

1966
Nov. 21

[JOSEPHIDES J.].

AKTIEBOLAGET
SVENSKA
OSTAFRICA LINJEN
D.
GEORGE
D. COUNNAS
& SONS LTD.

AKTIEBOLAGET SVENSKA OSTAFRICA LINJEN,
Plaintiffs,
v.
GEORGE D. COUNNAS & SONS LTD.,
Defendants.

(Admiralty Action No. 11/63).

Evidence -Affidavit evidence -Application' by the plaintiff for an order that the evidence of certain E.A., of Oslo, Norway, be given by affidavit - Application refused--On the ground that this is a case in which it is necessary for such witness to give his evidence viva voce -To enable the Court to observe his demeanour and hear his cross-examination -Burden of a plaintiff in applications of this kind, viz. for affidavit evidence or commission evidence to be put in, much heavier to discharge because he has chosen his forum--Than the burden of a defendant who is taken to the forum chosen by the plaintiff -Principles reviewed and laid down in the case of Margaret Power v. O. Beha (1959) C.L.R. 254, followed.

Affidavit--Affidavit evidence to be put in at the trial--See above.

Practice--Affidavit evidence etc. etc. See above.

Admiralty--Evidence by affidavit--See above.

The plaintiff applied for an order that the evidence of E.A. of Oslo, Norway, be given by affidavit. Defendant's counsel did not oppose the application with regard to the first six paragraphs of E.A.'s affidavit (attached to the said application), but he opposed the application with regard to paragraph 7 of the said affidavit proposed to be put in evidence. The text of that paragraph is set out in the Ruling of the Court (*post*). In refusing leave as to paragraph 7, the Court:

Held, (1) (a) the principles on which affidavit evidence or commission evidence is allowed to be put in at the trial were reviewed in the case of *Margaret Power v. O. Beha*, (1959) C.L.R. 254, where the English authorities were reviewed, including the leading cases of *Lawson v. Vacuum Brake Co.* [1884] 27 Ch. D. 137 and *Berdan v. Greenwood* [1881] 20 Ch. D. 764.

(b) I need not quote in extenso the general principles except this extract from the judgment in *Berdan v. Greenwood* (*supra*).

" Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet, if the non-attendance of the witness before the tribunal which has to decide the case and the consequent inability of the tribunal to observe the demeanour and hear the answers of the witness, should lead to injustice towards one of the parties, the commission ought to be refused ".

(1) It should, also, be stated that a plaintiff who has chosen his forum has a heavier burden to discharge than a defendant who is taken to the forum chosen by the plaintiff.

(2) In considering the contents of paragraph 7 of the proposed affidavit (*note*. The text is given in the ruling of the Court, *infra*) it seems to me that this is one of the cases in which it would be necessary for such witness to give evidence *intra voce* before the trial Court to enable the Court to observe his demeanour and hear his cross-examination.

Leave as to paragraph 7 of the proposed affidavit refused.

Cases referred to :

Margaret Power v. Beha (1959) C.L.R. 254, *followed*.

Lawson v. Vacuum Brake Co. [1884] 27 Ch. D. 137, *followed*;

Berdan v. Greenwood [1881] 20 Ch. D. 764, *followed*.

The following ruling was delivered by :

JOSEPHIDES, J. . First, as to the plaintiffs' application dated 21st October, 1966, for an order that the evidence of JAN ASERUD of Stockholm, Sweden, be given by affidavit (attached to the application, sworn on the 12th October, 1966). Defendants' counsel no longer opposes this application and it is accordingly granted.

Secondly, as to the plaintiffs' application dated 14th October, 1966, for an order that the evidence of EINAR HANEBORG-AAS of Oslo, Norway, be given by affidavit (for which purpose affidavit dated 29th September, 1966, is attached to the application) : Having regard to the submissions made and the course the argument has taken in these proceed-

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ings, defendants' counsel stated that he does not oppose the application with regard to the first six paragraphs of Mr. Haneborg-Aas' affidavit, subject to the production of the log-book of the vessel. But he opposes the application with regard to paragraph 7 of the proposed affidavit. That paragraph reads as follows :

"7. It was impossible to find other cargo to replace defendants' cargo by the time the defendants cancelled their booking. The vessel was already committed to a certain route by the other cargo on board".

Mr. Haneborg-Aas describes himself in paragraph 1 of the affidavit as the 'Chief Officer' of the vessel at the material time.

The principles on which affidavit evidence or commission evidence is allowed to be put in at the trial were reviewed in the case of *Margaret Power v. O. Beha* (1959) C.L.R. 254. The English authorities were reviewed in that judgment, including the leading cases of *Lawson v. Vacuum Brake Co.* [1884] 27 Ch. D. 137, and *Berdan v. Greenwood* [1881] 20 Ch. D. 764. I need not quote in extenso the general principles, except this extract from the judgment in *Berdan v. Greenwood* :

" Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet, if the non-attendance of the witness before the tribunal which has to decide the case, and the consequent inability of the tribunal to observe the demeanour and hear the answers of the witness, should lead to injustice towards one of the parties, the commission ought to be refused".

As was stated in *Margaret Power v. Beha (supra)*, at page 258 :

" The degree of necessity which the case involves of the witness being seen in Court, his demeanour observed, and his cross-examination heard, appears therefore to constitute the standard which will regulate the granting or refusing of applications for an examination".

I think that it should also be stated that a plaintiff who has chosen his forum has a heavier burden to discharge than a defendant who is taken to the forum chosen by the plaintiff.

In considering the contents of paragraph 7 of the proposed affidavit, it seems to me that it is hardly within the province of the duties of a Chief Officer of a boat to find other cargo to replace some other cargo cancelled by a customer. But, what is more important to my mind, is that this is one of the two or three main questions in issue in this case, that is to say, the issue of the amount of damages and the mitigation of damages. Even if the proposed statement as to the impossibility of finding other cargo was strictly within the sphere of the duties of the Chief Officer and within his own knowledge, I think that this is one of those cases in which it would be necessary for such a witness to give his evidence *viva voce* before the trial Court to enable the Court to observe his demeanour and hear his cross-examination. In these circumstances, I would not be prepared to allow affidavit evidence to go in at the trial with regard to the proposed statement in paragraph 7 of Haneborg-Aas' affidavit.

The *order* which is accordingly made in the plaintiffs' application (dated 14th October) is as follows :

(1) Subject to paragraph 2 below, the evidence as proposed in paragraphs 1, 2, 3, 4, 5 and 6 of the affidavit of Haneborg-Aas, dated 29th September, 1966, may be given on affidavit to be produced at the trial. The plaintiffs shall be at liberty to read in evidence at the trial of this action the aforesaid affidavit.

(2) The leave granted in paragraph 1 above is subject to the plaintiffs allowing facilities to the defendants to examine the vessel's log-book prior to the date of trial.

(3) Leave is refused for affidavit evidence to be given in respect of paragraph 7 of the aforesaid affidavit of Haneborg-Aas.

(4) Costs in cause but not against the defendants in any event.

Order accordingly.