Mitsui OSK Lines Ltd v Samudera Shipping Line Ltd
[2007] SGHC 41

Case Number : Suit 445/2006, SUM 438/2007

Decision Date : 30 March 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leong Kah Wah (Rajah & Tann) for the plaintiff; Chan Leng Sun (Ang & Partners) for the defendant

Parties : Mitsui OSK Lines Ltd — Samudera Shipping Line Ltd

30 March 2007 Judgment reserved.

Choo Han Teck J:

1 This was an application by the defendant to strike out the plaintiff's action in this suit. On 15 June 2006, the plaintiff together with another company namely, Mitsui OSK Lines (SEA) Pte Ltd commenced arbitration proceedings against the defendant, claiming damages for breach of contract and in negligence in tort. In the contract of carriage in question, Mitsui OSK Lines (SEA) Pte Ltd purported to have executed the agreement "on behalf of the plaintiff". When the defendant denied this, and consequently, denied any liability to the plaintiff on the ground that it (the defendant) did not have any contractual relationship it (the plaintiff), the plaintiff commenced this action in tort against the defendant. It did so because it feared that should the arbitrator find that the defendant was right, then the plaintiff would have no standing to make its claim in tort in the arbitration proceedings.

2 Commencement of this suit meant that the defendant has to defend the claim against the plaintiff in this suit as well as against the arbitration proceedings commenced by the plaintiff and Mitsui OSK Lines (SEA) Pte Ltd and both proceedings concern the same facts, that is, the loss of certain cargo, the subject of which was not in dispute. The defendant would only be liable for one set of damages, that is, either in contract or in tort, and not for both. It would be liable only to the plaintiff or Mitsui OSK Lines (SEA) Pte Ltd and not to both. Thus, unless one of the proceedings is stayed, the defendant has to defend itself on the same set of facts against the same plaintiff twice over, and that would be wrong. For that reason, one of the two proceedings is stayed pending the outcome of the other. The plaintiff had the option of suing the defendant in contract and in tort in this suit but he did not, electing to sue only in tort.

3 Mr Chan, counsel for the defendant, applied by this summons, for an order that the [plaintiff] "be restrained and an injunction be granted restraining the plaintiff from prosecuting arbitration or other proceedings against the [defendant] in respect of the claims made in this action." He submitted that after filing a protective writ as the plaintiff had done, it could have applied straightaway to have the action stayed pending the outcome of the arbitration proceedings. Instead, it proceeded to take the further step of filing the Statement of Claim. Mr Chan submitted that under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act"), which was the applicable Act in this case, either party could have applied for a stay of proceedings. Section 6 provided as follows:

> (1) Where any party to an arbitration agreement institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering

any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that -

(a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,

make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

4 It seems to me that s 6 of the Act applies only in cases in which the party instituting a court action was "a party to an arbitration agreement". In the present case, the defendant objected to the plaintiff's standing in the arbitration proceedings precisely because it alleged that the plaintiff had no contractual relations with the defendant, that is to say, that the plaintiff was not a party to the arbitration agreement. So, although the plaintiff should not be permitted to bring legal proceedings against the defendant in two forums at the same time over the same set of facts, s 6 of the Act cannot be the basis for the defendant's application to stay the arbitration proceedings. The plaintiff in this action was not a party to the arbitration agreement. That agreement was executed between Mitsui OSK Lines (SEA) Pte Ltd and the defendant. Although the plaintiff claimed that Mitsui OSK Lines (SEA) Pte Ltd executed the agreement on its behalf, the agreement itself made no mention of that as Mr Chan had pointed out. Whether that was so would be a matter of fact for the arbitration to determine and was outside the scope of the proceedings before me. An order for the stay of proceedings would affect a third party, namely, Mitsui OSK Lines (SEA) Pte Ltd. It would be more equitable to stay the present proceedings in this suit. Both parties would have their dispute resolved together with that of Mitsui OSK Lines (SEA) Pte Ltd at the arbitration, which would be determinative of all issues save the one in tort which the arbitrator would not have against the plaintiff if it is established that the plaintiff had not contractual basis to commence arbitration proceedings against the defendant. Its claim in tort would not have been re-litigated and there is thus no prejudice against the defendant.

5 Mr Chan argued that having filed the Statement of Claim, the plaintiff had elected to litigate and cannot simultaneously pursue its claim in arbitration by reason of s 6 of the Act. Counsel relied on my decision in *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 4 SLR 441, at 448 where I had held that "once an election has been made and accepted, the parties may resort to arbitration again only by a subsequent consensus." That would be relevant here had the defendant accepted the plaintiff's challenge in the court action, but it did not. Nonetheless, one of the proceedings by the plaintiff must be stayed, and in my view, the present action would be the appropriate one. The only issue was whether this court had the power to stay the present proceedings. By cl 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, R5, 2006 Rev Ed) the High Court is empowered to dismiss or stay proceedings by reason of a multiplicity of actions (and other grounds not relevant here). Mr Chan argued that this power should not be exercised to "undermine the effect of other legislation and established doctrine". By that, counsel was referring principally to s 6 of the Act. Apart from the reasons above, I would add that the High Court's power has not been expressly curtailed as counsel submitted. It would be a severe handicap to the administration of justice if the court cannot exercise that power in the present circumstances. Even the power under s 6 of the Act is a power and not a rule. Such powers enable the court to adjudicate

according to the facts of each case, so that a fair application of the general legislative (and common law) rules may be made.

6 For the reasons above, I will dismiss the defendant's application to stay the arbitration proceedings and order instead, a stay of the present action pending the result of the arbitration, or further order of court. The parties will be at liberty to apply in this respect. I shall hear parties on costs at a later date if they are unable to agree costs.