Sunlight Mercantile Pte Ltd and Another v Ever Lucky Shipping Co Ltd [2003] SGCA 47

Case Number : CA 42/2003

Decision Date : 21 November 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : R Govintharasah (Gurbani and Co) for the appellants; Jude Benny and Adam Abdur Rahim (Joseph Tan Jude Benny) for the respondents

Parties : Sunlight Mercantile Pte Ltd; Liberty Citystate Insurance Pte Ltd formerly known as Citystate Insurance Pte Ltd — Ever Lucky Shipping Co Ltd

Admiralty and Shipping – Carriage of goods by sea – General average – York Antwerp Rules – Whether shipowner entitled to general average contribution when failed to meet obligation under common law to provide seaworthy vessel – Whether exclusion clause in bill of lading sufficient to exclude shipowner's liability in failing to provide seaworthy vessel

Admiralty and Shipping – Carriage of goods by sea – Limitation of liabilities – Seaworthiness – Exclusion clause – Whether exclusion clause in bill of lading sufficient to exclude shipowner's liability in providing seaworthy vessel

Words and Phrases – "Howsoever arising" – "Howsoever caused" – Whether use of these phrases in bill of lading sufficient to exclude shipowner's obligation to provide seaworthy vessel at common law

Delivered by Tan Lee Meng J

1. The appellants, Sunlight Mercantile Pte Ltd and Liberty Citystate Insurance Pte Ltd, who owned a cargo of timber carried on the deck of a vessel owned by the respondents, Ever Lucky Shipping Co Ltd, appealed against the trial judge's ruling that they were obliged to contribute towards general expenses incurred by the respondents as a result of the unseaworthiness of the vessel. The respondents contended that the judge rightly held that they were entitled to such a contribution even though the general average expenses had been necessitated by the unseaworthiness of their vessel because their bills of lading contained exceptions to the effect that they were not responsible for loss or damage "howsoever arising" or "howsoever caused". We agreed with the appellants that the exceptions in question could not be relied upon as the respondents had failed to fulfil their overriding obligation to provide a seaworthy ship at the commencement of the voyage and now set out the reasons for our decision.

A. Background

2. In September and October 1999, the appellants shipped a cargo of African round logs from three West African ports to Tuticorin, India, on board the respondents' vessel, a bulk log carrier. The African ports were Port Owendo, Port Gentil and Bata. A total of 2,212 logs, measuring slightly more than 10,000 cubic metres, were loaded onto the vessel in the three ports. Loading of the cargo, which commenced on 28 September 1999, was completed on 26 November 1999. Twenty-one bills of lading were issued for the cargo. The bulk of the cargo was stowed in the holds. However, some 430 logs were stowed on deck and this fact was noted in the bills of lading for the deck cargo.

3. On 18 December 1999, the vessel left Port Gentil and commenced on her contractual voyage. Due to unexpected delays at Port Gentil and Port Owendo, the vessel had insufficient provisions on board and the master was directed to proceed to Cape Town to take on bunkers, provisions and fresh water. On the way to Cape Town, the vessel encountered a number of

problems. She sailed at a reduced speed because her ageing hull had been fouled by seaweed and barnacles as a result of anchoring for an extended period at Port Owendo. Furthermore, on 22 and 23 December 1999, she had to stop for a while because of generator failure. Finally, on 24 December 1999, there was an explosion in her main engine crankcase. The explosion occurred without any warning signs. After the explosion, the engine could not be operated and the vessel lay adrift in the ocean.

4. The vessel was towed to Port Launda, the nearest port, and she arrived there on 28 December 1999. As she could not be repaired at that port, she was towed to Cape Town for repairs to be effected. She arrived at Cape Town on 3 March 2000 but it was difficult to obtain a repair berth and the respondents asserted that unreasonable demands were made by the port authorities for the provision of such a berth. A decision was then made to have the vessel towed all the way from Cape Town to Tuticorin, the port of discharge.

5. The respondents insisted that the cargo owners were obliged to contribute towards general average expenses because they were attempting to save the vessel and her cargo from a common danger. After negotiations between the respondents and the appellants, a general average bond was furnished by the first appellants and a general average guarantee was provided by the second appellants. The vessel arrived at Tuticorin on 14 May 2000 and the discharge of her cargo of logs was completed on 4 June 2000. On 29 June 2000, the respondents sold the vessel as the cost of sending her to a shipyard for complete repairs was too costly and would take a few months. The vessel was subsequently scrapped.

6. The respondents informed the appellants that general average expenses incurred by them totalled US$910,288.78. Under the York Antwerp Rules 1974 and/or the York Antwerp Rules 1994, US$746,967.18 was attributable to the cargo and this sum was claimed from the appellants as general average contribution or, alternatively, as damages.

7. The appellants asserted that as the respondents had failed to ensure that the vessel was seaworthy before and at the beginning of the voyage, the question of a contribution for general average expenses did not arise. The respondents retorted that even if the vessel had not been seaworthy at the commencement of the voyage, the bills of lading for the deck cargo contained exceptions that were wide enough to allow them to claim a contribution for general average expenses from the appellants.

B. The trial judge's decision

8. The trial judge noted that the issue before her was whether or not the respondents had, in the light of Rule D of the York Antwerp Rules, a right to claim a contribution towards that expenditure from the appellants. Rule D of the York-Antwerp Rules 1974, which governs rights of contribution towards general average loss and expenses, provides as follows:

> Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

9. As for the meaning of the term "fault" in Rule D of the York-Antwerp Rules, the trial judge referred to *Goulandris Brothers Ltd v Goldman & Sons Ltd* [1958] 1 QB 74, where Pearson J explained that "fault" in Rule D refers to an actionable fault. For the purpose of determining whether or not there was an actionable fault in this case, much depended on whether or not the vessel was

seaworthy at the commencement of the voyage and on the effect of exceptions in the bills of lading.

10. The trial judge found that the vessel was unseaworthy when she left Port Gentil for her contractual voyage because of defects in her main engine. She also found that the explosion in the main engine was not caused by a latent defect. The breach of the absolute undertaking of seaworthiness by the respondents amounted to an actionable fault that would deprive the respondents of a general average contribution from the appellants unless there was an exception in the contract of carriage that altered the position. After noting that the deck cargo was outside the scope of the Hague-Visby Rules, the trial judge added that the issue before her was one of construction of the exceptions in the bills of lading for the deck cargo. Two types of exceptions were found in the bills of lading in question. One batch of bills of lading provided as follows:

> Pieces shipped on deck at Shipper's risk; the Carrier not being responsible for loss or damage howsoever arising.

On the other hand, another batch of bills of lading contained the following slightly different words:

> Logs … loaded on deck at the shipper's … risk, expense and responsibility without liability on the part of the vessel or her owners for any loss, damage, expense or delay howsoever caused.

12. The trial judge laid great emphasis on the words "howsoever arising" in the first batch of bills of lading and the words "howsoever caused" in the second batch of bills of lading. Relying on the decision of Langley J in *The Imvros* [1999] 1 Lloyd's Rep 848, she held that these words were wide enough to absolve the respondents from liability for unseaworthiness. As such, there was no actionable fault on the part of the respondents and the appellants were obliged to contribute their share of the general average expenses. The appellants, who were dissatisfied with this ruling, appealed against the trial judge's decision.

C. The Appeal

13. As the contract for the carriage of the appellants' deck cargo is outside the ambit of the Hague-Visby Rules, it ought to be borne in mind that at common law, a shipowner has an absolute obligation to send his ship out to sea in a seaworthy state at the commencement of the agreed voyage. In *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co* [1922] 2 AC 250, 260, Lord Sumner explained the effect of this obligation on exceptions in the contract of carriage by sea in the following succinct terms:

> Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability namely that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowner's protection in such a case.

14. It is well established that an exception that is intended to relieve a shipowner from the consequences of the unseaworthiness of the vessel at the commencement of the voyage must be "express, pertinent and apposite" (per Bigham J in *Sleigh v Tyser* [1900] 2 QB 333, 337). Innumerable cases have shown how difficult it is to frame an exception that would be applicable in cases of unseaworthiness. In *Steel v State Line SS Co* [1877] 3 AC 72, 89, Lord Blackburn gave an indication of what a shipowner might do to escape liability for unseaworthiness when he said as follows:

> The shipowners might have stipulated, if they had pleased …. We will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship, that is your look-out; you shall not have any remedy against us if we do.

15. In *The Makedonia* [1962] 1 Lloyd's Rep 316, one of the rare cases where an exception was applicable even though loss was caused by unseaworthiness, the exception in question was almost as exhaustive as that suggested by Lord Blackburn. It provided as follows:

> [T]he carrier shall not under any circumstances of any kind whatsoever be liable for any loss of or damage or delay thereto, whether or not such loss, damage or delay may be due to the act, neglect or default of the carrier or the master, pilot, officers, crew, stevedores … or other person whomsoever for whom the Carrier may be responsible, whether in the service of the Carrier or not, and whether or not the above-named vessel … was unseaworthy at the time of loading or sailing or at any other time.

16. In contrast, in most other cases, less exhaustively worded exceptions have proved to be ineffective where loss was caused by unseaworthiness. In *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16, a cargo of meat arrived at its destination in a damaged condition because of the unseaworthiness of the ship, which resulted from the shipowners' agents' negligence. The shipowners sought to rely on an exception which provided that they were not liable for "any damage or detriment which is capable of being covered by insurance". It was held that this exception did not apply where loss has resulted from unseaworthiness. Lord Loreburn agreed that the exception appeared to excuse the shipowners from every imaginable liability that could be covered by insurance. However, in his view, the clause was so ill thought out and expressed that it was not possible to be sure what the parties intended to stipulate. He reiterated that while shipowners may contract themselves out of their duty to provide a seaworthy ship, they cannot do so "by producing language which may mean that and may mean something different".

17. In *Ingram and Royle Ltd v Services Maritimes du Treport Ltd* [1913] 1 KB 538, the defendants carried the plaintiffs' cargo of mineral water on board their ship, which was unseaworthy when she commenced on her voyage because she also carried a large quantity of improperly stowed cases of metallic sodium, which was dangerous if mixed with water. When the ship encountered rough weather, several cases of metallic sodium broke loose and came into contact with water. As a result, there were explosions and a fire on board the ship, which was lost together with her cargo. As the cases of metallic sodium had broken loose because they had been stowed with insufficient care, a question arose as to whether the shipowners could rely on an exception in the bill of lading which provided that the shipowners were not responsible for "any neglect of the officers in the stowing of the ship". Scrutton J held that this exception was only applicable if the ship had been seaworthy at the commencement of the voyage. In his view, this exception was restricted to situations where negligent stowage damaged cargo without rendering the ship unseaworthy.

18. In the present case, the respondents, who relied on Langley J's decision in *The Imvros* [1999] 1 Lloyd's Rep 848, contended that the words "howsoever arising" and "howsoever caused" in the exceptions in the bills of lading enabled them to avoid liability for loss caused by unseaworthiness. In *The Imvros*, a vessel, which was on a trip charter, carried a cargo of sawn timber in bundles from Brazil to Durban, Kohsichang and Manila in that order. The charterparty required that bills of lading issued for deck cargo include a clause to the effect that the cargo was carried "on deck at Shippers' risk without responsibility for loss or damage however caused". Some of the cargo of timber was stowed on deck but the bills of lading for the deck cargo was not claused in the manner required under the charterparty. While on the way to Durban, part of the deck cargo was

lost overboard during heavy weather. The cause of the loss was unseaworthiness as the cargo had been insufficiently lashed before the commencement of the voyage. One of the issues that was considered in an action between the shipowners and the charterers was whether or not if the bill of lading had been claused as required, the former would have been able to avoid liability for the loss of the timber. Langley J disagreed with the cargo-owners' contention that the words "howsoever caused" were insufficient to deny the shipowners the right to avoid liability even though the cargo had been lost as a result of the unseaworthiness of the vessel.

19. *The Imvros* has been criticised and rightly so (see *Simon Baughen*, LMCQ [2000] 295). We do not think that it ought to be followed as it is out of line with the authorities. For a start, insufficient attention was given in that case to a shipowner's implied duty under the common law to provide a seaworthy ship at the commencement of the voyage. The main case relied on by the judge, namely *Travers v Cooper* [1915] 1 KB 73, concerned negligence and not unseaworthiness. In *Travers v Cooper*, where goods were carried on a barge and the relevant exception provided that there was no liability for damage to goods however caused which can be covered by insurance, a majority of the English Court of Appeal accepted that those words covered damage caused by negligence. Reliance was placed on a number of railway cases which suggested that the plain meaning of the words "however caused" ought not be restricted. In our view, this reliance was misplaced because there is no obligation in contracts of carriage of goods by rail that equals the fundamental obligation of a carrier to provide a seaworthy ship. In any case, this decision must now be viewed in the context of the threefold test for negligence referred to by Lord Greene MR in *Alderslade v Hendon Laundry Ltd* [1945] KB 189, 192.

20. As far as the words "at shipper's risk" in the exceptions in the present case are concerned, in *The Galileo* [1914] P 9, a decision of the English Court of Appeal, Lord Sumner explained that their Lordships thought that the words "at shipper's risk" were "clearly referable to other risks than that of a breach of this fundamental obligation of the shipowner" to provide a seaworthy ship.

21. As for the words "however caused" or words of similar effect, these have also been construed in contracts of carriage by sea in relation to a shipowner's obligation to provide a seaworthy ship at the commencement of the voyage on previous occasions and the conclusions reached do not support the decision in *The Imvros*. In *Steel v State Line SS Co* [1877] 3 AC 72, a cargo of wheat was damaged by sea water that burst through a porthole that had been insufficiently fastened before the commencement of the voyage as a result of the negligence of a crew member. The shipowners tried to rely on the following widely worded exception in the bill of lading to avoid liability for the loss in question:

> Not accountable for leakage, breakage … however caused. Not responsible for … any of the following perils, whether arising from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, or persons in the service of the ship, or for whose acts the shipowner is liable or otherwise: namely, risk of craft or hulk, or transhipment, explosion, heat or fire at sea, in craft or hulk, or on shore, boilers, steam or machinery, or from the consequence of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other peril of the seas, rivers, navigation or land transit, of whatever nature or kind soever, and however caused, excepted.

22. It was held by the House of Lords that an express exception against negligence does not cover loss due to unseaworthiness. The approach of the House of Lords must apply with even more force where exceptions, such as those in the present case, do not specifically refer to negligence.

23. The decision of the English Court of Appeal in *Owners of Cargo on Ship "Maori King" v Hughes*

[1895] 2 QB 550 also illustrates that an exception that is applicable to negligence does not, without more, apply to loss caused by unseaworthiness. In that case, the shipowners agreed to carry a cargo of frozen meat from Melbourne to London. As the refrigeration machinery broke down due to a defect that was present at the commencement of the voyage, the cargo had to be landed in Sydney and sold there before it became putrid. An exception in the contract of carriage provided as follows:

> Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto arising from failure or breakdown of machinery …. nor for the consequences of any act, neglect, default, or error of judgment …. nor for any other cause whatsoever….

24. It was held by the Court of Appeal that the loss was due to the shipowners' failure to provide a ship that was fit to carry the frozen meat to London. As for the effect of the exception in question, Lord Esher MR explained at p 555 why it was inoperative in the following terms:

> But the exceptions here are, in my opinion, of the same kind as exceptions in ordinary bills of lading – that is, with regard to matters which may happen during the voyage…. They do not apply to the primary warranty of the condition of the machinery at the time when its application is to begin.

25. We are aware that in *The Kapitan Petko Voivoda* [2003] 2 Lloyd's Rep 1, the English Court of Appeal accepted that carriers may rely on Art IV r 5 of the Hague Rules to limit their liability even where loss has been caused by unseaworthiness. However, that case is distinguishable as it involved the interpretation of Art IV r 5 of the Hague Rules, which provides that unless the nature and value of the goods have been declared by the shipowner before shipment and inserted in the bill of lading, "neither the carrier nor the ship shall in any event" be liable for an amount exceeding £100 per package or unit or the equivalent of that sum in other currency. Longmore LJ explained that as the most natural meaning of the words "in any event" is "in every case", Art IV r 5 may be relied upon by a carrier where unseaworthiness has caused loss to deck cargo.

26. Apart from the fact that we are presently dealing with the common law obligations of a shipowner and not the Hague Rules, it cannot be overlooked that the case before us concerns the effect of exceptions and not provisions that limit liability. In *The Happy Ranger* [2002] 2 Lloyd's Rep 357, 364, Tuckey LJ, with whom Rix and Aldous LJJ agreed, rightly pointed out that a provision that seeks to limit liability is different in character from an exception. That is why under the Hague and Hague-Visby Rules, the exceptions in Art IV r 2 cannot be relied upon where unseaworthiness has caused loss because, as Lord Somervell put it in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, Art III r 1 of the Rules, which requires a carrier to exercise due diligence to have the ship made seaworthy before and at the beginning of a voyage, creates an overriding obligation.

27. As we held that the exceptions in the bills of lading for the deck cargo in the present case are inapplicable because the vessel was unseaworthy when she commenced on her contractual voyage, it followed that there was an actionable fault on the part of the respondents. In view of this, the question of a contribution from the appellants for general average expenses did not arise. We thus allowed the appeal with costs. As for the costs in the court below, we decided that the matter should, in the circumstances of the case, be dealt with by the trial judge.