1967
Feb. 20
1968
Oct. 8

GEORGE S. GALATARIOTIS & SONS LTD.,

Plaintiffs,

v.

THE SCANDINAVIAN BALTIC AND MEDITERRANEAN SHIPPING CORPORATION OF MONROVIA,

Defendants.

(Admiralty Action No. 8/64).

Admiralty—Contract of carriage by sea—Breach—Damage to cargo—Action for damages—Charter-Party and Bill of Lading—Clause in charter-party providing for the covering of deck-cargo—Interpretation—Cargo once loaded on board ship is under the charge and control of master of the ship—Clause in Bill of Lading to the effect that cargo deck is travelling at charterer's risk—Must be read in conjuction with the previous clause in charter-party.

Arbitration—Contract—Arbitration clause in a contract—Effect—Such clause does not oust the jurisdiction of the Court—Not a bar or defence to proceedings in Court in respect of a dispute agreed to be referred to arbitration—Such clause merely gives the right to a party to such proceedings to apply, under certain formalities and conditions, for a stay of the action and reference of dispute to arbitration.

Practice—Special case under clause 102 of the Cyprus Admiralty Jurisdiction Order, 1893—When the rule in that clause may be invoked.

The plaintiffs' claim in this case is for £500 compensation for damage alleged to have been caused to a cargo of timber imported by them from Finland on board the m/v "Nissos Thassos" owned by the defendants. By clause 26 of the charter-party entered into between the parties it was specifically agreed that approximately 1/3rd of the cargo would be loaded on deck and that such "deck cargo shall be covered by tarpaulins which the vessel will supply free". One of the clauses of the Bill of Lading provides "..... 7,117 pieces on deck at charterer's risk to be delivered .....". By another clause all clauses of the charter-party should

apply to the Bill of Lading and were deemed to be incorporated therein.

It is common ground that the deck cargo was not covered by tarpaulins nor was it protected in any other way from getting wet and damaged either through rain, sea-water or mist. The ship arrived at Famagusta port on October 21, 1963; and on the same day it started unloading. There is no question that this deck cargo had been damaged through being left uncovered and that such damage was estimated at £500.

The defendants raised three points in their defence:

(*a*) Clause 26 (*supra*) imposed no obligation on the ship-owners or the master to cover the deck cargo with tarpaulins but only to provide the tarpaulins and it was for the plaintiffs or their agents or the shippers to cover the cargo.

(*b*) By reason of clause 25 which provides that "any dispute arising under the charter-party to be referred to Arbitration in Piraeus.....", the plaintiffs are precluded from instituting the proceedings under this action, which, therefore, must be dismissed.

(*c*) In view of the provision in the Bill of Lading that the 7,117 pieces on deck were travelling at charterer's risk (*supra*), they, in any event, are not liable.

Held, as to (a) above:

It seems to me that such argument is really too far-fetched. The deck cargo once loaded on board the ship, was under the absolute charge and control of the master and I think that having regard to all the circumstances and the wording of this clause 26 the clear implication is that it was the duty of the defendants to cover the deck cargo with tarpaulins.

Held, as to (b) above:

(1) An arbitration clause in a contract does not oust the jurisdiction of the court and such clause is not a bar or defence to proceedings brought in respect of a dispute agreed to be referred to arbitration; it merely gives the right to any other party to such proceedings, subject to certain formalities and conditions, to apply for a stay of proceedings

and reference of such dispute to arbitration. (See *Doleman and Sons* v. *Osset Corporation* [1912] 3 K.B. 257 and *Heyman* v. *Darwins Ltd.* [1942] 1 All E.R. 337).

(2) The defendants in the present case have taken no step at the proper time i.e. before delivering any pleading or taking any other step in the proceedings, or at all, to stay this action. Consequently the plaintiffs are not precluded from having the whole question determined in Court.

(3) Clause 102 of the Cyprus Admiralty Jurisdiction Order, 1893 has no application to the facts of this case and I am unable to see how the defendants may, at this stage, invoke this rule at all.

Held, as to (c) above:

In my view, the provision in the Bill of Lading that the 7,117 pieces on deck were travelling at charterer's risk must be read in conjunction with clause 26 (*supra*). In other words the defendants would not be liable for any risks so long as they complied with the obligation expressly undertaken by them under the charter-party and particularly with their obligations under the said clause 26.

Held: In the light of all the above I am of the opinion that the plaintiffs have proved their case and are entitled to the assessed damages. There will be judgment for the plaintiffs for £500 and costs.

Judgment and order as to costs as aforesaid.

Cases referred to:

Doleman and Sons v. Osset Corporation [1912] 3 K.B. 257;

Heyman v. Darwins Ltd. [1942] 1 All E.R. 337.

Admiralty Action.

Admiralty Action for £500 damages alleged to have been caused to a cargo of timber imported by plaintiffs from Finland on board a ship owned by the defendants.

M. Montanios, for the plaintiffs.

A. Michaelides, for the defendants.

Cur. adv. vult.

The following judgment was delivered by:-

LOIZOU, J.: The plaintiffs' claim in this case if for £500 damages alleged to have been caused to timber imported by them from Finland.

The plaintiffs are merchants dealing, *inter alia*, in the importation of timber. The defendants are a shipping corporation incorporated in Monrovia and are, or were at the material time, the owners of the m/v "Nissos Thassos". They are represented in Cyprus by the Cyprus Shipping Co. Ltd., of Famagusta.

In June, 1963, the plaintiffs placed an order through their agents, Messrs. Zimbler & Co. of Nicosia, with a Finnish company, Ruukki Oy, for a quantity of timber. Messrs. Zimbler & Co. acting on behalf of their principals entered on the 3rd July, 1963, into a charter-party (*exhibit* 1) with the defendants. By clause 26 of the charter-party it was specifically agreed that approximately 1/3rd of the cargo, which would consist mainly of fifth quality Deals and Battens would be loaded on deck. The last paragraph of this clause reads as follows: "The deck cargo shall be covered by tarpaulins which the vessel will supply free".

A certain amount of timber consisting of unsorted Redwood of various dimensions and fifths Redwood was loaded at the port of Lapaluoto in Finland and the Bill of Lading No. 7 (*exhibit* 2) was issued by the master.

One of the clauses of the Bill of Lading reads: "17,717 pieces of Battens (as per specification under this Bill of Lading) of which 7,117 pieces on deck at charterer's risk to be delivered in the like good and condition at the aforesaid port of destination unto ORDER .... or their Assigns, he or they paying freight for the same as per charter-party dated as above;" and then follows this clause: "All the terms, conditions, clauses and exceptions including clause 32, contained in the said charter-party apply to this Bill of Lading and are deemed to be incorporated herein". As far as I have been able to ascertain there is no clause 32 in the charter-party, but this does not, in my view, affect the issue one way or the other since quite obviously the intention of the parties was that all clauses of the charter-party should apply to the Bill of Lading and were deemed to be incorporated therein.

It is further clear from the uncontradicted and unchallenged evidence of Mr. Simos Galatariotis, who is one of the Directors of the plaintiff company, that having paid for the goods the Bill of Lading was duly endorsed to the plaintiff company who, thus, became holders in due course and that at the time of the issue of the Bill of Lading they (the plaintiffs) were aware of all the terms and conditions of the charter-party because they were in possession of a copy of it.

It is common ground that the deck cargo was not covered by tarpaulins nor was it protected in any other way from getting wet and damaged either through rain, sea-water, mist or any other climatic conditions. In any case, the ship arrived at Famagusta on the 21st October, 1963; and on the same day it started unloading the deck cargo and such unloading was completed in a couple of days. There is no question that this deck cargo had been damaged through being left uncovered and that such damage was estimated at £500.- by an assessor appointed by the parties for this purpose. It may be said here and now that the amount of damage has not been challenged in these proceedings.

The case for the plaintiffs is that the defendants are liable, in that, in breach of the charter-party and/or the Bill of Lading, they had failed to deliver the deck cargo in good condition as they had failed to cover it by tarpaulins and/or get it so covered or protected during the voyage as provided in clause 26; in the alternative plaintiffs claim damages for negligence.

The defendants on their part submitted that clause 26 imposed no obligation on the ship-owners or the master to cover the deck cargo with tarpaulins, but only to provide the tarpaulins and it was for the plaintiffs or their agents or the shippers to cover the cargo. It seems to me that such argument is really too far-fetched and I find it very difficult to accept defendants' submission. The deck cargo, once loaded on board ship, was under the absolute charge and control of the master and, therefore, of the defendants and I think that having regard to all the circumstances and the wording of this clause the clear implication is that it was the duty of the defendants to cover the deck cargo with tarpaulins, which they had to provide themselves.

The other point raised by the defendants (at paragraph 3 of their answer) is that in the light of clause 25, which pro-

vides that "any dispute arising under the charter-party to be referred to Arbitration in Piraeus in accordance with the *Piraeus Chamber of Shipping Regulations*" the plaintiffs are precluded and estopped to institute the proceedings under this action and, therefore, their action must be dismissed.

To my mind this is not a correct statement of the legal position. There is ample authority for the proposition that an arbitration clause in a contract does not oust the jurisdiction of the court, as otherwise it would be illegal and void as being contrary to public policy, and such clause is not a bar or defence to proceedings brought in respect of a dispute agreed to be referred to Arbitration, but it merely gives the right to any other party to such proceedings, subject to certain formalities and conditions, to apply for a stay of proceedings and reference of such dispute to Arbitration. See *Doleman and Sons* v. *Osset Corporation* [1912] 3 K.B. p. 257 and *Heyman* v. *Darwins Ltd.*, [1942] 1 All E.R. p. 337.

The defendants in the present case have taken no step, at the proper time i.e. before delivering any pleadings or taking any other steps in the proceedings, or at all, to stay this action on the ground that the parties had agreed to refer their disputes to arbitration. In these circumstances, I think that the plaintiffs are not precluded from having the whole question determined in Court and the defendants must be taken to have abandoned their right to so refer the dispute. But in the course of his final address learned counsel for the defendants has referred me to clause 102 of the Cyprus Admiralty Jurisdiction Order, 1893 and has submitted that although he took no steps to stay proceedings and have the matter referred to arbitration it was still open to him to apply to this court to decide on this same question of the Arbitration clause in the form of a special case under this rule. The rule cited enables the Court, if it appears to it that there is a question of law which it would be convenient to have decided in the first instance, to direct that such question be raised in a special case or in such other manner as may be deemed expedient. I find myself unable to see how in the circumstances of this case, in which the defendants had to follow a specific prescribed procedure if they wished to go to arbitration, they may, at this stage, invoke this rule at all or how the rule may be applied to the facts of this case.

One last point raised by learned counsel for the defendants

is with regard to the provision in the Bill of Lading that the 7,117 pieces on deck were travelling at charterer's risk. In my view this provision must be read in conjunction with clause 26. In other words the defendants would not be liable for any risks so long as they complied with the obligations expressly undertaken by them under the charter-party and particularly with their obligation under the said clause 26.

In the light of all the above I am of the opinion that the plaintiffs have proved their case and are entitled to the assessed damages.

In the result there will be judgment for the plaintiffs for £500 and costs.

Judgment and order as to costs as aforesaid.