UCO Bank v Golden Shore Transportation Pte Ltd
[2005] SGHC 65

Case Number : Suit 1582/2001, RA 257/2004

Decision Date : 05 April 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Bazul Ashhab (T S Oon and Bazul) for the plaintiff; Toh Kian Sing and John Seow (Rajah and Tann) for the defendant

Parties : UCO Bank — Golden Shore Transportation Pte Ltd

Admiralty and Shipping – Bills of lading – Bills of lading as contract of carriage – Plaintiff bringing action under contracts of carriage against defendant – Bills of lading not indorsed by shippers before delivery – Whether plaintiff entitled to bring actions under contracts of carriage – Whether plaintiff lawful holder of bills of lading – Section 5(2) Bills of Lading Act (Cap 384, 1994 Rev Ed)

5 April 2005

Belinda Ang Saw Ean J:

1 The preliminary issue in this appeal, although limited to whether the plaintiff, UCO Bank ("the bank"), has title to sue in contract the defendant shipowner, Golden Shore Transportation Pte Ltd, raised some interesting legal points of general interest.

2 The claims in this action based on contract concerned four shipments of Sarawak round logs that were carried on board the defendant's vessel, the *Asean Pioneer*, on a voyage from various East Malaysian ports to Kandla, India, in the year 2000/2001 ("the four shipments"). The defendant issued four bills of lading, namely, SYT/2300, AP/MW/01, BW/066/2000 and RW/044/2000 covering the four shipments ("the original bills"). The original bills were dated between 22 and 31 December 2000. The buyers of the logs were SOM International Pte Ltd ("SOM"). SOM was a banking customer of the plaintiff. The four shipments were financed by way of irrevocable letters of credit opened by SOM with the plaintiff. At the same time, the letters of credit could also operate as a negotiation credit. One letter of credit (which was in favour of Bo Lu International Trading & Investments Co Ltd) contained the bank's engagement in the negotiation credit towards the drawers, indorsers and *bona fide* holders of drafts drawn under the credit. In two of the letters of credit, the negotiation credit was addressed to banks in Malaysia generally. On all three letters of credit was a statement that "Negotiations under this credit are unrestricted." The credit was subject to the provisions of the Uniform Customs and Practice for Documentary Credits (1993 Revision) ("UCP 500").

3 The shippers named on the original bills were Shin Yang Trading Sdn Bhd, Millenwood Sdn Bhd, The Sarawak Company (1959) Sdn Bhd and Rapid Wealth Sdn Bhd. All original bills were made out to "the order of UCO Bank" and the notify party was named as SOM and UCO Bank.

4 On or about 15 January 2001, the vessel arrived at Kandla, India. It transpired that SOM had arranged with the defendant to issue switch bills of lading for the four shipments. SOM was named as "shipper" on the switch bills of lading. The switch bills were endorsed by SOM and presented by the end receivers to take delivery of the logs. Delivery of the logs was given to the end receivers between 15 and 25 January 2001. Notably, the defendant had issued the switch bills without first retrieving the original bills for cancellation. SOM had apparently promised to return the original bills and had provided a letter of undertaking to the defendant for this purpose. It was not the defendant's case (and rightly so) that the switch bills had displaced the original bills. So the plaintiff

sued the defendant on the original bills for US$556,514.08 contending that the defendant had delivered the logs in India without production of the original bills, which had all the time been in the plaintiff's possession as consignees and/or lawful holders.

5 Section 2(1)(a) of the Bills of Lading Act (Cap 384, 1994 Rev Ed) ("the Act") transfers rights of action under the contract of carriage to the lawful holder of a bill of lading. It was common ground between the parties that if the bank was not a "lawful holder" of the original bills, the action could properly be struck out. It was also agreed that the outcome of this appeal should also determine the fate of the other three similar appeals, namely Registrar's Appeal No 252 of 2004 in Suit No 1583 of 2001, Registrar's Appeal No 254 of 2004 in Suit No 56 of 2002, Registrar's Appeal No 255 of 2004 in Suit No 184 of 2002.

6 Between 2 and 4 January 2001, the shippers/beneficiaries under the letters of credit presented the relevant drafts and shipping documents to three branches of the Hongkong and Shanghai Banking Corporation ("HSBC"), namely the Kowloon Branch, the Bintulu Branch and the Miri Branch. On the plaintiff's own evidence, HSBC, as the negotiation-bank, duly negotiated the drafts. It was HSBC as the negotiation-bank who presented the shipping documents to the plaintiff as issuing bank. The original bills were forwarded to the plaintiff without any indorsement, either specifically or in blank. The plaintiff duly paid HSBC as the negotiation-bank, but SOM did not reimburse the plaintiff at all.

7 It is convenient to set out the relevant statutory provisions. Section 2(1)(a) of the Act provides that:

> Subject to the following provisions of this section, a person who becomes —
>
> (*a*) the lawful holder of a bill of lading;
>
> …
>
> shall (by virtue of becoming the holder of the bill …) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

8 Section 5(2) of the Act provides:

> References in this Act to the holder of a bill of lading are references to any of the following persons:
>
> (*a*) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
>
> (*b*) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
>
> ...
>
> and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

9 Counsel for the plaintiff, Mr Bazul Ashhab, submitted that on the facts as outlined above, the plaintiff became the holder of the original bills as defined in s 5(2)(a) of the Act. The original bills were

made out to the order of the plaintiff. As such, a mere delivery of the original bills by HSBC was sufficient to pass possession to the bank. It was not necessary for the shippers to indorse the original bills before delivery. Accordingly, by reason of s 2(1) of the Act, the plaintiff was entitled to sue the defendant as lawful holder of the original bills in contract.

10 On behalf of the defendant, Mr Toh Kian Sing, on the other hand submitted that only actual possession following indorsement and delivery could render the plaintiff the lawful holder of the original bills. For this purpose, he referred me to ss 2(1) and 5(2)(b). The crucial difference here is that the drafts and shipping documents were, on the plaintiff's own evidence, negotiated by HSBC as the negotiation-bank. The shipping documents were not presented to the plaintiff by the shippers or on their behalf. It was common ground that the original bills were not indorsed by the shippers to HSBC as the negotiation-bank either specifically or in blank. As formulated, the defendant's case is that s 5(2)(a) was not the applicable provision. In the absence of an indorsement by the shippers, no rights of suit were transferred to and vested in the negotiation-bank and the plaintiff in turn was in no better a position. The plaintiff, therefore, could not bring any action under the contracts of carriage. The defendant's case was that the shippers had title to sue. By s 2(4) of the Act, the shippers could have sued for the benefit of the bank.

11 In response, Mr Bazul argued that s 5(2)(a) made reference to the consignee being in "possession" of the bill and nowhere did the subsection call for direct delivery of the bill by the shipper or on its behalf. The bank had come into possession of the original bills in good faith having reimbursed HSBC for the documents. It made no difference to the plaintiff's case and s 5(2)(a) applied even with the involvement of HSBC as the negotiation-bank.

12 On their face, the original bills were order bills and were in conventionally negotiable form. Ordinarily, a bill of lading made out to the order of the consignee would be capable of transfer by its original holder (*ie*, the shipper or on its behalf) to the consignee without any indorsement: see Charles Debattista, *The Sale of Goods Carried by Sea* (Butterworths, 2nd Ed, 1998) at para 4-29. Following thereon, the consignee would come within the definition of "holder of a bill of lading" under s 5(2)(a).

13 However, I accepted Mr Toh's submissions that the imposition of HSBC as the negotiation-bank would alter the otherwise generally-held view. The bank's practice of requiring bills of lading to be made out to its order is a means of ensuring a contractual right against the carrier. The assurance intended from the practice is, however, compromised where the documentary credit is a straight and negotiation credit. The shippers did not use HSBC as their agent to present the documents for collection of payment. The shippers, having sold the drafts to HSBC as the negotiation-bank, were not looking to be paid under the letters of credit by the issuing bank. HSBC, as the negotiation-bank, paid the shippers. The negotiation-bank's presentation of the drafts and shipping documents to the plaintiff for reimbursement was made under a different and independent contract between HSBC and the plaintiff. In *Credit Agricole Indosuez v Banque Nationale de Paris* [2001] 2 SLR 1, Chao Hick Tin JA said at [16]:

> [A] negotiation credit allows the negotiating bank, pending maturity of the credit to buy over or give value for the documents and drafts drawn by the beneficiary. The negotiating bank will then be entitled in its own right to present the document and drafts to the issuing bank and obtain payment at maturity. This right of the negotiating bank to obtain payment is not defeated by any fraudulent conduct of the applicant, the beneficiary or any third party, provided that the negotiating bank takes the documents in good faith and is not privy to, or has knowledge of, the fraud: see art 14(a) of UCP [500].

14 There is nothing in principle against the shippers indorsing and delivering the original bills to

HSBC even though they were initially made out to the order of the bank. The rationale is that the consignee is not a party to the contract of carriage evidenced by the bill of lading; the mere naming of a party in the bill as consignee gives that party so named no rights under the contract: see *Carver on Bills of Lading* (Sweet & Maxwell, 1st Ed, 2001) at para 1-012, citing *Elder Dempster Lines v Zaki Ishag (The Lycaon)* [1983] 2 Lloyd's Rep 548. A bill of lading made out to the order of a consignee can be varied by indorsement. The Act seems to contemplate the possibility of more than one consignee being named. Indeed, s 5(3) of the Act contemplates a change in the named consignee. The subsection provides that a person may be "identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue". The consequence of the shipper changing the named consignee by indorsement is that a bill of lading made out to order of a consignee may be varied by indorsement so as to take the case out of s 5(2)(a) into s 5(2)(b): *Carver on Bills of Lading* at para 5-014.

15 For the purposes of the Act, in the hands of HSBC (neither as consignee or indorsee), the original bills would not fit within the definition of "bill of lading" in s 1(2) although they were described as such by name. It is because they were "incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement". As they would not count as "bills of lading", they could not be the means upon which rights of action could be transferred under the Act. HSBC would not have qualified as a holder so much so that when HSBC sent the documents to the plaintiff, it was not passing on anything like a "bill of lading" as defined by s 1(2)(a). Section 5(1) states that in the Act, "bill of lading" is to be construed in accordance with s 1. The presentation of the shipping documents to the plaintiff would equally have been incompetent and hence ineffective. In my judgment, the situation does not right itself just because the plaintiff happened to be named consignee (bearing in mind the rationale explained in [14] above) and have the documents in hand. Such a result (serendipity if anything) would run counter to two incontrovertible features in the case. First, the shippers never intended to part with the shipping documents with the intention that HSBC was to collect payment on their behalf. They parted with the shipping documents to the negotiation-bank who bought the documents. Second, without any indorsement, the right of action against the defendant remained firmly with the shippers. It follows that the plaintiff would likewise not be a holder within s 5(2)(a) or 5(2)(b) so that no rights under the contracts of carriage could pass to the plaintiff by virtue of s 2(1)(a).

16 Title to sue derives from enquiring whether the bill of lading is lawfully held. A holder is defined in s 5(2). Mr Toh rightly pointed out that s 2(1) speaks of a person who "becomes" a lawful holder and "by virtue of becoming the holder of the bill" shall have transferred and vested in him all rights of suit. The language used requires a consideration of how the bill was acquired. In my view, it would not be putting a gloss on the wording of s 5(2)(a) where an inquiry as to how the bill of lading was acquired leads to the conclusion that there was no delivery of the bill of lading by the shipper or on its behalf. Section 5(2)(a) speaks of "possession of the bill" and this can be read to imply that delivery of the bill is required.

17 An original shipper who is party to a contract contained in or evidenced by a bill of lading remains entitled to all the rights thereunder until he effects a transfer of it to a "lawful holder" of the bill of lading whereupon he is divested of his rights. This can be read to imply that the initial delivery in the case of s 5(2)(a) would be from the shipper or on the shipper's behalf to the named consignee. On the facts of this case, the original bills were not transferred from or delivered by the shippers to the plaintiff nor was HSBC acting on the shippers' behalf when the original bills were presented to and accepted by the plaintiff. In the absence of any indorsement by the shippers, s 5(2)(b) also did not apply.

18 Senior Assistant Registrar Ms Thian Yee Sze decided that in the circumstances of this case

the bank never became a holder of the original bills. Ms Thian concluded from her reading of *East West Corporation v DKBS 1912* [2003] 1 Lloyd's Rep 239 ("*East West Corporation*") and *The Aegean Sea* [1998] 2 Lloyd's Rep 39 ("*The Aegean Sea*"), that there was an underlying assumption that delivery to the named consignee in s 5(2)(a) or the indorsee in s 5(2)(b) was to be made by the shipper in s 5(2)(a) and the indorser in s 5(2)(b). She said that the delivery must be made by the shipper, and not by any intermediary party. Accordingly, she found that s 5(2)(a) was not applicable to this case.

19 In *East West Corporation*, the bills of lading were made to the order of Chilean banks (the named consignees) for the purpose of collecting payment for the shippers. The bills of ladings were indorsed and then delivered to the Chilean bank by the shippers' bank, Wing Hang Bank, in Hong Kong under the authority of the shippers. Wing Hang Bank had no interest in the goods as it did not provide any financing to the shippers. The sale to the Chilean buyers was on the basis that cash would be paid against the release to the buyers of the shipping documents. Eventually, the Chilean banks returned the bills of lading to the shippers without any indorsement. The English Court of Appeal held that the shippers could not sue under the contract of carriage as without an indorsement from the Chilean bank, all rights of suit remained with the latter. It held that the rights of suit under the contracts of carriage were transferred to the Chilean banks when they became under s 5(2)(a) holders of the bills delivered to them by or with the authority of the shippers. *East West Corporation* illustrates that the reason for or capacity in which the consignee came into possession of the bills of lading was not relevant. Of relevance was the fact that the shippers parted with the bills of lading with the intention that the Chilean bank should have them.

2 0 *The Aegean Sea* is a case on s 5(2)(b) where the intention of the original holder for the transferee to have the bill of lading was found to be determinative. In *Voyage Charters* (LLP, 2nd Ed, 2001), Julian Cooke *et al*, commenting on *The Aegean Sea*, said at para 18.83 that under s 5(2)(b) "[t]here is … a necessary element of intention and an exercise of will by both transferor and transferee". Similar observations were also made by *Carver on Bills of Lading* ([14] *supra*) at para 5-015, that "any transfer of" a bearer bill would presumably involve not only the physical receipt of the bill by one person from another, but also mental elements of the same kind as were in *The Aegean Sea* held to be necessary for "delivery". Thomas J in *The Aegean Sea* held that "delivery" required more than merely sending the bill from the transferor to the transferee; such an act must be accompanied by an intention on the part of the transferor to deliver the bill to the recipient and an intention on the part of the recipient to accept delivery. In that case, the owners of the tanker *Aegean Sea* sued Repsol Petroleum SA ("Repsol") and Repsol Oil International Limited ("ROIL") for an indemnity following the grounding and destruction of the *Aegean Sea* and its cargo. The vessel grounded whilst proceeding to berth at La Coruña. Very substantial claims for pollution damage from the loss of her cargo of crude oil as well as claims for salvage services rendered were made against her owners. The owners sought to recover from ROIL and Repsol the amounts for which claims were brought against them, together with the value of the vessel, bunkers on board and the freight. ROIL denied that La Coruña was an unsafe port and blamed the grounding on the negligence of the master. It was held that Repsol had never become the lawful holders of the bills of lading. This was because they knew the bills should have been endorsed to ROIL and not to them because it was ROIL who purchased the cargo. Furthermore, the delivery which completed the indorsement had to be made by the indorser and that was not done.

21 For all these reasons, I affirmed the senior assistant registrar's decision that the plaintiff was not the lawful holder of the original bills of lading. I accordingly dismissed the appeal with costs.

Appeal dismissed.