CARGO HANDLING CORPORATION LTD v FAST SHIPPING & TRANSPORTATION CO. LTD

2022 SCJ 419

Record No. 1642 – 6B/45/20

THE SUPREME COURT OF MAURITIUS

(COURT OF CIVIL APPEAL)

In the matter of:

Cargo Handling Corporation Ltd

Appellant

v.

Fast Shipping & Transportation Co. Ltd

Respondent

JUDGMENT

On 21 February 2019, Cargo Handling Corporation Ltd (Cargo Handling) caused a statutory demand to be served upon Fast Shipping & Transportation Co. Ltd (Fast Shipping) pursuant to Section 180 of the Insolvency Act (the Act). The statutory demand pertained to an alleged debt in an amount of Rs 4,681,704.80 representing outstanding stevedoring charges due to Cargo Handling for the period October 2013 to February 2014 with respect to stevedoring services which it had provided to Evergreen Marine Corporation (Taiwan Ltd) (Evergreen). It has never been in dispute that Fast Shipping was the agent of Evergreen in Mauritius at all material times.

On 1 March 2019 Fast Shipping made an application pursuant to Section 181 of the Act for the setting aside of the statutory demand. In its application Fast Shipping essentially averred:

(i) that by virtue of an agency agreement with Evergreen, Fast Shipping acted as Evergreen's shipping agent in Mauritius until 31 March 2014 when Evergreen put an end to the agreement;

(ii) the dispute regarding Evergreen's termination of the agreement, was referred for arbitration in London;

(iii) an arbitration award was given against Fast Shipping on 9 March 2018 holding *inter alia* that the *"question of stevedoring charges has been taken care of …"* (affidavit dated 1 March 2019);

(iv) Fast Shipping has appealed against the said award before the *"competent Court in England"* and the appeal is pending;

(v) the claim, subject matter of the statutory demand, should be addressed to Evergreen, as principal, inasmuch as Fast Shipping no longer has any capacity to represent the principal;

(vi) as from the time of the dispute, Fast Shipping did not receive any further payment from Evergreen;

(vii) *"there is no sum due by* [Fast Shipping] *to* [Cargo Handling] *until and unless the appeal goes against* [Fast Shipping]*."*

Fast Shipping accordingly contended that there was a substantial dispute as to whether it was personally liable for the amount claimed in the statutory demand.

In the light of the evidence before her and after hearing arguments from both parties, the Court found that:

(i) it was not in dispute that Cargo Handling had provided stevedoring services to Evergreen; and that

(ii) it was entitled to payment in the amount claimed in respect of the stevedoring services provided.

The Court was however of the view that there was a substantial dispute as to the identity of the debtor i.e. namely whether it was Evergreen or Fast Shipping, which was responsible for payment of the debt due to Cargo Handling.

It went on to hold that in the circumstances Fast Shipping had established that there exists a substantial dispute as to whether it was liable for the debt and the statutory demand was accordingly set aside.

Cargo Handling has now appealed against the said judgment on four grounds.

All the grounds in effect challenge the trial Judge's finding that Fast Shipping had been able to establish that there is a substantial dispute as to whether Fast Shipping is liable to Cargo Handling for the debt arising out of the stevedoring services provided to Evergreen; we shall deal with all the grounds of appeal together.

It was submitted under:

(i) Ground 1:

that *"The Learned Judge was wrong to find that she had to "embark upon an extended enquiry to determine whether the Applicant has defrauded Evergreen Marine." Having wrongly stated what she was required to do in an application to set aside a statutory demand, she has necessarily come to the wrong conclusion."*

(ii) Ground 2:

that the learned Judge had failed to appreciate:

(a) that the invoices, subject of the statutory demand, were all addressed to Fast Shipping and the latter had not, at the material time ever contended that they had been mistakenly directed to it;

(b) that Fast Shipping had already executed part of the payment obligations due on the said invoices;

(c) the evidence on record showing that Evergreen had transferred all funds due in respect of the said debt to Fast Shipping.

(iii) Ground 3:

that the learned Judge had failed to appreciate that Fast Shipping had given different versions to explain its failure to effect the payments due to Cargo Handling;

(iv) Ground 4:

that the trial Judge was wrong to conclude that Fast Shipping had discharged its burden of proof and established that there was a substantial dispute as to the identity of the debtor –

(a) in the absence of the terms of the agency agreement between Fast Shipping and Evergreen;

(b) in the light of the evidence which revealed that:

(i) Fast Shipping had already made part payment of the amount due on the invoices;

(ii) Evergreen had already transferred all necessary funds for payment for Cargo Handling's services to Fast Shipping.

The Law

An applicant who is seeking an order to set aside a statutory demand bears the burden to show that there is arguably a genuine and substantial dispute that it is not liable for the amount claimed.

However, *"The mere assertion that a dispute exists is not sufficient. Material, short of proof, is required to support the claim that the debt is disputed."* **(Amstar Interiors Limited v. AIS Insulation Limited (In Liquidation) - HC AK CIV-2011-404-3320)**

It is accordingly incumbent upon an applicant to lay *"… a proper foundation for the dispute and assertions made must pass the threshold of credibility ..."*

The applicant must thus –

> *"… place before the Court information which, while not being required to carry the Court to the point where it is able to conclude that the information is correct, at least has the appearance of sufficient reliability that it can be said that a Court dealing with the matter could accept the account given as being correct".* **[Denize Farms Limited and Spotburn Farms Limited (In liquidation) – (CIV-2011- 404-5374)]**

In the present case, the contentions of Fast Shipping were as follows:

(1) the claim should be addressed to the principal, namely Evergreen, to whom the stevedoring services were provided;

(2) Fast Shipping no longer had the capacity to represent Evergreen inasmuch as on 31 March 2014 Evergreen had informed Fast Shipping

that it would terminate, as from 30 April 2014, the agency agreement existing between them;

(3) following the termination of the agency agreement, arbitration proceedings were instituted and an award was handed down by the arbitrator on 9 March 2018, the award went against Fast Shipping;

(4) Fast Shipping has lodged an appeal against the arbitration award and the appeal is still pending;

(5) in the light of the averments in its first affidavit *"no sum is due by"* Fast Shipping *"until and unless the appeal goes against"* it.

Before the lower Court it was not in dispute that on 31 March 2014 pursuant to a notice of termination, Evergreen had put an end to its agency agreement with Fast Shipping with effect from 30 April 2014. The said notice which was annexed to the application (Annex C refers), reveals that the basis of the termination was on account of serious breaches of the agreement *"more specifically"* Clause 7 entitled *"Freights and other Receivable Items remittance"* as well as Clause 10 entitled *"Responsibility of Agents for Accuracy of Disbursements" "and failure to perform specific obligations"* under the agreement.

The present claim pertains to payment due for the stevedoring services by Cargo Handling for the period during which the agency agreement was still in force, that is, for the period October 2013 up till February 2014 as it is not in dispute that the termination of the agreement could only have taken place with effect from 30 April 2014.

It was further not in dispute that Fast Shipping was Evergreen's agent during the whole of the material time that Cargo Handling had been providing stevedoring services to the tune of Rs 4,681,704.80 to Evergreen.

Although it is not in dispute that Fast Shipping was Evergreen's agent at the material time, it cannot necessarily be inferred that the agent would bear no responsibility for

payment to Cargo Handling for the simple reason that subsequent to its liability to pay Cargo Handling for the stevedoring services provided in February 2014, its agency agreement would have been terminated by its principal on 30 April 2014.

At this juncture it is useful to refer to the case of **Wolfe Stevedores (1968) Ltd. [Wolfe] v. Joseph Salter's Sons Ltd., 1970 CarswellNS 125, 16 D.L.R. (3d) 334, 2 N.S.R. 2d) 269** where the situation was comparable to the present one. Wolfe Stevedores had provided stevedoring services to the owner of vessels, the principal, for which the defendant (Salter's) acted as agent at the material time. Wolfe Stevedores sued Salter's to recover payment of an amount due for its services.

> *"… The principal issue in the action was whether the defendant Company was itself liable or whether it had entered into the agreement for the stevedoring services which gave rise to the claim of the plaintiff solely as agent for the owner of the vessels and not on its own behalf …"*

In the circumstances of the case, the lower Court held that the agent was liable for the payment. On appeal the Court maintained the decision and went on to make the following observations at paragraph 18 of the judgment:

> *"The principal issue before us as it was at the trial of the action is whether the contracts for loading the vessels were made by the appellant* [Salter's] *on its own behalf so as to make the appellant liable for payment of the services or whether the contracts were made by the appellant solely as agent for the owner. The law applicable is set out in Bowstead on Agency, 13th ed., pp. 374. 5 as follows:*
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> > *The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and, if so, the extent of his liability on the contract depends on the intention of the parties to be deduced from the*

> *nature and terms of the particular contract and the surrounding circumstances, including any binding custom."*

In the absence of any evidence as to the nature and terms of the particular contract one therefore needs to look at all the surrounding circumstances in order to determine whether there was indeed a substantial dispute as to the liability of Fast Shipping to pay the debt.

We consider that in all the surrounding circumstances, Fast Shipping had not discharged its burden of proof and had not adduced sufficient evidence that could establish a substantial dispute as to its liability on account of the fact that it was merely acting by virtue of an agency agreement which has however been terminated by the principal.

The evidence has indeed irrrebuttably established that:

(i) the invoices, subject of the statutory demand, had all, without any objection on its part, been addressed to Fast Shipping;

(ii) Fast Shipping had effected part payment of the sums due on the said invoices;

(iii) Evergreen would have transferred all funds for payment of the stevedoring services to Fast Shipping.

A perusal of Fast Shipping's founding affidavit also reveals that it does not contain any denial of the existence of the debt in respect of stevedoring services which had been provided at its request as agent for Evergreen.

Nor has Fast Shipping denied that payments for Cargo Handling's services have been paid in full to Fast Shipping by Evergreen as set out in the letter addressed to Cargo Handling and dated 17 April 2014 emanating from Roger's Shipping Ltd which had been appointed as Evergreen's new agent.

The said letter is reproduced below:

> *"… we would like to confirm on behalf of Evergreen that:*
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> *(i) They have paid in full to Fast Shipping & Transportation Co Limited (Fast Shipping) all amounts for port and handling fees due up to and including the last ship that called Mauritius on the 2nd February, 2014. We would appreciate confirmation that all amounts due have been received by yourselves from Fast Shipping.*
>
> *(ii) …"*

Fast Shipping has in relation to that letter, contended itself with the following reply: *"The letter was inadmissible evidence and cannot be relied upon."*

The record reveals that Fast Shipping's agency agreement was terminated on 30 April 2014 on account of alleged serious breaches of Clause 7 entitled: *"Freights and Other Receivable Items remittance"* as well as Clause 10 entitled*: "Responsibility of Agents for Accuracy of Disbursements"* together with failure to perform specific obligations under the contract.

It would thus appear that the dispute which had allegedly been referred to arbitration was confined to Fast Shipping's breaches of the agreement *vis à vis* its principal. Once again Fast Shipping has not deemed it fit to annex any document pertaining to such arbitration proceedings be it the terms of reference or the statement of case thereof. There is as such on record only the vague assertions of Fast Shipping that the terms of the agency agreement had given rise to an arbitration, the outcome of which went against Fast Shipping including the issue of payment of stevedoring services and, further that Fast Shipping has appealed against the arbitral award.

In view of what has been stated above, the outcome of the alleged appeal against the arbitral award would be of no consequence as regards the liability of Fast Shipping towards Cargo Handling.

In any event however whilst in the application dated 1 March 2019, Fast Shipping had averred that it had lodged an appeal against the arbitral award and the appeal is pending, Fast Shipping did not annex any document in support of its contention. Nor was Mr. Naveen Dookhit, counsel appearing for Fast Shipping, in a position to answer our queries as regards the alleged appeal, be it the Court before which the appeal is allegedly pending following the award in 2018 and still less, whether the appeal has, as yet, been heard. Before us, Mr. N. Dookhit only made a statement to the effect that judgment had not as yet been handed down in the appeal. Fast Shipping's contentions on that issue have remained mere assertions.

In the light of the issues highlighted above and in view of the fact that the debt claimed pertains to a claim prior to the termination of Fast Shipping's agency agreement and that Fast Shipping had already effected part payment of the claims as per the invoices, we consider that Fast Shipping has failed to adduce sufficient material which would support its claim that its liability as a debtor can be seriously challenged. Fast Shipping has failed to lay a proper foundation for any dispute as to its liability to pay; its case is in effect based on mere assertions not substantiated by any evidence which *"at least has the appearance of sufficient reliability that it can be said that a Court dealing with the matter could accept the account given as being correct."*

This appeal must therefore succeed since the finding of the learned Judge is not for all the given reasons supported by the evidence.

Furthermore, taking into account that Fast Shipping had failed to establish any of the grounds that would warrant the setting aside of the statutory demand under Section 181(4) or that there exists a substantial dispute as regards the debt, the Court below was empowered to make an order pursuant to Section 181(6)(a) of the Insolvency Act which provides as follows:

"Where, on the hearing of an application under this section, the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of substantial dispute, or is not subject to a counterclaim, set-off or cross-demand, the Court may –

(i) order the company to pay the debt within a specified period and that, in default of payment, the creditor may make an application to put the company into liquidation; or

(ii) dismiss the application and forthwith make an order under section 102 putting the company into liquidation,

on the ground that the company is unable to pay its debts as they become due in the ordinary course of business."

In the light of our above conclusions in this appeal and the nature of the evidence on record, we make an order pursuant to Section 181(6)(a)(i) of the Insolvency Act for the respondent to pay the debt due on the statutory demand within a period of one month from the date of this judgment, failing which Cargo Handling may make an application to put the company in liquidation.

We allow the appeal and quash the judgment of the trial Court which granted Fast Shipping's application to set aside the statutory demand. With costs.

B. R. Mungly-Gulbul
Chief Justice

M. I. Maghooa
Judge

HEARD ON : 10 November 2022

DELIVERED ON : 19 December 2022, by Honourable B.R. Mungly-Gulbul, Chief Justice

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For Appellant : **Mr. S. Dabee, of Counsel**
Mr. J. Gujadhur, Senior Attorney

For Respondent : **Mr. N. Dookhit, of Counsel**
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