Exxonmobil Asia Pacific Pte Ltd v Bombay Dyeing & Manufacturing Co Ltd [2007] SGHC 137

Case Number : Suit 120/2007, RA 151/2007

Decision Date : 28 August 2007

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Lai Swee Fung (Unilegal LLC) for the appellant/defendant; Paul Sandosham and Sung Jingyin (Wong Partnership) for the respondent/plaintiff

Parties : Exxonmobil Asia Pacific Pte Ltd — Bombay Dyeing & Manufacturing Co Ltd

Civil Procedure – Stay of proceedings – Whether proceedings should be stayed on ground of forum non conveniens

Conflict of Laws – Whether India more appropriate forum than Singapore for resolution of dispute

28 August 2007

Tan Lee Meng J:

1 This case involves an unmeritorious appeal by the defendant against the dismissal of its application for a stay of proceedings by the assistant registrar, Ms Charlene Tay ("AR Tay"). I dismissed the appeal and now give the reasons for my decision.

2 The plaintiff, Exxonmobil Asia Pacific Pte Ltd ("Exxonmobil") a Singapore company, is in the business of refining, manufacturing and trading of petrochemical and petroleum products. The defendant, Bombay Dyeing & Manufacturing Co Ltd ("Bombay Dyeing"), is in the business of manufacturing and selling textiles.

3 In late September 2006, Exxonmobil and Bombay Dyeing concluded a contract (the "contract"), under which the former sold the latter 5,000 metric tonnes (+/- 5% at the seller's option) of paraxylene in bulk at USD1,365.00 per metric tonne. Paraxylene is a raw material used in the manufacture of dimethyl terephthalate ("DMT"), which is required for the production of polyester. Bombay Dyeing has been manufacturing DMT for its textiles since 1986.

4 The paraxylene was to be carried from Singapore to Mumbai and delivery was to be made in end October or early November 2006.

5 On 9 October 2006, Bombay Dyeing informed Exxonmobil that they were having serious problems with the process air compressor in its DMT plant and that it could not take delivery of the paraxylene that it had purchased. Bombay Dyeing claimed that it was entitled to rely on the *force majeure* provisions in the contract to refuse to take delivery of the paraxylene.

6 On the following day, Bombay Dyeing alleged that it had entered into the contract on the basis of Exxonmobil's representation that the contract price for the paraxylene was within the international price range for the product. Obviously unhappy about the price it had agreed to pay for the paraxylene, Bombay Dyeing sought, in its letter of 10 October 2006, to repudiate the contract on the ground of fraud and misrepresentation. What was rather interesting was that in the same breath, Bombay Dyeing offered to buy the same cargo at a reduced price. It stated that "in the interest of ..

continued good relationship", it was "ready and willing" to take delivery of the paraxylene if Exxonmobil would reduce the price to USD1,260.00 per metric tonne.

7 On 12 October 2006, Exxonmobil wrote to Bombay Dyeing to reject the allegations of fraud and misrepresentation. The relevant parts of the letter included the following:

> We … refute any and all allegations of fraud or misrepresentation on our part. …
>
> We hereby reject your repudiation of our contract dated September 28, 2006 for the sale of 5,000 MT of paraxylene. We further reject your request for a reduction in the price to 1,260$/T ….
>
> We further reject your declaration of Force Majeure …. The unserviceability of your process air compressor does not constitute an event of Force Majeure within the terms of the contract and does not entitle you to delay performance of, or not perform, your contractual obligations. In any case the fact that you have offered to take the parcel at the reduced price is not consistent with any Force Majeure situation.
>
> We therefore expect to receive your letter of credit by 22 October 2006.

8 As Bombay Dyeing refused to take delivery of the paraxylene at the contract price, Exxonmobil sold the said cargo to another party at a loss. On 11 January 2007, Exxonmobil informed Bombay Dyeing that it had suffered a loss of USD1,045,000.00 as a result of its attempt to mitigate the loss occasioned by the latter's breach of contract. Apart from claiming this sum, Exxonmobil also claimed dead freight charges amounting to USD116,899.87 from Bombay Dyeing.

9 In February 2007, Exxonmobil instituted the present suit to recover damages for wrongful breach of contract by Bombay Dyeing. Exxonmobil claimed the sum of USD1,161,899.87 from Bombay Dyeing and interest on this sum.

10 Bombay Dyeing applied for the proceedings to be stayed on the ground of *forum non conveniens.* It alleged that India was a more appropriate forum than Singapore for the resolution of the dispute.

11 On 19 June 2007, the defendant's application to stay the proceedings was heard by AR Tay, who dismissed it with costs. Bombay Dyeing appealed against her decision.

Whether the action should be stayed

12 As far as the approach with respect to a stay of proceedings on the ground of *forum non conveniens* is concerned, the Court of Appeal has endorsed on many occasions the view of Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. In *Brinkerhoff Maritime Drilling Corp and Another v PT Airfast Services Indonesia and Another Appeal* [1992] 2 SLR 776, Chao Hick Tin J, as he then was, who delivered the judgment of the Court of Appeal, stated as follows at [35]:

> Lord Goff, who delivered the judgment of the House [in the *Spiliada*], to which the other four Law Lords agreed, restated the law … as follows:
>
> > (a) the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which

the case may be tried more suitably for the interest of all the parties and the ends of justice;

(b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;

(c) the burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;

(d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on business;

(e) if at that stage, the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;

(f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

13 In the present case, there is a contract between a Singapore seller and an Indian buyer, which specifically provides that the governing law of the contract is Singapore law. Bombay Dyeing conceded that this was an important factor to be taken into account when deciding whether or not the Singapore proceedings should be stayed.

14 The main ground advanced by Bombay Dyeing in favour of a stay of proceedings concerns the location and compellability of witnesses. Bombay Dyeing claimed that the breakdown of its DMT plant in India is a key issue and that it intended to call around 20 Indian witnesses to testify on the breakdown.

15 Admittedly, the location and the compellability of witnesses may, in appropriate circumstances, be an important factor. In *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2007] 1 SLR 377, Andrew Phang JA pointed out at [19] that much depends on whether the main disputes revolve around questions of fact. In the present case, at the hearing before AR Tay, Bombay Dyeing clearly did not know whether or not any of its potential witnesses had refused to come to Singapore for the trial or testify in India via video-link. In these circumstances, AR Tay rightly dismissed Bombay Dyeing's application for a stay of proceedings.

16 After studying AR Tay's notes of evidence, Bombay Dyeing's Vice-President, Mr Sudhir Kumar Gupta ("Mr Gupta"), filed a new affidavit for the purpose of the hearing of the appeal by this court. In this new affidavit, Mr Gupta referred to the lack of evidence before AR Tay regarding the refusal of witnesses to testify if the trial was conducted in Singapore and added that he had spoken to three potential witnesses who had intimated that they were unwilling to be witnesses in the litigation, whether it be conducted in Singapore or in India. The three potential witnesses, who are employees of Siemens, the company that built and maintains Bombay Dyeing's DMT plant, are Mr Vivek Pisokar

and Mr Anthony Mathew, who are both senior managers at Siemens, and Mr Rajgopal Nair, who is Siemens' service engineer (collectively referred to as "Siemens personnel").

17 Exxon understandably submitted that Mr Gupta's self-serving hearsay evidence should be disregarded. Apart from Mr Gupta's bare assertion that the Siemens personnel were unwilling to give evidence, there was no other proof that this was the case. If Bombay Dyeing can succeed in establishing that India is a more appropriate forum than Singapore by merely having one of its officers testify that some witnesses had said to him that they would not co-operate if the trial was conducted in Singapore, all that any defendant has to do in future to have Singapore proceedings stayed is to merely state in an affidavit without any further proof that he has spoken to two or three witnesses who do not wish to testify and cannot be compelled by the Singapore courts to do so. Surely more is expected of a defendant who seeks a stay of proceedings in Singapore on the basis that a foreign forum is, as compared to Singapore, a more appropriate forum.

18 Finally, it ought to be noted that although Bombay Dyeing had commenced proceedings in India for a declaration that the contract was not binding, it did not rely on this fact as a ground for a stay of the Singapore proceedings during the hearing of the appeal. In any case, it is worth noting that in *De Dampierre v De Dampierre* [1988] AC 92 at 108, Lord Goff pointed out that while the existence of such foreign proceedings may, depending on the circumstances, be relevant to the inquiry, they may be of no relevance at all if, for example, one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction *or the proceedings have not passed beyond the stage of the initiating process*. This view was endorsed by VK Rajah J, as he then was, in *Peters Roger May v Pinder Lilian Gek Lian* [2006] 2 SLR 381 at [33]. In the present case, AR Tay viewed the Bombay proceedings as a pre-emptive move by Bombay Dyeing, which had already received a letter from Exxonmobil in January 2007 with respect to its liability to Exxonmobil for damages for failing to take delivery of the paraxylene that it had purchased. Further, as was the case in *Peters Roger May*, at the time of the hearing before AR Tay, the foreign proceedings were still in the preliminary stage as Bombay Dyeing had merely obtained leave to effect service of the relevant documents outside jurisdiction. In these circumstances, the Bombay proceedings cannot be a sufficient reason for a stay of the Singapore proceedings.

19 For the reasons stated, I affirmed AR Tay's decision to dismiss the application for a stay of proceedings. Exxonmobil is entitled to costs.

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