IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 272

Suit 2056/1993

Between

The Hooghy Mills Co Ltd

… Plaintiff

And

Seltron Pte Ltd

… Defendant

GROUNDS OF DECISION

Conflict of Laws — Choice of jurisdiction; Conflict of Laws — Choice of law; Conflict of Laws — Choice of law — Contract

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The Hooghy Mills Co Ltd v Seltron Pte Ltd

[1994] SGHC 272

Suit 2056/1993
Judith Prakash JC
31 October 1994

1 In April this year, the learned assistant registrar, on the application of the defendants, made an order that all further proceedings in this action against the defendants be stayed. He also gave the parties liberty to apply for the stay to be lifted in the event that the defendants` action against the plaintiffs in the High Court of Calcutta, India, was discontinued without determination of the merits of the case or if a permanent stay of that action was granted by the High Court of Calcutta. The plaintiffs appealed against that decision and, on 21 July 1994, I allowed the appeal. The defendants are dissatisfied and have appealed to the Court of Appeal.

2 **Background**

3 The plaintiffs are a company incorporated in India and carrying on business in Calcutta. The defendants are a company incorporated in Singapore. In September 1992, the plaintiffs agreed to sell the defendants two million hessian sugar bags at a price of US$32.50 per 100 bags cif Odessa, Russia. The agreed terms of payment were 60 days after acceptance of documents drawn on

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the defendants and sent to them through their bankers in Singapore. The goods were duly shipped in October 1992.

4 In January 1993, the plaintiffs forwarded to the defendants a bill of exchange dated 31 October 1992 for US$650,000 drawn by the plaintiffs upon the defendants and payable to The Vysya Bank Ltd (`Vysya Bank`) accompanied by the invoice and the bills of lading and other documents relating to the shipment. The defendants duly accepted the bill of exchange. However, the bill was dishonoured by non-payment when the same was presented by the plaintiffs for payment on or about 23 June 1993. The defendants have not since then made any payment to the plaintiffs in or towards settlement of the amount due for the goods. They contend that the goods delivered did not conform to specifications and were unmerchantable and that they are entitled to damages for breach of contract on the part of the plaintiffs.

5 The plaintiffs commenced this action on 16 October 1993. Their claim in the action is based on alternative grounds. On the one hand, having paid Vysya Bank on the bill of exchange after it was dishonoured by the defendants, they claim under that bill. On the other hand, they claim the price of goods sold and delivered pursuant to the sale contract with the defendants.

6 The writ of summons herein was served on 19 October 1993, the defendants entered an appearance on 25 October 1993 and the statement of claim was served on 26 November 1993. The defendants did not file a defence. Instead, on 11 January 1994, they took out an application for stay of the proceedings.

7 The defendants had, however, in the meantime, taken steps in India. In June 1993, they had commenced a suit against the plaintiffs as the first

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defendants and Vysya Bank as second defendants in the High Court of Calcutta, India. In those proceedings, the defendants alleged that they had lost the benefit of a sub-sale of the goods by reason of the plaintiffs` breach of contract and they claimed damages for loss of profit and an indemnity against the claim of their sub-purchaser. The defendants also sought to avoid the bill of exchange on the grounds of total failure of consideration and fraud. The writ in the Indian action was not, however, served on the plaintiffs until 10 January 1994, ie three months after the writ herein was issued and served on the defendants in Singapore.

8 **The application**

9 There was no dispute as to the law applicable to this application. It was accepted that the governing principles were those laid down in as adopted by the Court of Appeal in . The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that another forum is the appropriate forum for the trial of the action. In this context `appropriate` means that a trial in that forum will be more suitable for the interests of all the parties and the interests of justice.

10 Whilst initially the defendants have the burden of persuading the court to grant a stay, once the court is satisfied that there is another available forum which is, prima facie, the appropriate forum for the trial of the action, the burden shifts to the plaintiff to show the existence of special circumstances justifying a trial here. However, where the plaintiffs have, as in this case, founded jurisdiction here as of right in accordance with Singapore law, the defendants` burden is not just to show that Singapore is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the Singapore court. In this connection, it is

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relevant to note that in the case Lord Goff regarded the `natural forum` as being that with which the action had the most real and substantial connection.

11 In their first affidavit in support of the application, the defendants put forward three factors as indicating that India was the forum conveniens. First, they said that the law applicable to the transaction was the law of India. Their second contention was that the transaction took place in India and the main witnesses were in India. Thirdly, they had already commenced legal proceedings in India against the plaintiffs by the time this action had started and the issues in both actions were identical. Accordingly, the Singapore action was an abuse of the process of the court and ought to be stayed. I will deal with each of these points in turn.

12 **(1) The governing law**

13 The defendants contended that the law of India was the governing law of the transaction. In this contention, they did not differentiate between the contract of sale and the separate (though derivative) contract constituted by the acceptance of the bill of exchange. The plaintiffs on the other hand did distinguish between the two but contended that both contracts were governed by Singapore law. The assistant registrar found the contract of sale to be governed by Indian law and assumed, in the absence of proper arguments from the defendants, that the acceptance contract was governed by Singapore law though he had some doubts as to whether this was in fact the case.

14 The basis of the defendants` contention that the contract of sale was governed by Indian law was that they had sent a fax to the plaintiffs on 30 September 1992 expressly making the law of India the governing law. The plaintiffs denied ever having received this fax. The assistant registrar, quite

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correctly, perceived this dispute as a dispute of fact which he was not in a position to decide in view of the paucity of the evidence before him. Instead he proceeded as if there had been no express choice of law clause and made an objective determination of the proper law of the sale contract. He came to the conclusion that Indian law was the proper law of the sale contract because it had the most real and substantial connection with it. The factors which he took in to consideration were fully dealt with in his grounds of decision and I accepted both his reasoning and his conclusion.

15 In relation to the law governing the acceptance contract, as stated above the assistant registrar assumed that Singapore law applied. In my opinion, Singapore law was clearly the governing law of this contract. Here the acceptor was a Singapore company, the acceptor signed the bill of exchange in Singapore, and the bill of exchange was presented for payment and dishonoured in Singapore. Under s 72(b) of the Bills of Exchange Act (Cap 23), it is provided that the interpretation of the acceptance of a bill of exchange is determined by the law of the place where such contract is made. Counsel for the plaintiffs submitted that the word `interpretation` in the statute referred not only to the issue of construction but also to that of enforcement. This submission was supported by ***Byles on Bills of Exchange*** (26th Ed) at p 357 to 358 commenting on a series of judicial opinions on the meaning of `interpretation`. Accordingly, the effect of s 72(b) is that in Singapore the law of the place where the contract of acceptance was made would govern the enforcement of the bill.

16 In his judgment, the assistant registrar pointed out that under s 21(1) of the Bills of Exchange Act, the contract of acceptance is incomplete and revocable until delivery of the instrument in order to give effect thereto or until the acceptor gives notice to the person entitled to the bill that he has accepted it. Thus the contract of acceptance would be made at the place where the accepted

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bill of exchange was delivered, or the notice of acceptance was given, to the holder of the bill.

17 In this particular case, the bill as originally drawn named Vysya Bank as payee. Vysya Bank forwarded the bill to Bank of India, Singapore branch, to be presented to the defendants for acceptance. Although Bank of India was the defendants` bank, it acted as Vysya Bank`s agent in presenting the bill for acceptance. This is shown quite clearly from the fact that subsequently it was the Bank of India which presented the bill for payment. In the note of protest that was made after non-payment of the bill, the notary public stated that the note was issued at the request of Bank of India, the holder of the bill. The Bank of India could hardly have acted as holder of the bill for the defendants. It must have been acting for Vysya Bank. Accordingly, after acceptance of the bill, it would have been returned to Bank of India, Singapore branch, which would have taken delivery of it on behalf of Vysya Bank. Thus the bill was not only accepted here but the contract of acceptance was completed in Singapore by delivery of the bill to the agent of the holder. This course of events would have been in accordance with normal banking practice. In the circumstances, I considered that the law of Singapore was the governing law.

18 The result of the above was that of the two bases on which the plaintiffs` claim were put forward, one was governed by Indian law whereas the other was governed by Singapore law. As regards the claim governed by Indian law, there was no evidence before me that the Indian law as to the sale of goods and the obligations of the seller to deliver goods meeting the contractual specifications was any different from Singapore law on the subject. In this connection, the following words of Lai Kew Chai J in at p 535 were apposite:

> *It is clearly advantageous for questions of foreign law to be decided by the courts of that country, and this advantage has*

> *been recognized and given due weight in numerous cases. However, the importance of this factor will depend to a large extent on the difference between the applicable law and Singapore law. There will be no real prejudice to either party if the law of the foreign court does not differ significantly from the relevant law of Singapore.*

19 With respect, I agree with that observation. It appeared to me that in this case the governing law issue was a neutral one. On the one hand, Singapore law governed a substantial portion of the case. On the other hand, since no significant difference had been shown by the defendants to exist between Indian law and Singapore law on the sale of goods, no real advantage would be gained by the defendants in having the action heard in India simply because the Indian sale of goods law had to be applied. It was also significant that one of the things which the defendants sought to do in India was to avoid the bill of exchange on the ground of fraud or total failure of consideration. Whether this could be done was a Singapore law issue which would be better decided by the Singapore court.

20 **(2) Location of evidence**

21 This factor was raised by para 7 of the affidavit of Subhash Chandra Sharma filed on behalf of the defendants in January 1994. This paragraph read:

> *The said transaction took place in India and the main witnesses are in India. As the law applicable would be the law of India and (sic) any legal disputes arising thereto between the parties ought to be tried and resolved in the Indian courts.*

22 It would be noted that the reference to the witnesses and the evidence was as brief as it could possibly be. No details were given there or in a subsequent affidavit filed by Mr Sharma of the witnesses whom the defendants intended to call and the evidence which it was intended to adduce. The court had to make inferences as to the position from the copies of the pleadings in the

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Indian action and other documents exhibited to the affidavits. The court was also assisted by the submissions of counsel on this point.

23 It appeared to me that the evidence relating to the action would be located in India, in Singapore and in Russia. As far as the plaintiffs were concerned, in relation to their action on the bill of exchange, little or no evidence would have to be produced apart from the original accepted bill and notice of protest. The defendants did not deny accepting the bill, neither had they denied dishonouring it. In those circumstances, the onus would be on them to show why the plaintiffs should not get judgment. The defendants in order to discharge that onus would rely on the evidence of their director, a Singapore resident, as to telephone conversations which he had had with the plaintiffs` representative before he accepted the bill. They would also need the evidence of their surveyor from Russia to prove the condition of the goods on their arrival in Odessa. In relation to the defendants` counterclaim, the evidence again would be of the Singaporean director and the Russian surveyor. The defendants might also wish to adduce the evidence of their Russian sub-purchaser to support their claim for loss of profit and an indemnity. On the other hand, the plaintiffs in order to defend the counterclaim, would have to adduce the evidence of their Indian employees/surveyors engaged in the production and checking of the goods prior to shipment. Finally, documentary evidence as to the loss suffered by the defendants as a result of any breach on the part of the plaintiffs would be located in Singapore.

24 My conclusion was that this too was a neutral factor. The Russian evidence was irrelevant for the purpose of deciding the forum since the Russian witnesses would have to travel whatever the result of this application. There was no preponderance of evidence located either in Singapore or in India. Counsel for the defendants tried to persuade me that there was more evidence in India

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than in Singapore but I could not accept that. The only relevant evidence in India would be as to the specifications of the goods that were shipped and their condition on shipment. This evidence would come from the plaintiffs themselves and not from third parties. Further, it was in fact more important for the plaintiffs than for the defendants to adduce this evidence and if there was any difficulty in procuring it such difficulty would result in prejudice to the plaintiffs rather than to the defendants. I could not see any evidence in India which the defendants themselves would wish to adduce. Their case, both in relation to the defence and to the counterclaim, depended on evidence located in Russia and Singapore. If specific Indian evidence on which they wished to rely existed, it was up to the defendants to disclose it since they were the party propounding this as a factor pointing to India as the appropriate forum. They did not do so preferring to rest on the plain statement `the said transaction took place in India`. That fact, in my view, was not sufficient to discharge the onus of proof on the defendants since it was only a partial truth, the transaction relating to the acceptance contract having taken place in Singapore and the defendants` main witness on whose evidence they would rely to establish essential details about both contracts being here in Singapore.

25 **(3) Lis alibi pendens**

26 The approach which the court should take when one of the grounds supporting an application for stay is that there is a pending action involving the same parties and the same issues in a foreign forum was set out by Lord Goff in at pp 107-108 in the following words:

> *Under the principle of forum non conveniens now applicable in England as well as in Scotland, the court may exercise its discretion under its inherent jurisdiction to grant a stay where `it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the*

> *interests of the parties and for the ends of justice`: see [1892] 19 R (Ct of Sess) 665, 668, per Lord Kinnear. The effect is that the court in this country looks first to see what factors there are which connect the case with another forum. If, on the basis of that inquiry, the court concludes that there is another available forum which, prima facie, is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted: see the case [1987] AC 460, 475-478. The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum: see [1984] AC 398, 411, per Lord Diplock. However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competent jurisdiction, or the proceedings had not passed beyond the stage of the initiating process. But if for example, genuine proceedings had been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties.*

27 The defendants` contention was that the existence of the Indian proceedings was a relevant factor to be taken into account because the Indian action was started first, about four months before the Singapore action, and because that action included a party, Vysya Bank, which was not a party to the Singapore action and whom it would be inconvenient to join in the Singapore proceedings as it has no presence here.

28 The plaintiffs in response argued that the Indian proceedings were not relevant for two reasons. First, they contended that those proceedings were not genuine proceedings in that they had been commenced simply for the purpose of demonstrating the existence of the competing jurisdiction. This they said was shown by the fact that the defendants had not served the writ issued by the High Court of Calcutta on the plaintiffs until January 1994, some three months after

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the writ in the Singapore action had been issued and served. The defendants` explanation for this was that they had withheld service of the writ because negotiations had been taking place between them and the plaintiffs and they had not wanted to prejudice those negotiations. The plaintiffs denied that any negotiations had been held. I found the defendants` explanation difficult to accept. Even if there had been negotiations, the issue and service of the Singapore writ was a clear signal to the defendants that the plaintiffs wanted to resolve the matter in court instead of by negotiation. The defendants could then have taken immediate steps to serve the Indian writ. Instead, they did nothing for a further two months and their next step, taken on 14 December 1993, was to make an ex parte application before the Indian court to restrain the plaintiffs from continuing with the Singapore proceedings. The writ itself was not served for a further month. Such delay cast doubts on the sincerity of the defendants` use of the Indian court as a method of resolving the dispute.

29 The second point taken by the plaintiffs was that the Indian action had not proceeded very much beyond the stage of initiating process. This was partly due to the delay in serving the writ and partly due to the defendants` success in obtaining the ex parte restraint order in relation to the Singapore action. From the time that the plaintiffs became aware of this order up to at least April 1994 (which was the latest date mentioned in the affidavits filed) the plaintiffs were engaged in trying to have this ex parte order discharged. It was true that the plaintiffs themselves had not taken any further steps in the Indian proceedings in that they had not filed any defence to the action. It was argued that the Indian proceedings would not have been halted at the initial stage if the plaintiffs had taken active role in defending the claim. In my view, however, the plaintiffs were not to be penalised for having concentrated their efforts on removing the

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restraining order since their view of the matter was that the action should proceed in Singapore rather than in India.

30 I was also not impressed by the fact that Vysya Bank had been made a party to the Indian action and that it would be difficult to join it in the Singapore proceedings. I could see no legal reason why Vysya Bank should be a party to any proceedings arising out of the dispute between the plaintiffs and the defendants. Once the plaintiffs had paid Vysya Bank the amount due on the bill, Vysya Bank ceased to have any interest whatsoever in the bill. Further, an examination of the plaint filed by the defendants in the Indian action disclosed that they did not ask therein for any specific remedy against Vysya Bank. Instead their reason for joining Vysya Bank as a party was stated in the plaint itself as follows: `Defendant No 2, The Vysya Bank Ltd, has been impleaded in this suit so that the controversy relating to the said bill of exchange may be decided in its presence`. The defendants wanted to have Vysya Bank before the court but it appeared to me that, in terms of relief, nothing turned on this joinder of Vysya Bank.

31 When I considered all the circumstances relating to the Indian proceedings and the steps taken by the defendants therein, I agreed with the plaintiffs` submission that the Indian action was defensive in nature and that the course of events indicated that there was no true desire on the part of the defendants to litigate in India. In this regard, I noted that the defendants` claim as formulated in the Indian courts substantially exceeds the plaintiffs` claim for the price of the goods. One would have expected a party with a claim for such a significant amount to have vehemently pursued it in the Indian court instead of sitting on the matter for so long. Further, while to say so might come perilously close to judicial chauvinism (to use Lord Diplock`s phrase in), I found it difficult to believe that a Singaporean party would sincerely consider

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that its claim would be better dealt with in a foreign court even though the foreign party concerned was willing to litigate in Singapore. I had the clear impression that the defendants had ulterior motives in wanting to shift this litigation from Singapore.

32 Thus, whilst the court must always be concerned to try and avoid the complications that arise when there are concurrent proceedings in different jurisdictions involving the same parties and similar issues, in this particular case, I was not convinced that the existence of the Indian proceedings was a positive factor making the Indian court the more appropriate court to adjudicate the dispute.

33 **Conclusion**

34 The defendants in this case were not able to discharge the burden on them of showing that the Indian court was clearly and distinctly the appropriate court for resolving the dispute. The factors which they brought forward in favour of such a finding were neutral. Whilst they indicated that the Indian court would have jurisdiction and would be able to hear the case, they did not make it more appropriate than the Singapore court in this respect. In my judgment, the Singapore court had as much real connection with the dispute as did the Indian court. It was clear from ***Spiliada*** that if this initial burden was not discharged by the defendants, the Singapore court should not grant a stay. Accordingly, I allowed the appeal of the plaintiffs, set aside the orders below and dismissed the defendants` application.

35 ***Appeal allowed*** .

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Judith Prakash JC

Teo Weng Kie (Khattar Wong & Partners) for the plaintiffs
Asogan (R Raman & Co) for the defendants

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