1962

Apr. 18, 19

May 1

QUEBEC ADMIRALTY DISTRICT

BETWEEN:

NORTHERN SALES LIMITED .....PLAINTIFF;

AND

NATIONAL GYPSUM COMPANY INC. ..DEFENDANT.

Shipping—Practice—Action on charterparty containing clause for arbitration of disputes—Motion to dismiss action or stay of proceedings dismissed—Arbitration clause null and void as against public policy—Arbitration proceedings in foreign country no bar to action in Canada.

Plaintiff's action is to recover from defendant damages alleged to have been sustained as the result of a breach at Montreal, Quebec of a charterparty entered into between them at New York, U.S.A. The charterparty provided for the settlement of any dispute by arbitration at New York. Defendant moves for a dismissal of the action or a stay of proceedings on the ground *inter alia* that the Court is without jurisdiction to hear it.

Held: That this Court has jurisdiction to hear and determine the issues and the arbitration clause in the charterparty is against public policy and null and void.

2. That arbitration proceedings commenced in New York do not bind the defendant and do not constitue a *lis pendens* and do not bar the action.

MOTION to have plaintiff's action dismissed or proceedings stayed.

The motion was heard before the Honourable Mr. Justice A. I. Smith, District Judge in Admiralty for the Quebec Admiralty District at Montreal.

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Robert A. Hope for the motion.

L. S. Reycraft contra.

SMITH D.J.A. now (May 1, 1962) delivered the following judgment:

The court, seized of defendant's motion demanding the dismissal of plaintiff's action or alternatively the staying of all proceedings therein, having heard the parties by their respective attorneys, examined the proceedings and deliberated:

By its action the plaintiff claims damages allegedly sustained by it as the result of defendant's breach of a charterparty signed at New York, on the 7th day of December 1960, by which the defendant undertook that its steamship *Lewis R. Sanderson* would proceed with all convenient speed to Montreal and there load a cargo of wheat for carriage to "one safe Port out of Civitavecchio, Genoa or Naples".

It is alleged that the said vessel failed to proceed to Montreal and there load said cargo in accordance with the said contract with the result that the plaintiff was unable to ship wheat which it had contracted to deliver to Federazione Italiana dei Consorzi Agrari and as a consequence was obliged to pay damages to said purchaser; which damages, plus loss of profit, interest and expenses, total the sum of $81,307.78, the plaintiff claims from the defendant.

The defendant's motion which seeks to obtain the dismissal of plaintiff's action or alternatively a stay of proceedings is based upon the fact that the said charterparty contains what is described as a

New York Produce Exchange Arbitration Clause

Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

It appears that by letter dated February 22, 1962, plaintiff through its attorneys claimed payment of the above-mentioned damages. To this letter the defendant through its attorneys replied by letter of February 28, 1962, indicating that it wished to arbitrate the matter in accordance

with the terms of the charterparty and appointed as its arbitrator one P. V. Everett, of New York, and called upon plaintiff to name an arbitrator by March 2, 1962.

On March 7, 1962, defendant's attorneys obtained an order from the United States District Court (Southern District of New York) ordering plaintiff to show cause why it should not arbitrate. The plaintiff appeared in response of this order and contested the jurisdiction of the United States Court, and, on March 9, 1962, procured the issue of a Writ of Summons in the present case.

On April 3, 1962, plaintiff's contestation of the New York arbitration was dismissed and plaintiff was ordered to appoint an arbitrator within 10 days.

The defendant appeared on the present action under protest and in support of its present motion it alleges that:

a) The said charterparty signed and dated in New York called for arbitration in New York;

b) Plaintiff was called on to arbitrate prior to the issue of the Writ herein;

c) Defendant appointed its arbitrator to the knowledge of Plaintiff's attorneys;

d) Plaintiff has not named an arbitrator and has not complied with the terms of the charterparty or the law;

e) The dispute should first be arbitrated;

f) The plaintiff has been ordered to appoint an arbitrator by a competent Court having jurisdiction in the matter;

g) There is *lis pendens*;

h) This Court has no jurisdiction.

I propose to deal first with the last mentioned ground of attack, namely that this Court is without jurisdiction.

In my opinion, this ground of complaint is unfounded. On the contrary this Court has jurisdiction both *ratione materiae* and territorially. Plaintiff's claim arises "out of an agreement relating to the use or hire" of a ship and falls within the jurisdiction of this Court *ratione materiae*. (*Admiralty Act*, Sec. 18, Para. 3(*a*)(i)).

The plaintiff in its Statement of Claim alleges breach of the said contract at Montreal and this allegation has not been denied. It would appear therefore that this Court has territorial jurisdiction in virtue of Sec. 20(1)(*e*) of the *Admiralty Act*, which provides that:

20(1) An action may be instituted in any registry when:

(*e*) the action is *in personam* and is founded on any breach or alleged breach within the district or division of such registry, of any con-

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tract, wherever made, that is one within the jurisdiction of the Court and, according to the terms thereof, ought to be performed within such district or division.

The arbitration clause above quoted, even if valid, could not have the effect of removing the dispute from the jurisdiction of this Court. *(Code of Civil Procedure 94) Gordon & Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd.*[1]

It was submitted on behalf of the defendant that if this Court has jurisdiction the charterparty is governed by the law of the United States or alternatively by the law of England and that the question of whether or not the said arbitration clause is binding and valid must be determined in accordance with the law of the United States or of England. This is a proposition which I am unable to accept.

Arbitration agreements and proceedings, as well as the rules relating to *lis pendens* are procedural in nature. (*Code of Civil Procedure* 411 *et seq;* and *Code of Civil Procedure* 173) and, in the absence of any provision relating to same in the Admiralty Rules or in the *General Rules and Orders of the Exchequer Court,* they are governed by the practice and procedure in force in the Superior Court of this Province. (*General Rules and Orders in Admiralty,* Rule 215; and *General Rules and Orders of the Exchequer Court,* Rule 2(1)(*b*).)

It must be determined therefore whether the said arbitration clause is valid according to the laws of the Province of Quebec and is one which our Courts will enforce and give effect to.

The question as to whether arbitration clauses which would have the effect of removing the hearing and determining of disputes from the jurisdiction of our Courts are or are not contrary to public order has been the subject of much judicial discussion and certainly some difference of opinion. Perhaps the most recent decision bearing on this matter is the judgment of the Court of Appeal in the case of *Vinette Construction v. Dobrinsky*[2], where the Court (one judge dissenting) held that an arbitration clause which constitutes a true clause compromissoire, the effect of which would be to deprive the Court of jurisdiction, is contrary to public order and null. This decision is in accordance with

[1] (1940) 40 Que. K.B. 428. [2] [1962] Que. Q.B. 62.

a considerable body of jurisprudence and must, in my opinion, be regarded as binding until it has been overruled. It would, moreover, appear to be in accord with the common law of England.

Halsbury Laws of England, Vol. 8, 2nd Ed. page 532, Para. 1177.

That the arbitration clause under consideration is a true clause compromissoire, the effect of which, if enforced, would be to deprive the Court of jurisdiction, I have no doubt.

Counsel for defendant argued however that the validity of the said arbitration clause must be determined in accordance with the laws of the United States, where the contract was made. It is no doubt true that our Courts in adjudicating in respect of contracts executed in foreign jurisdiction are obliged to give consideration to the *lex loci contractus,* but they will not enforce or give effect to a contract which, under the laws of this Province, is against public order, even though the said contract may be legal and binding in the jurisdiction in which it was made. (*Civil Code* 13; *Johnson Conflict of Laws,* p. 186).

Apart however from the fact that the said arbitration clause is against public order and illegal, the mere institution of arbitration proceedings in the State of New York does not, in the opinion of the Court, constitute *lis pendens* and justify the defendant's demand that the proceedings taken before this Court be either dismissed or stayed.

Whatever the decision of the Arbitration Board in New York may be, it will not be *res judicata* here (*Code of Civil Procedure* 210) and for that, if for no other reason, such arbitration proceedings do not constitute *lis pendens.* (*Johnson Conflict of Law,* Vol 2, p. 434; *The Howard Guernsey Man. Co. v. King*[1]; *Rice v. Holmes*[2]; *Roscoe Admiralty Practice,* 5th edit. p. 102; *The London*[3], *The Christiansborg*[4].

I conclude therefore that this Court has jurisdiction to hear and determine the issues herein and that the arbitration clause above-quoted is a clause compromissoire and, as such, is against public policy and null and void. This being so, the said clause is not binding upon the defendant and

[1] (1894) 5 Que. S.C. 182.
[2] (1899) 16 Que. S.C. 492.
[3] [1931] P. 14.
[4] (1885) 10 P.D. 149.

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the arbitration proceedings commenced in New York do not constitute *lis pendens* and are no bar to the present action.

The defendant's motion is unfounded and is dismissed with costs.

Judgment accordingly.