IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 391

DCA 48/1998

Between

Concord Express (Singapore)
Pte Ltd

… Plaintiff

And

Powermatic-Apcom Systems
Pte Ltd

… Defendant

GROUNDS OF DECISION

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Concord Express (Singapore) Pte Ltd v Powermatic-Apcom Systems Pte Ltd

[1998] SGHC 391

DCA 48/1998
Judith Prakash J
27 November 1998

1 **Judgment :**

2 **GROUNDS OF DECISION**

3 1. This matter came before me as an appeal from a decision of a district judge in chambers in connection with an application to strike out the statement of claim filed in the action. The appellants before me were the defendants in the action and the respondents were the plaintiffs. In order to avoid confusion, I will continue herein to refer to the parties as the plaintiffs and the defendants respectively. The defendants' original application to strike out the statement of claim was first heard before a registrar of the Subordinate Courts and was dismissed. The defendants then appealed to the district judge in chambers and that appeal was also dismissed. The defendants persevered by appealing to the High Court. I heard the appeal and allowed it but gave the plaintiffs leave to amend their statement of claim. The plaintiffs have now appealed to the Court of Appeal.

4 The proceedings

5 2. The plaintiffs' claim arises out of the shipment of a consignment of computer parts to buyers in India. The plaintiffs used the services of the defendants who carry on business as freight forwarders for the transport of the goods to India. Their complaint is that the goods were misdelivered and as a result they have suffered loss and damage.

6 3. In their statement of claim, the plaintiffs first pleaded the two agreements which they had made with the buyers of the goods, a company called Pixtel Computers, in relation to the sale of the goods. They pleaded that it was an express, alternatively, an implied term of these agreements that the purchase price of the goods would be paid by Pixtel Computers to the Dena Bank of Mumbai against presentation of documents viz the respective packing lists, airway bills, invoices and drafts. Only after payment would Pixtel Computers be able to take delivery of the goods.

7 4. By paragraph 4 of the statement of claim, the plaintiffs pleaded that on certain dates in April and May 1997 they delivered the goods to the defendants in Singapore for delivery by the defendants to Dena Bank in Mumbai on the terms of three airway bills dated 23 April 1997, 4 May 1997 and 11 May 1997 respectively which the defendants had issued to the plaintiffs as independent contractors; alternatively as the plaintiffs' agents on the recommendation of them by Pixtel Computers. The plaintiffs further pleaded that in each airway bill the plaintiffs were named as the shipper of the goods, Dena Bank was named as the consignee and Pixtel Computers was named as the notify party.

8 5. In paragraphs 6 to 8, the plaintiffs averred that the airway bills and other documents needed for delivery of the goods were duly forwarded to Dena

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Bank but that the defendants failed to deliver the goods to Dena Bank or at all. Instead the defendants either by themselves or by their agents in Mumbai misdelivered the goods to Pixtel Computers without first obtaining from them the specified documents. Up to the date of the issue of the writ, Pixtel Computers had failed to pay for the goods and the documents, having been returned by Dena Bank, were still in the plaintiffs' possession.

9 6. By paragraph 12, the plaintiffs pleaded that the defendants were in breach of duty and/or contract as bailees and/or guilty of conversion. As a result the plaintiffs had suffered loss and damage, particulars of which were set out in paragraph 13. The amount of the plaintiffs' claim was US$105,430 being the value of the goods and S$1,776.25 as bank charges.

10 7. The defendants' position was that the aforesaid statement of claim disclosed no reasonable cause of action and/or was an abuse of the process of the court because in accordance with the decision of the Court of Appeal in *Seagate Technology International v Changi International Airport Services Pte Ltd* [1997] 3 SLR 1, the plaintiffs' sole and exclusive cause of action against the defendants was to be found in the Warsaw Convention ('the Convention'), which has the force of law in Singapore by virtue of the Carriage of Air Act (Cap 32A) ('the Act'), and the relevant liability creating provisions in the Convention have to be pleaded in the plaintiffs' statement of claim. No other basis for the defendants' liability existed and the plaintiffs were not entitled to claim against the defendants for common law breach of contract, negligence, tort of conversion which were the causes of action pleaded in the statement of claim.

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11 8. The learned district judge rejected the defendants' arguments. He held that the plaintiffs' claim did not fall within the Convention because the plaintiffs were not suing the defendants in respect of loss to the goods in the course of carriage in an aircraft. Their claim, rather than being a claim relating to the physical carriage of the goods, was a claim based on the fact that after the goods had been unloaded from the aircraft at the airport of destination, the defendants had wrongly delivered or released them to Pixtel Computers without obtaining or being presented with an airway bill that had been endorsed by the consignee Dena Bank in favour of Pixtel Computers. It was therefore a claim that arose out of events occurring subsequent to the carriage. Accordingly, the Convention did not apply and the plaintiffs were not obliged to plead its provisions in their statement of claim.

12 9. Before me, the plaintiffs repeated the learned district judge's reasoning. They also contended that his decision should be supported on the ground that it was consistent with decisions made by the Assistant Registrar of the High Court in Suit 1080 of 1997 and of the Deputy Registrar of the Subordinate Court in DC Suit 4990 of 1997 which involved similar facts. However, in neither of those decisions were written grounds given. The plaintiffs also argued that the Convention had no application to their common law claim for damages against the defendants who were freight forwarders. As freight forwarders, the defendants were not carriers within the meaning of the Convention which applied only to the actual physical carriers.

13 Analysis

14 10. The main issue in the case was whether the Convention applied to the defendants. If it did, there was little doubt that the statement of claim was

defective. This was made clear by the Court of Appeal in the *Seagate* case. There, the plaintiffs/appellants, who were cargo owners, brought a claim against the cargo handling agents of the air carriers, KLM Royal Dutch Airlines, in negligence, bailment and conversion. The issue before the Court of Appeal was whether the appellants were obliged to plead article 18 of the Convention or whether they could simply plead the common law causes of action of negligence, bailment and conversion. It is relevant to set out Article 18 here since it is also helpful in considering the present case:

15 ‘ *Article 18*

> (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> (2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.
>
> (3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.’

16 11. The judgment of the Court of Appeal was delivered by Karthigesu JA. His Honour analysed the import of Articles 17, 18 and 19 of the Convention as follows:

> ‘Articles 17, 18 and 19 stipulate the various situations under which the carrier will incur liability for events occurring in the course of the contract for carriage by air. Unlike the position under, for example, the common law where the carrier’s liability is generally fault-based, under the regime of the amended Convention, the carrier’s liability is almost a strict one (subject

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> to the defences in arts 20 and 21) for death or injury to passengers and loss, damage or delay to registered baggage or cargo. Liability arises on the occurrence of facts falling within the scope of arts 17, 18 or 19, independently of any negligence or breach of contract or whether it was the carrier or its agents that actually performed the function or service during the course of which damage was sustained. These articles form the sole foundation of the carrier's liability in respect of loss or damage falling within the scope of those articles. In such cases, the party seeking satisfaction from the carrier need not and, in fact, cannot plead his case in common law or otherwise. It is the articles of the Amended Convention to which he must look for the exclusive cause of action and remedy. … *Hence, for actions brought against the carrier which fall within the scope of arts 17, 18 and 19, the relevant article must be pleaded in the statement of claim because no other basis for the carrier's liability exists at law.*' (at pp 8-9) (emphasis mine)

17 12. The actual holding in *Seagate* was that as the liability of air carriers was governed by the terms of the Convention, any claim against an air carrier had to be brought under the Convention. However, since the liability of the carrier's agents was not governed by the terms of the Convention, a claim against such agent need not be brought under it. In this case, therefore, whether or not the Convention applies depends solely on whether the defendants acted as a 'carrier' within the meaning of that term as it is used in the Convention and particularly in art 18 thereof.

18 13. There is no definition of carrier in the Convention. Article 1 of the Convention, however, deals with the applicability of the Convention and from this it can be inferred who would be a 'carrier' under the Convention. Article 1(1) states 'This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking'. There is no distinction drawn in the Convention between the person who physically undertakes the air carriage ie the operator of the aircraft used for the carriage

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and the person who contracts with the owner of goods to transport goods by air from point A to point B but sub-contracts the actual transportation to an airline operator. On the wording of this article the only test of whether a situation in which payment for air carriage is required falls within the Convention is whether there was an 'international carriage of cargo … performed by aircraft for reward'.

19 14. In the present case, the defendants in the course of their business and for reward issued airway bills in respect of each of the consignments which the plaintiffs wanted transported to Mumbai. The plaintiffs themselves pleaded that the goods were to be delivered by the defendants on the terms of the said airway bills. They obviously recognised that the airway bills formed part, if not the whole, of the contract between them and the defendants. Each bill evidenced a contract for the carriage of goods from Singapore airport to Mumbai airport in India. At the top right hand portion of each bill there appeared the following words 'Not negotiable Consignment Note/Air Bill Issued by Concord Express Singapore'. At the bottom of each bill above the printed words 'Signature of Issuing Carrier or its Agent' appeared a small rubber stamp bearing the words 'Concord Express (S) Pte Ltd' and an illegible signature. Each bill also stated the particulars and date of the flight on which the goods would be carried.

20 15. There was no endorsement on the airway bill or in any of the other documents relating to the carriage of the goods that indicated that the defendants were undertaking the carriage as agents for someone else. The plaintiffs themselves recognised that their contractual relationship was with the defendants as they pleaded that the defendants had issued the airway bills as independent contractors.

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21 16. In my judgment, the facts showed that the contract between the plaintiffs and the defendants was one whereby in consideration of payment, the defendants undertook to transport the goods by air from Singapore to Mumbai and to deliver them at Mumbai airport. The defendants therefore undertook an international carriage of cargo to be performed by an aircraft for reward within the meaning of art 1(1) of the Convention. The fact that the defendants themselves would not be the operators of the aircraft in which the physical carriage was to take place was irrelevant. It was the defendants who were undertaking the role of carriers vis--vis the plaintiffs and who would be responsible to the plaintiffs for any loss or damage to the goods at any stage of the carriage.

22 17. Counsel for the defendants referred the court to the position in the United States, another party to the Convention. From the authorities cited by counsel including *DHL Corporation v Civil Aeronautics Board* 584 F 2D 914 and *Hitachi Data Systems Corp. v Nippon Cargo Airlines Ltd* 24 Avi Cases 18, 433, it appears that courts in the United States have recognised two distinct types of air carriers namely ‘direct air carriers’ and ‘indirect air carriers’ the latter being ‘forwarders who assume the responsibility of a carrier, but shipped by air in direct carriers’ planes’. Freight forwarders have been held to be indirect air carriers and their liability limited in accordance with the Convention. For example, in the case of *Royal Insurance v Amerford Air Cargo* 21 Avi 17, 482, it was held by District Judge Cannella that an air freight forwarder, whose business consisted of ‘picking up goods from its customers, arranging air transport on a direct air carrier, consolidating goods in preparation for transport, and delivering them to the air carrier’ was a ‘carrier’ within the ambit of the Convention and could rely on the limitation of liability set out therein. The sensible and logical approach of the courts in the United States to the

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interpretation of the Convention is in line with the commercial realities of the modern business of transporting goods by air and is an approach which has equal validity here.

23 18. Article 18 provides that the 'carrier' is liable for damage sustained in the event of inter alia, loss of cargo if the occurrence which caused the damage took place 'during the carriage by air'. That 'carrier' as used in this art does not refer only to the physical carrier ie the aircraft operator is shown by para 2 of this article which defines what is meant by 'carriage by air'. This is the period when the cargo concerned 'is in the charge of the carrier' whether during the time of custody the cargo is in an aerodrome or on board the aircraft. Thus, the carrier's liability starts in the aerodrome of the airport of departure or even before then if the carrier takes possession of the goods outside the aerodrome and transports to the aerodrome for the purpose of loading on to the aircraft (see art 18(3)) and continues after discharge into the aerodrome of the airport of destination and is not limited to the period when the goods are physically on board the aircraft. As the time when the goods are in the aircraft is only part of the carriage by air, it is not conceptually illogical that the person who is the carrier may not also be the aircraft operator.

24 19. In arriving at his decision, the learned district judge relied upon the wording of art 1 read with art 18 of the Convention to conclude that as the plaintiffs' claim related to loss which allegedly occurred 'not during or in an air carriage but after [it]' consequently the Convention would not be applicable. However, as stated above, under art 18(2) the carriage 'comprises the period during which the … cargo is in the charge of the carrier' and therefore the test of whether the loss took place during the carriage by air is not whether the same occurred while the cargo was on board the aircraft but rather whether the cargo

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was in the charge of the carrier whether in an aerodrome or on board an aircraft at the time the loss allegedly occurred. In the present case, the loss occurred when the goods were delivered at Mumbai airport to Pixtel Computers without submission of the relevant documents evidencing payment. It is the plaintiffs' case that, at that time, the goods were still under the charge of the defendants. In one of their affidavits they alleged that the period during which the goods were in the defendants' charge 'commence[d] from the plaintiffs' factory in Singapore and end[ed] at their destination' in India when the goods were delivered to the party entitled to take delivery of the same. Therefore the loss must have occurred while the carriage of air continued.

25 Conclusion

26 20. For the reasons given above, the defendants were carriers under art 18 of the Convention and the plaintiffs' claim arose only within the corners of the Convention. Accordingly, it and the relevant articles should have been pleaded in the statement of claim and as then structured, that statement disclosed no valid cause of action. I accordingly allowed the defendants' appeal and set aside the orders made by the district judge. However, as the facts which the plaintiffs relied on did give them a cause of action against the defendants provided it was properly pleaded, I gave the plaintiffs leave to amend their statement of claim by adding the cause of action arising under the Convention and made an order that the action would only be struck out if the plaintiffs did not undertake such amendment within fourteen days of my decision. It is clear from the commentary at para 18/19/2 of the White Book (1999 Ed) that the court has the power to give a plaintiff the opportunity to amend his statement of claim where the same does not disclose a cause of action even though the formulation

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of the amendment is not before the court as long as there is no reason to suppose that the case cannot be improved by amendment.

27 JUDITH PRAKASH

28 JUDGE

29 SINGAPORE

Judith Prakash J

Danny Chua with Magdalene Chew (Khattar Wong & Partners) for the defendants/appellants
Lawrence Teh with Adrian Loke (Rodyk & Davidson) for the plaintiffs/respondents

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