Bandung Shipping Pte Ltd v Keppel Tatlee Bank Ltd
[2002] SGCA 46

Case Number : CA No 13 of 2002

Decision Date : 30 October 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J

Counsel Name(s) : Toh Kian Sing and Ung Tze Yang (Rajah & Tann) for the appellants; Haridass Ajaib and Thomas Tan (Haridass Ho & Partners) for the respondents

Parties : —

Admiralty and Shipping – Bills of lading – Bills of Lading Act (Cap 384, 1994 Rev Ed) ss 2(1), 2(5) & 5(2)

Admiralty and Shipping – Bills of lading – Local bank indorsing and delivering bills of lading to foreign bank – Buyer failing to pay – Foreign bank redelivering bills of lading to local bank without any indorsement – Whether local bank retains rights of suit under bills of lading

Admiralty and Shipping – Bills of lading – Local bank stamping word "cancelled" over indorsement to foreign bank in bills of lading – Whether rights of suit under bills of lading re-vested in local bank

Civil Procedure – Striking out – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 18 r 19 – Whether plaintiffs have right of suit under Bills of Lading Act (Cap 384, 1994 Rev Ed)

Judgment

GROUNDS OF DECISION

1 This was an appeal against a decision of the High Court reversing in part a decision of the Deputy Registrar striking out the statement of claim of the plaintiffs, the respondents before us. The High Court while restoring the plaintiffs' claim based on contract/bills of lading, agreed with the Deputy Registrar that those parts of the statement of claim based on negligence and conversion should be struck out. We heard the appeal on 11 September 2002 and allowed it, restoring the decision of the Deputy Registrar striking out the entire statement of claim and the action. We now give our reasons.

The facts

2 The defendant-appellants (Bandung) were at all material times the owners of the vessel "Victoria Cob". The respondent-plaintiffs (Keppel TL) were bankers. A cargo of 508 m/t of crude palm oil, which was the subject matter of the action, was shipped by Shweta International Pte Ltd (Shweta) on board the vessel at Belawan, Indonesia for delivery at Kandla, India. Two bills of lading (B/L), dated 13 April 2000, were issued by Bandung for that shipment.

3 In the statement of claim, Keppel TL averred that they were the owners of the cargo which was carried on board the vessel. In the alternative, they alleged that they were the lawful holders or indorsees of the two B/Ls and were thus entitled to immediate possession of the same.

4 Keppel TL further averred in the statement of claim the following:-

> 7. In breach of contract and or in breach of their duty as bailees and or through negligence the Defendants failed to take reasonable care of the Cargo and to deliver the Cargo to the Plaintiffs against the presentation and or production of the original Bills of Lading and instead delivered the Cargo to person(s) who did not hold and or present and or have possession of the said original Bills of Lading.
>
> 8 . Further and or alternatively, the Defendants have converted the cargo to their own use and have

wrongfully deprived the Plaintiffs thereof.

9. By reason of the Defendants' breach of contract and or duty and or negligence and or conversion aforesaid, the Plaintiffs have suffered loss and damage.

5 We would point out that the portions of 7 to 9 of the statement of claim quoted above which were underscored, were the portions which were struck out by the judge below when allowing in part the appeal of Keppel TL. There was no appeal by Keppel TL against the order striking out those parts. Following the decision of the High Court, what remained of Keppel TL's claim was on contract/bills of lading.

6 Pursuant to a written request by Bandung, further and better particulars were furnished. Keppel TL stated that they obtained the two B/Ls by purchase from Ranchhoddas Purshottam Holdings (RPH). They alleged that at all material times Keppel TL were holding the B/Ls and yet Bandung delivered the cargo to another who never presented the B/Ls.

7 When particulars were requested as to the party who allegedly endorsed the B/Ls to Keppel TL, the latter asserted that they were not relying on any indorsement on the B/Ls to establish their title to sue.

8 After the particulars were furnished, Bandung applied to have the action struck out under O.18 r.19(1)(a)-(d) of the Rules of Court. From the affidavits filed by the parties, the following facts emerged. Shweta had sold the cargo to RPH and shipped them on board the "Victoria Cob". Shweta indorsed the B/Ls in blank and delivered them to RPH who, in turn, had on-sold the cargo to Lanyard Foods Ltd (Lanyard). Thereafter, RPH, through its bankers, Bank National de Paris, delivered the two B/Ls to Keppel TL for purchase/negotiation, without filling in any name onto the indorsement made in blank by Shweta.

9 On 25 May 2000, Keppel TL filled in the name "the State Bank of Saurashtra in India" (State Bank) onto the blank endorsement made by Shweta and forwarded the two B/Ls to the State Bank to hold the same for collection by Lanyard. However, Lanyard never came forward to pay for the cargo and collect the two B/Ls, which were duly returned by the State Bank to Keppel TL in November 2000. No indorsement was made by the State Bank on the B/Ls either in blank or specially in favour of Keppel TL. Upon receipt of the two B/Ls, Keppel TL, on their own motion, just stamped the word "CANCELLED" over the indorsement in each of the two B/Ls.

10 In the meantime, the vessel arrived at Kandla and discharged the cargo to the agents of Lanyard, without the production of the B/Ls.

Decision below

11 To succeed under r 19(1)(a), no other material may be referred to except the pleadings. As Keppel TL had pleaded that they purchased the B/Ls from RPH, that Bandung had delivered the cargo to a third party without the presentation of the B/Ls which were still held by them and that they had thereby suffered loss, Bandung could not possibly succeed in having the action struck out under r 19(1)(a). And the judge below so held.

12 However, affidavit evidence is admissible for the purposes of r 19(1)(b)-(d), and such facts may be taken into consideration in determining whether the action should be struck out. The judge below noted that Keppel TL inserted the name of State Bank in the blank indorsement as a safety precaution, in case either of the two B/Ls should go astray in transit. With regard to the argument raised by Bandung, that the cancellation of the indorsement effected by Keppel TL had the result of nullifying the original indorsement of Shweta, the judge was of the view that this was a question of law which was not altogether clear and that the issue should proceed to trial. He said that it was only in plain and obvious cases that the power of striking out should be invoked.

Issues on appeal

13 There was in substance only one issue for this court to decide: Had Keppel TL the rights of suit under the contracts of carriage as evidenced by the two B/Ls. A related question was, if Keppel had no such right of suit, whether the action should have been struck out. We will first deal with the substantive question.

Rights of Suit

14 Under s 2(1) of our Bills of Lading Act (B/L Act), which was adopted from, and is in *pari materia* with, the English Carriage of Goods by Sea Act, 1992 (COGSA 1992), a person who has become the lawful holder of a B/L shall have and "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".

15 Under s 5(2)(b) of the B/L Act, 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 who "has become the holder of the same in good faith", shall be regarded as the lawful holder of the bill. In short, an indorsee who is in possession of the B/L in good faith would be the lawful holder. We should add that under s 5(2)(a) and (c), two other situations are provided where a person could be the lawful holder of a bill but they do not concern us here.

16 Another relevant provision is section 2(5) of the B/L Act which reads:–

> "2(5) Where rights are transferred by virtue of the operation of subsection (1) in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives,
>
> (a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage;
>
> (b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document,"

17 The effect of s 2(5) is explained in *Carver on Bills of Lading* as follows (at 5-066):-

> "The situation here to be considered is that in which goods are shipped by A under a bill of lading which he transfers to B who then transfers it to C. If each of these transfers is made in circumstances vesting rights in the transferee, by virtue of section 2(1) of the 1992 Act, then section 2(5) (which extinguishes the contractual rights of the transferor) operates in relation to the second transfer no less than in relation to the first. In other words, the first transfer extinguishes A's rights under the bill of lading as an original party to the contract of carriage, and the second transfer extinguishes the rights under the contract which had been vested in B by virtue of section 2(1). The latter consequence follows from section 2(5)(b) which extinguishes B's 'entitlement to those rights which derives … from the previous operation of … [section 2(1)] … in relation to the bill'."

18 At common law an "order" bill is a document of title and may be transferred by indorsement. The provisions of s 5(2)(b) of the B/L Act reflect that position. There are two types of indorsements: blank indorsement and special indorsement (also known as "endorsement in full"). Here, we would quote from *Scrutton on Charterparties and Bills of Lading (20th Edn)* at p. 184:-

> Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an "indorsement in blank", or by the writing "Deliver to I, (or order), F", which is called an "indorsement in full".
>
> So long as the goods are deliverable to a name left blank, or to bearer, or the indorsement is in blank, the bill of lading may pass from hand to hand by mere delivery, or may be redelivered without any indorsement to the original holder, so as to affect the property in the goods.

19 In *Benjamin's Sale of Goods (5th Edn)* the difference between the two types of indorsements is described as follows (at p.986):-

> "… where the person to whom goods are deliverable under an order bill wishes to transfer the bill to another, the transfer must be effected by indorsement by the transferor and delivery of the bill to the transferee. The indorsement may be to the transferee by name or in blank, in which latter case no further

indorsement, but only delivery, is as a matter of law required for subsequent transfers."

20 In other words, where a B/L has been indorsed in blank, it becomes like a bearer bill and can be transferred simply by delivering the bill to the intended transferee without any further indorsement. But where a B/L has been specially indorsed, the indorsee must, if he wishes to further transfer the B/L, indorse it either specially or in blank. And if this further indorsement is in blank, then the B/L will again function like a bearer B/L. This is the scheme of things under the B/L Act. The rights under a bill of lading operate independently of the banking arrangements which any of the holders of the B/L in the chain may have with his bankers.

21 In a very recent decision, *East West Corporation v DKBS 1912 & Anor* [2002] EWHC 83 (COMM), where the facts were similar to those of the present case, except that the bankers, the Chilean banks, instead of being indorsees were the named consignees and who did not, in turn, indorse the B/Ls over to the claimants, Thomas J of the English Commercial Court held that a valid indorsement, besides the physical possession of the bill, was critical to the claimants obtaining the rights to suit. We did not think it was in any way material that the Chilean banks were consignees instead of indorsees.

Our decision

22 Reverting to the instant case, it would be recalled that Shweta indorsed the B/Ls in blank and the bills eventually came into the hands of Keppel TL. The effect of such an indorsement was that each of the B/Ls had become a bearer bill, transferable with the mere passing of the bill. At that point, Keppel TL had become the holder of the two bills and could have sued on them if the shipowner were to be unable to deliver the cargo upon the presentation of the B/Ls. If Keppel TL had not inserted the name of the State Bank in forwarding the bills to the latter, and if the bills were later to be returned by the latter to Keppel TL without further ado, Keppel TL would again become the lawful holder of the bills.

23 However, by inserting the name of the State Bank onto the blank endorsement in each of the two B/Ls, the character of each bill changed from that of a bearer bill to that of a bill which had been transferred specifically to the State Bank. And upon each bill being physically conveyed over to the State Bank, the latter would become the lawful holder thereof and in turn acquire the rights of suit pursuant to s 5(2)(b). Of course, the State Bank could further transfer the bill but to do so it must indorse the bill over, either to a specific transferee or in blank. In fact, Keppel TL had expected the State Bank to indorse the B/Ls over to Lanyard as and when the latter came forth to pay for the goods and collect the bills. However, Lanyard did not do so. Eventually, the State Bank returned the bills to Keppel TL without making any indorsement. In our opinion, this indorsement was crucial to enable Keppel TL to become the lawful holder again.

24 The argument raised by Keppel TL was that the specific indorsement and delivery of the B/Ls to the State Bank were insufficient to determine whether the State Bank had become the "lawful holder", thereby extinguishing the rights of suits that Keppel TL had acquired under s 2(1). For this argument, they relied on the element of "good faith" laid down in s 5(2). They contended that it was never their intention to vest the rights of suit in the State Bank. That could not be so. The fact of the matter was that the State Bank was clearly authorized to indorse the B/Ls and deliver them over to Lanyard upon the latter paying for the goods. The precise instruction to the State Bank was to "deliver documents against payment". Reading this instruction together with the special indorsement made in favour of the State Bank, it was obvious that the intention was to vest the rights of suit in the State Bank with a view to enabling the latter to transfer the B/L, with the attendant rights of suit, to Lanyard.

25 We would also point out that there is no longer any requirement that an indorsement be intended to pass any property to the goods (see *Voyage Charters by Julian Cooke* at 18.84 and 31 below). If, as we thought was the case, the rights of suit did vest in the State Bank for the purpose of indorsing the B/Ls over to Lanyard or its nominee, then there can be no question of any residual rights of suit remaining with Keppel TL. Any other approach to the matter would do violence to the scheme envisaged under the B/L Act (and COGSA 1992). A simple indorsement by the State Bank in favour of Keppel TL or in blank would have transferred the rights of suit back to Keppel TL.

26 Reliance was also placed by Keppel TL on *Aegean Sea Traders Corp v Repsol Petroleo SA* [1998] 2 Lloyd's Rep 29 to support the proposition that mere indorsement, followed by delivery of the bill, does not make the indorsee a lawful holder. But in *Aegean Sea Traders* the name of the indorsee was entered by mistake. The indorsee, in fact, refused to accept it and sent it back to be indorsed to the rightful indorsee and transferee. It was because of that that the court held that the indorsee did not become the lawful holder.

27 We must reiterate that the court does not look behind a B/L to determine who is entitled to delivery. As pointed out by the English and Scottish Law Commissions (the Law Commissions) in their joint report, which led to the passing of COGSA 1992, under the law as it then stood, a carrier was bound to make delivery against presentation of the B/L without inquiry as to the way in which the presenter of the B/L had acquired the property in the goods. The change brought about by COGSA was to simplify the law. The Law Commissions further pointed out that if a person who transfers a B/L were to retain rights, it would enable him to undermine the security of the new holder and expose the carrier to inconsistent claims. Keppel TL's attempt to rely on their underlying arrangement with the State Bank pursuant to which the B/Ls were specially indorsed over to the State Bank was, therefore, without merit.

28 Accordingly, there was no basis for Keppel TL to claim that they had acquired any rights of suit in relation to the B/Ls, as the B/Ls were not indorsed specially in their favour or in blank. Physical possession of a B/L does not constitute the holder the lawful holder; there must be a valid indorsement.

29 The court below seemed to have been troubled by the case, *Gurney v Behrend* (1854) 3 El. & BL 622, which Keppel TL's counsel argued supported the proposition that if an agent indorses a B/L without authority, his principal may still retain rights of suit under the contract of carriage contained in the B/L. But the case did not involve a suit by a holder of a B/L against the carrier. The issue in the case was not the rights of suit in relation to the B/L but the rights of property or title to the goods carried under the B/L. This is apparent from the following portion of the judgment of Lord Campbell CJ (at p.1279):-

> "For this purpose it is not enough that they had become bona fide holders of the indorsed bill of lading, for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it, as against the shipper of the goods. The bill of lading only represents the goods: and, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented."

30 The court there was concerned with determining, as between two competing claimants, who had the better title to the goods and Lord Campbell came to the conclusion (at p.1280):-

> "Ever since the great case of *Lickbarrow v Mason*(a), the law has been considered to be that the bona fide transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop in transitu, as against the purchase; and we believe it to be of essential importance to commerce that this law should be upheld. For these reasons we give Judgement for the plaintiffs."

31 It is vitally important to differentiate rights of suit under a B/L and the issue as to who, among competing claimants, has the better title to the goods. The difficulties in relation to these two matters under the previous Bill of Lading Act 1855 were discussed in the Law Commissions' report and they came to the conclusion that there should be a severance of the link between the passing of title or property in goods and the transfer of B/L and rights of suits under a contract of carriage contained in the B/L. In 2.22 of their report, the Commissions stated:-

> "We recommend that Option 3 [i.e., rights of suit under contract of carriage vested in holder of bill of lading] should form the basis of a reform of the Bills of Lading Act 1855. Thus, there would no longer be a link between the transfer of contractual rights and passing of property. Instead, any lawful holder of a bill of lading would be entitled to assert contractual rights against the carrier."

32 Therefore, *Gurney v Behrend* does not stand for the proposition which Keppel TL sought to advance before us. In any event, the question of rights of suit is now governed by the B/L Act and under this statute an order B/L is transferred by indorsement, coupled with

physical delivery of the bill.

33 Before we conclude, we would like to make a brief observation on the "cancellation" stamp effected by Keppel TL over the indorsement. As we have explained above, Keppel TL can only become a lawful holder of the B/L if there is an appropriate indorsement. Keppel cannot by their own act of cancelling the indorsement made in favour of the State Bank improve their position. However, there is no need for us at this time to decide what effect the cancellation stamp has on the B/L.

Striking out

34 In the light of the foregoing it was plain and obvious that the claim could not succeed. It was hopeless and should be struck out. To allow the case to go further for trial would be to compel the defendants (Bandung) to expend time and money in defending a case which obviously had no merit whatsoever. There was really no dispute on facts. The question raised was one of law which we have answered. The parties had made full arguments before us. Accordingly, we struck out the action on the ground that it was an obviously unsustainable claim.

Sgd:

CHAO HICK TIN	JUDITH PRAKASH
JUDGE OF APPEAL	JUDGE

Copyright © Government of Singapore.