The "Hung Vuong-2"
[2000] SGCA 25

Case Number : CA 135/1999

Decision Date : 11 May 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Philip Tay and Chin Song Yeow (Rajah & Tann) for the appellants; Haridass Ajaib (Haridass Ho & Partners) for the respondents

Parties : —

Conflict of Laws – Choice of jurisdiction – Exclusive – Shipper indorsing bill of lading in blank to respondents – Carrier delivering cargo without production of bill of lading – Respondents suing carrier for breach of duty – Carrier seeking stay of action – Jurisdiction clause – Whether real dispute exists – Whether court entitled to consider conflicting opinions of experts on foreign law – Whether strong cause to disregard jurisdiction clause exists

When the respondents took out an application for summary judgment, the appellants applied to have the proceedings stayed on the ground that there was a jurisdiction clause in the B/L referring all disputes arising from the B/L to the country of the appellants principal place of business, which was Vietnam. The clause also stated the governing law to be that of Vietnam.

The appellants called an expert on Vietnamese law, Mr Cuong, who opined that notwithstanding the "blank" endorsement by Pacific Sugar on the B/L, the respondents were not the persons entitled to receive the cargo. Mr Cuong relied on article 84(b) of the Maritime Code of Vietnam, which reads:

> " An order bill of lading is transferred by writing in its counter signing square on the back of the bill of lading the name of the person who has the right to issue an order for delivery of the cargo ".

According to Mr Cuong, this meant that the B/L could be transferred only if the name of the transferees (i.e. the respondents in this case) was written on the back of the B/L. In the present instance, this was not done as Pacific Sugar only endorsed their own name on the back of the B/L and not the name of the respondents. It was thus argued that the respondents were not entitled to sue for the loss. Mr Cuong further opined that there was no such concept as "the holder of the Bill of Lading" under Vietnamese law. This opinion was contradicted by the expert called for the respondents. The appellants however argued that the difference in expert opinion gave rise to a "dispute" between the parties for the purposes of the jurisdiction clause, which had to be referred to Vietnam for adjudication.

The stay application was dismissed by the assistant registrar. That decision was in turn affirmed by the learned judge below. The appellants appealed.

Held

, dismissing the appeal:

> (1) A party seeking to bring an action in a Singapore court in breach of a jurisdiction clause must show "strong cause". One of the factors which the court takes into account in determining if "strong cause" has been shown is whether

the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages (10). In this regard, the question of whether there was a genuine dispute between the parties became crucial. It would be difficult for a party to contend that he seriously desired trial in the contractual forum if he was unable to show that there was a real dispute, or putting it another way, that he had a real defence to the claim. The court clearly has jurisdiction to determine whether a dispute exists (11).

(2) Questions of foreign law are questions of fact and where the opinions of experts conflict on such foreign law, the court should as a general rule refrain from making a determination on the basis of affidavit evidence. Furthermore, there is much to be said for the proposition that disputes about foreign law should more appropriately be resolved by the courts of that foreign country. But it does not follow that in every instance where there is a conflict of opinions, the Singapore courts should always shy away from examining the opinions given (16).

(3) Upon a prima facie examination of Mr Cuongs opinion and the relevant provisions of the Vietnamese Maritime Code, it was clear that there was no basis for his opinion that article 84(b) required the specific endorsement of the transferees (i.e., the respondents) name on the reverse side of the B/L (17). The critical words in article 84(b) of the Maritime Code of Vietnam are "the person who *has the right* to issue an order." At the point in time immediately before the execution of the transfer, the person who has the right to issue an order for delivery of the cargo cannot be the transferee. It has to be the transferor. Until the transfer is completed and effected the transferee would have no right to issue any order for delivery. Therefore, in this case, the party whose name must be endorsed on the reverse side of the B/L is Pacific Sugar. This had been done here (18).

(4) The appellants assertion that Vietnamese law did not recognise the concept of "holder of the bill of lading" also could not be sustained. What was reflected in article 84(b) was really that concept and was wholly in line with international maritime practice. Even the B/L itself provided that "the shipper, consignee and the holder of this bill of lading hereby expressly accepts all printed provisions on this bill of lading, including those on the back hereof". On the back of B/L, the term "shipper" was defined to include, *inter alia*, "the holder of the bill of lading". It was quite disingenuous on the appellants part to deny the existence of such a concept (19).

(5) The appellants, while submitting that the respondents were not the persons entitled to receive the cargo, volunteered the view that the legal cargo receiver were "the shippers". Presumably they meant, Pacific Sugar. However, it was absurd for the appellants to so suggest when all the three original copies of the B/L had already been transferred by Pacific Sugar to the respondents. Pacific Sugar had already been paid for the cargo and would not have any basis whatsoever to make any claim to the cargo (20).

(6) With regards to the matter of whether "strong cause" was shown, it should be remembered that the weight which the court should accord to each factor is a matter of judgment in the light of the nature of the claim and all the

surrounding circumstances. However, this exercise is not just a numbers game. It does not follow that because a greater number of factors favour one approach, that approach would necessarily be adopted by the court. The weight to be given to each factor is not the same (21).

(7) In this case, once it is shown that there is no defence to the claim, and thus no dispute, then there is really nothing to go for trial at the contractual forum. In these circumstances to insist that the claim should nevertheless proceed to trial in the contractual forum would cast considerable doubt as to the bona fides of that party in wanting to have a trial in the contractual forum (21).

(8) Reverting to the instant appeal, there was really no dispute to be submitted for trial at the contractual forum. There would be no sense in staying the proceedings. The appellants were really seeking to gain a technical advantage in asking for a stay. Furthermore, any stay would only cause unnecessary delay (24).

(9) The appellants also made the point that there was a dispute as to the correct measure of damage, asserting that the loss should be based on the market value of the cargo at the discharge port and not the contract value. However, the respondents had, in their statement of claim, based their claim on the "arrived value of the cargo". The applicable principle was thus not in dispute. To insist that the mere determination of the value warranted a trial in Vietnam seemed again to indicate a desire for delay or other procedural advantages (26).

(10) In the premises, strong cause had been shown and the stay application should be refused.

(11) Various other matters raised by the respondents included: doubts as to the competence of the Vietnamese judges on maritime law; doubts as to the independence of the Vietnamese courts; and the question whether the maritime law of Vietnam was sufficiently developed. It should be pointed out that it is not for this court or any court in Singapore to pass judgment on the competence or independence of the judiciary of another country, all the more so of a friendly country. Comity between nations would be gravely undermined if such a wholly invidious pursuit is embarked upon. Equally it is not for this court to say whether the maritime law of Vietnam is sufficiently developed, especially when the parties themselves had agreed that Vietnam law would apply to the B/L (27).

Case(s) referred to

Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd

[1975-77] SLR 258 (refd)

Jag Shakti

[1986] 1 Lloyds Rep 1 (refd)

Standard Chartered Bank v Pakistan National Shipping Corp

[1995] 2 Lloyds Rep 365 (refd)

The Asian Plutus

[1990] 2 MLJ 449 (refd)

The Atlantic Song

[1983] 3 Lloyds Rep 394 (refd)

The Eleftheria

[1969] 1 Lloyds Rep 237 at 242 (folld)

The Frank Pais

[1986] 1 Lloyds Rep 529 (refd)

The Jian He

[2000] 1 SLR 8 (folld)

The Vishva Prabha

[1979] 2 Lloyds Rep 286 (refd)

JUDGMENT:

Grounds of Judgment

1. This was an appeal against the decision of Amarjeet Singh JC affirming the Assistant Registrars refusal of the appellants application for a stay of proceedings on the ground of an exclusive jurisdiction clause contained in a bill of lading (B/L). At the conclusion of the hearing, we upheld the decision of the learned judge. We now give our reasons.

The facts

2. The facts giving rise to this admiralty action were largely undisputed. The respondents claim was in respect of a cargo of 2,000 metric tons of raw sugar (the cargo) which was shipped by a Thai company, Pacific Sugar Corporation Ltd (Pacific Sugar), on board the appellants vessel, *"Hung Vuong-3"*, at Bangkok for discharge at the main port of South China.

3. By a contract dated 19th December 1997, the respondents agreed to sell 4,000 metric tons of raw sugar, FOB Bangkok (and/or three other Thai ports), to a company in China called *Guangxi Yulin Prefecture Economic Trade Development Co (Guangxi)*. Shipment was to be effected during the period of 15 December 1997 to 15 February 1998. Payment was to be by way of letter of credit (LC). To fulfil in part the obligations of the respondents under this contract, they purchased the cargo from Pacific Sugar.

4. For the shipment of the cargo, the appellants issued a "to order" B/L to Pacific Sugar as the shipper. The B/L was in turn endorsed over in blank by Pacific Sugar to the respondents in this manner:

"PACIFIC SUGAR CORPORATION LTD

Sgd.

_____

(YONCHAILAI JATURAFIS)

GENERAL MANAGER"

The B/L (in three original copies) was duly conveyed by Pacific Sugar to the respondents.

5. Problems arose when *Huang Vuong-3*, on arrival at Beihai, China, delivered the cargo to *Guangxi*, without the production of any of the copies of the B/L. The respondents had tendered all the relevant documents to negotiate the LC but failed to receive payment under it. The B/L was in due course returned to the respondents. However, *Guangxi* did make part payment for the cargo - US$120,772.95 out of US$654,000, being the purchase price. Thereafter the appellants sought to pressurise *Guangxi* to pay the balance. But it remained unpaid at the time the action was commenced.

6. Upon the institution of Admiralty in Rem No 733 of 1998, the respondents caused to be arrested *"Hung Vuong-2"*, a sister ship of the *"Hung Vuong-3"*. *"Hung Vuong-2"* was later released after the appellants P&I Club posted sufficient security to meet the respondents claim.

Stay application

7. The basis of the respondents claim was that the B/L was endorsed in blank to them by Pacific Sugar. Being the holders of the original B/L (all three copies thereof), they had acquired title to the cargo and were entitled to delivery of the same. The appellants delivery of the cargo to *Guangxi*, without the production of the B/L, constituted a clear breach of contract and/or duty on the part of the appellants. Thus the respondents claimed for their losses, based on the balance purchase price of the cargo amounting to US$533.227.05.

8. The respondents took out an application for summary judgment against the appellants on the ground that there was no defence to the respondents claim. They contended it was clear beyond doubt that the appellants were in breach when the latter delivered the goods to *Guangxi* without the production of any of the original copies of the B/L. However, the appellants applied to have the proceedings stayed on the ground that there was a jurisdiction clause in the B/L which read as follows:

> "Any dispute arising from this B/L shall be decided in the country where the Carrier has his principal place of business, and law of such country shall apply except as provided elsewhere herein."

As the appellants principal place of business was and is in Vietnam, they contended that the action here should accordingly be stayed. As a result, the respondents application for summary judgment was adjourned pending the outcome of the stay application, which was eventually dismissed by the assistant registrar. That decision was affirmed by the learned judge.

Issues

9. Two main issues were canvassed before us. They were broadly the same issues which were raised before, and rejected by, the learned judge, namely:

> (i) whether the appellants had raised a dispute for the purposes of the

jurisdiction clause, so that by virtue of the clause, the respondents claim would have to be brought in Vietnam and not Singapore.

(ii) whether the circumstances of this case were such that they constituted strong cause justifying this court to disregard the jurisdiction clause.

Was there a dispute

10. It is trite law that a party seeking to bring an action in a Singapore court in breach of a jurisdiction clause must show "strong cause". The factors or circumstances which the court would take into account in determining "strong cause" were those enunciated by Brandon J in *The Eleftheria* [1969] 1 Lloyds Rep 237 at 242 and which were adopted by this Court in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975-77] SLR 258. They were:-

"(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

11. It was in relation to factor (d) that the question, whether there was a genuine dispute between the parties, became crucial. It would be difficult for a party to contend that he seriously desires trial in the contractual forum if he was unable to show that there was a real dispute, or putting it another way, that he had a real defence to the claim. In the recent decision of this Court in *The Jian He* [2000] 1 SLR 8, we reviewed the cases where the courts had refused a stay on the ground that there was no real dispute. There is clearly jurisdiction on the part of the court to make this determination.

12. We will now examine the basis upon which the appellants contended that there was a dispute. Counsel for the appellants conceded that the burden was on them. Their point was that notwithstanding the "blank" endorsement, the respondents were not the persons entitled to receive the cargo and thus sue for the loss. For this they relied upon the legal opinion of a Vietnamese Attorney-at-Law, Mr Tran Quang Cuong (Mr Cuong). The basis upon which Mr Cuong arrived at his conclusion was article 84(b) of the Maritime Code of Vietnam, which reads

"A bill of lading may be transferred in accordance with the following principles:

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.
An order bill of lading is transferred by writing in its counter signing square on the back of the bill of lading the name of the person who has the right to issue an order for delivery of the cargo. The last person who has the right to issue an order for delivery of cargo is the legal cargo receiver, even where counter signing square remains blank."

According to Mr Cuong, in order for the respondents to be the "legal cargo receivers" their names had to be written on the back of the B/L. In the present instance, this was not done as Pacific Sugar had only endorsed their own name on the back of the B/L and not the name of the respondents.

13. For a more complete picture, it is necessary for us to also set out the provisions of articles 81(2) and 93 of the same Code:

Article 81(2)

"The original B/L is a document of title for disposing of the cargo and for taking delivery thereof."

Article 93

"When the vessel arrives at the port of destination, the carrier is obliged to deliver the cargo to the legal cargo receiver who has at least one original bill of lading or forwarding document or similar way bill as referred to at paragraph 2 of Article 80 of this Code. After the cargo has been delivered, all other copies of the bill of lading stand void for receiving the cargo."

14. First, we would observe that the opinion of Mr Cuong seemed somewhat tentative as he stated that "the defendants (the owners) may not be liable to the plaintiffs (cargo owners)". Furthermore, his conclusion was that "the defendants may have a defence to the claim."

15. On the other hand, the legal expert of the respondents, Mr Nguyen Manh Dung (Mr Dung), deposed that in accordance with article 93 the shipowners should only deliver the cargo against the production of the B/L (at least one original copy) and if they did otherwise they would be acting at their own risk. He said the Vietnamese Maritime Code allowed the transfer of a "to order" B/L by endorsement and upon such transfer, the consequential rights and interest in the cargo were similarly transferred. It was adequate that the B/L was endorsed "in blank". Mr Dung opined that in the light of the blank endorsement of the B/L affected by Pacific Sugar, together with the actual transfer of the B/L to the respondents, the latter had acquired title to the cargo. The respondents were entitled therefore to sue the appellants, who were liable to the respondents for the misdelivery of the cargo to *Guanxi,* without the production of any of the original copies of the B/L. All the three original copies of the B/L were at all material times in the possession of the respondents.

16. We recognised that questions of foreign law are questions of fact and where the opinions of experts conflict on such foreign law, the court should as a general rule refrain from making a determination on the basis of affidavit evidence. Furthermore, there is much to be said for the proposition that disputes about foreign law should more appropriately be resolved by the courts of that foreign country: see *The Asian Plutus* [1990] 2 MLJ 449. But it does not follow that in every instance where there is a conflict of opinions, the Singapore courts should always shy away from examining the opinions given. Counsel for the appellants conceded that this Court was entitled to consider the opinions.

17. Upon a prima facie examination of Mr Cuongs opinion and the relevant provisions of the Vietnamese Maritime Code, it was clear to us that there was no basis for his opinion that article 84(b) required the specific endorsement of the transferees name (i.e., the respondents) on the reverse side of the B/L. It was common ground between the parties that the B/L here was an "order" B/L. It would be useful for us to set out again the relevant portion of article 84(b):-

"An order bill of lading is transferred by writing in its counter signing square on

> the back of the bill of lading the name of the person who has the right to issue an order for delivery of the cargo."

18. The critical words in this provision are "the person who has the right to issue an order." The question to ask is, who at that point in time immediately before the execution of the transfer, has the right to issue an order for delivery of the cargo. It cannot be the transferee. It has to be the transferor, who is the person who "has the right". Until the transfer is completed and effected the transferee would have no right to issue any order for delivery. Therefore, in this case, the party whose name that must be endorsed on the reverse side of the B/L was that of Pacific Sugar. This was what was done here. Thus, the rights to receive the cargo had effectively been transferred to the respondents upon the B/L being delivered to the latter. We found the following opinion of Mr Dung wholly logical and sensible

> "Such an "Order" Bill of Lading is transferred in writing. It is transferred in writing when the name of the person who has the right to issue an order for delivery of the cargo countersigns his name on the back of the Bill of Lading. The person who has that right on this Bill of Lading is Pacific Sugar Corporation Ltd, the shipper. The Bill of Lading is marked "To Order" which means it is to the order of Pacific Sugar Corporation Ltd. Pacific Sugar Corporation Ltd is the last person who has the right to issue an order for delivery of the cargo. They can transfer this right by countersigning their name in the counter signing square on the back of the Bill of Lading.
>
> In this case there is no square on the back of the Bill of Lading providing for this. Pacific Sugar Corporation Ltd therefore can sign their name on the reverse side of the Bill of Lading. By doing so, they transfer in writing the right to an issue of the Delivery Order. That right becomes transferred to the Holder of the Bill of Lading. This Bill of Lading itself states on the face of it that the Holder of this Bill of Lading is also bound by the contract evidenced by the Bill of Lading. That is the manner in which an "Order" Bill of Lading is transferred under Article 84(b) of the Maritime Code of Vietnam."

19. In our judgment, the opinion of Mr Cuong, that what must be endorsed on the reverse side of the B/L was the name of the transferee, was clearly unsustainable. It, therefore, followed that the appellants assertion that Vietnamese law did not recognise the concept of "holder of the bill of lading" also could not be sustained. It seemed to us that what was reflected in article 84(b) was really that concept and was wholly in line with international maritime practice. In passing, we would add that we felt fortified in this view by the fact that the B/L itself had provided that "the shipper, consignee and the holder of this bill of lading hereby expressly accepts all printed provisions on this bill of lading, including those on the back hereof". On the back of B/L, the term "shipper" was defined to include, inter alia, "the holder of the bill of lading". It was quite disingenuous on the appellants part to deny the existence of such a concept.

20. The appellants, while submitting that the respondents were not the persons entitled to receive the cargo, asserted that they need not "prove who (would) be the legal cargo receiver". However, they volunteered the view that the legal cargo receiver were "the shippers", presumably they meant, Pacific Sugar. But under the terms of the B/L, "the shipper" would include "the holder of the bill of lading". With respect, we thought it was absurd for the appellants to so suggest when all the three original copies of the B/L had already been transferred by Pacific Sugar to the respondents. Pacific Sugar had already been paid for the cargo and would not have any basis whatsoever to make any claim to the cargo.

Strong cause

21. We now turn to the second main issue, the question of strong cause, which we do not think should detain us for long in

the light of our views on the first issue. The factors which a court should take into account are those which are listed in 10 above. The weight which the court should accord to each factor is a matter of judgment in the light of the nature of the claim and all the surrounding circumtances. However, this exercise is not just a numbers game. It does not follow that because a greater number of factors favour one approach, that approach would necessarily be adopted by the court. The weight to be given to each factor is not the same. We recognised that in this case the B/L was governed by Vietnamese law and the appellants were resident in Vietnam. The respondents were a Hong Kong company, although they had since moved their operations to Singapore. But once it is shown that there is no defence to the claim, and thus no dispute, as in the present case, then there is really nothing to go for trial at the contractual forum. In these circumstances to insist, as the appellants had, that the claim should nevertheless proceed to trial in the contractual forum would cast considerable doubt as to the bona fides of that party in wanting to have a trial in the contractual forum.

22. In *The Vishva Prabha* [1979] 2 Lloyds Rep 286, the plaintiffs shipped bales of cloth on board the defendants vessel. However, there was a hole in the bulkhead of the hold. Oil went through the hole and damaged the cloth. The plaintiffs brought an action in England despite the existence of a jurisdiction clause referring any dispute to the place of the carriers principal place of business, Bombay. The plaintiffs asserted that the hole had been in the bulkhead even before the loading of the goods, so that the defendants had no defence to the plaintiffs claim. All the defendants could do was to suggest that the hole could have been caused by an act of sabotage that occurred after the goods had been loaded into the hold. Sheen J, having examined the allegation of sabotage, rejected it. He said (at p.288):

> Apart from the suggestion of sabotage in Boulogue, as a suggestion that cannot be excluded, the shipowners have not at any stage since the damage occurred suggested any defence to this claim. I am left in no doubt that as to that part of the claim there is no dispute at all. I hold that there is no dispute on the question of liability, which ought to be submitted to the Court in India.

23. In *The Jian He* this court had reviewed three other cases where a similar approach was also taken: *The Atlantic Song* [1983] 3 Lloyds Rep 394, *The Frank Pais* [1986] 1 Lloyds Rep 529 and *Standard Chartered Bank v Pakistan National Shipping Corp* [1995] 2 Lloyds Rep 365. We do not propose to traverse over them again. What those cases show is that this Court is entitled to look into the alleged defence to see whether there is any real substance in it.

24. Reverting to the instant appeal, we did not think there was any dispute to be submitted for trial at the contractual forum. There would be no sense in staying the proceedings. It seemed to us that the appellants were really seeking to gain a technical advantage in asking for a stay. Furthermore, any stay would only cause unnecessary delay.

25. Finally, the appellants had also made the point that there was a dispute as to the correct measure of damage, asserting that the loss should be based on the market value of the cargo at the discharge port and not the contract value, citing, ironically, the Privy Council case from Singapore *Jag Shakti* [1986] 1 Lloyds Rep 1, in support. This would suggest that the Vietnamese law on quantum of damages was the same as that applied by the Singapore/English courts. In the statement of claim the respondents claim was also based on the "arrived value of the cargo". Thus, the applicable principle was not in dispute. The "arrived value" would be that as at Beihai, China, not Vietnam. To insist that the mere determination of the value warranted a trial in Vietnam seemed again to us to indicate a desire for delay or other procedural advantages.

26. In the premises, we were satisfied that a strong cause had been shown and the stay application should be refused. Thus, we upheld the decision of the learned judge below.

27. Before we conclude, we ought to mention that various other matters had also been raised by the respondents in their affidavits which they thought were germane to the courts consideration of the stay application. Among them were the following : doubts as to the competence of the

Vietnamese judges on maritime law; doubts as to the independence of the Vietnamese courts; and the question whether the maritime law of Vietnam was sufficiently developed. We must point out at once that it is not for this court or any court in Singapore to pass judgment on the competence or independence of the judiciary of another country , all the more so of a friendly country. Comity between nations would be gravely undermined if such a wholly invidious pursuit is embarked upon. We have to disregard entirely such arguments. Equally it is not for this court to say whether the maritime law of Vietnam is sufficiently developed, especially when the parties themselves had agreed that Vietnam law would apply to the B/L. We would observe that all these matters are wholly alien to the factors enunciated by Brandon J in *The Eleftheria* (supra) which the court ought to give consideration to.

Yong Pung How	L P Thean	Chao Hick Tin
Chief Justice	Judge of Appeal	Judge of Appeal