the background of the bargain between the parties, I hold that the suit should be stayed.

5. There is, however, one other aspect of the matter. That is the question of limitation. According to the Hague Rules the suit has to be filed within one year of the cause of action. The alleged cause of action arose in December, 1970. The suit was filed in December, 1971. This application was made in August, 1972. Counsel for the respondent contended that there is a question of limitation which might not suit the present plaintiff in the Bulgarian forum. On behalf of the petitioner counsel gives this undertaking to the Court that his clients will not take the point of limitation if a proper proceeding is instituted in the appropriate forum in Bulgaria by the present plaintiffs against the petitioner in respect of the present cause of action within a period of six months. Furthermore, in the aforesaid view of the matter I direct that there will be a stay of the suit; but if on the ground of limitation the present plaintiffs are non-suited in the appropriate Court in Bulgaria in any suit instituted within a period of six months from date, the stay will stand vacated.

6. Costs of this application will abide by the result of the proceedings to be taken in Bulgaria by the plaintiffs. If no such proceeding is taken within six months, the plaintiffs must pay costs of this application.