[ZEKIA, P., TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

JADRANSKA SLOBODNA PLOVIDBA,
Appellants-Defendants,

v.

PHOTOS PHOTIADES & CO.,
Respondents-Plaintiffs.

(*Admiralty Action No.* 6/62)

Admiralty—Jurisdiction—Action for damages for breach of contract of carriage by sea—Leave for service outside jurisdiction.

Practice—Service outside jurisdiction—Application to set aside the writ for want of jurisdiction—Cause of action—Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, rules 23 *and* 24*—Rule* 24 (*read with rule* 237)*, not different from Order* 11 *of the English Rules of the Supreme Court—Courts of Justice Law,* 1960, *sections* 19 (*a*) *and* 29 (2) (*a*)*—Sufficient for plaintiff to show a " good arguable case ".*

Conflict of Laws—Breach of contract made outside jurisdiction—Breach committed within the jurisdiction, though preceded or accompanied by a breach outside jurisdiction—Discretion to allow proceedings in Cyprus—Whether discretion properly exercised—Onus on appellant to satisfy Appellate Court that discretion exercised on wrong principles—Agreement that disputes should be determined by foreign tribunal—Forum conveniens.

The appellants shipowners appealed against the decision of a Judge of this Court (sitting in original Admiralty Jurisdiction) refusing to set aside the writ for want of jurisdiction, in an action brought against them by Cypriot shippers of goods for damages for breach of contract of carriage by sea. The plaintiffs' claim is for £12,330 damages sustained by them on account of the defendants' delay in delivering goods loaded on board the appellants' steamer " Zenica " at the port of Massawa, Eritrea to be carried from Massawa to Famagusta or Limassol, Cyprus, at ship's option.

On the 7th July, 1962, leave was granted to the shippers (respondents) to serve notice of the writ on the shipowners (appellants) in the Socialist Federal Republic of Yugoslavia. The application for leave was founded on rules 23 and 24 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction.

(*Editorial Note :* Rules 23 and 24 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction are set out in the Judgment of the Court, at p. 62 post.)

The notice was duly served on the appellants who entered a conditional appearance on the 5th January, 1963, and on the same day filed an application to have the writ and the service thereof set aside for want of jurisdiction.

The defendants, in their affidavit filed in support of the application to set aside the writ, submitted that as the action was based on a breach of the bill of lading alleged to have been committed by the defendants, there was a dispute arising under the said bill of lading and that dispute, as expressly agreed by the parties, could only be decided in Yugoslavia according to Yugoslavian Law. It was also contended by the defendants that the *forum conveniens* was in the Republic of Yugoslavia.

The questions which the learned Judge had to decide were—

(1) whether there was jurisdiction in the Court to make the order for service out of jurisdiction and try the case ; and

(2) assuming there was, whether such jurisdiction ought as a matter of discretion, to be exercised in favour of the plaintiffs ;

As regards the first question, Counsel for the appellants-defendants in arguing the case before the Court of Appeal based it on two grounds, namely, (i) that the plaintiffs-respondents did not have a " good cause of action ", as provided in rule 24 of the Admiralty Rules, and that on the face of the bill of lading itself they should fail *in limine* ; and (ii) that the alleged delay in delivering the goods in Cyprus was caused outside Cyprus which was a breach of the contract committed outside the jurisdiction of the Court.

The learned Judge who heard the application in the present case was of the view that there was disagreement between the parties as to what was the contract between them, and he was of the view that the plaintiff had a " good arguable case " and left the question to be decided at the trial holding on the authority of *Vitkovice Horni* v. *Korner* (1951) 2 All E.R. 334, at p. 338, that he was not the proper Court to resolve the question at that stage.

Appellants' counsel contended that rule 24 of the Cyprus Admiralty Rules, is different from Order 11 of the English Rules

of the Supreme Court on which it was held (in the *Vitkovice* case) that it was sufficient for the plaintiff to show that he had a " good arguable case ".

Held, (1) it appears to be well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms : *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 105 ; and *Crooks* v. *Allan* (1879–80) 5 Q.B.D. 38.

(2) The shipper is not prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term.

(3) Having considered our rule 24 along with rule 237 and sections 19 (*a*) and 29 (2) (*a*) of the Courts of Justice Law, 1960, which confer on the Cyprus Court the Admiralty jurisdiction of the High Court of Justice in England and provide that English Law shall be applied (as may be modified by a Cyprus Law), we do not think that our rule 24 (which was made in 1893) should be interpreted in a different way. It suffices if the plaintiff alleges a breach which, if proved, would be held to have occurred within the jurisdiction, provided that the Court is satisfied that the allegation was not on the face of it false or frivolous (see the *Vitkovice* case (*supra*) at p. 338, and " *The St. Eleftherio* " (1957) P. 179 at pp. 185 and 186).

(4) In the circumstances the learned Judge, on the evidence before him, rightly held that the plaintiff had a " good cause of action " and that he had jurisdiction to make the order for service out of jurisdiction.

(5) In the present case, however, the defendants applied to the learned Judge to set aside the notice of the writ for want of jurisdiction but they did not apply to the Court to stay the proceedings on the ground that the parties agreed that all disputes under the contract should be decided in Yugoslavia according to Yugoslavian Law. It should also be borne in mind that the plaintiffs (respondents) in this case dispute the defendants'(appellants') allegation that they agreed to clause 3 in the bill of lading providing that disputes should be determined in Yugoslavia according to Yugoslavian law, and at this stage of the proceedings it is not for the Court to try the action or make a finding as to what was the contract between the parties.

(6) As we do not wish in any way to prejudice any issue which may come before the Court for determination at the hearing of the action, we have confined our remarks within the narrowest limits as it is not for us to express any opinion, at this stage, on the merits of the plaintiffs' claim.

(7) For all these reasons we are of the view that the action is a proper one to be tried in Cyprus and that the learned Judge did not err in the exercise of his discretion. The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.

Cases referred to :

Armour and Co. v. *Leopold Walford* (1921) 3 K.B. 473 ; 91 L.J.K.B. 26 ;

Fraser v. *Telegraph Construction Co.* (1872) L.R. 7 Q.B. 571 : *The Chartered Bank* v. *Netherlands India S.N. Co.* (1883) 10 Q.B.D. 528 ;

Leduc v. *Ward* 20 Q.B.D. 475 ;

Sewell v. *Burdick* (1884) 10 App. Cas. 74, 105 ;

Crooks v. *Allan* 5 Q.B.D. 38 ;

S.S Ardennes (Cargo Owners) v. *S.S. Ardennes (Owners)* (1951) 1 K.B.D. 55 at p. 59 ;

Vitkovice Horni v. *Korner* (1951) 2 All E.R. 334 at p. 338 ;

The St. Eleftherio (1957) P. 179 at pp. 185 and 186 ;

Chemische Fabrik vormals Sandoz v. *Badische Anilin und Soda Fabriks* (1904) 90 L.T. 733 at p. 735 ;

The Metamorphosis (1953) 1 All E.R. 723, at p. 728 :

The Athenee (1922) 11 Ll. L. Rep. 6 ;

The Fehmarn (1958) 1 All E.R. 333 at p. 336 ;

Carpantina Societé Anonyme v. *The Firm P. Ioannou & Co.* (1942), 18 C.L.R. 30 at p. 37 ;

Racecourse Betting Control Board v. *Secretary for Air* (1944) 1 All E.R. 60 at p. 65.

Appeal.

Appeal against the ruling made by a Judge of the Supreme Court of Cyprus, (Vassiliades, J.) in the exercise of the Admiralty Jurisdiction of the Court, on the 28th

September, 1963, in Admiralty Action No. 6/62, whereby he dismissed defendants' application to set aside the service of the notice of the writ of summons upon them.

J. Potamitis, for the appellants.

Chr. Mitsides, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by :

JOSEPHIDES, J. : This is an appeal by Yugoslavian shipowners against the decision of a Judge of this Court (sitting in original Admiralty Jurisdiction) refusing to set aside the writ for want of jurisdiction, in an action brought against them by Cypriot shippers of goods for damages for breach of contract of carriage by sea.

On the 7th July, 1962, leave was granted to the shippers (respondents) to serve notice of the writ on the shipowners (appellants) in the Socialist Federal Republic of Yugoslavia. The application for leave was founded on rules 23 and 24 of the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, which read as follows :

> " 23. Where the person to be served is out of Cyprus application shall be made to the Court or Judge for an order for leave to serve the writ of summons or notice of the writ ;
>
> 24. The Court or Judge before giving leave to serve such writ or notice of the writ shall require evidence that the plaintiff has a good cause of action, that the action is a proper one to be tried in Cyprus, and evidence of the place or country where the defendant is or may probably be found and of his nationality."

The notice was duly served on the appellants who entered a conditional appearance on the 5th January, 1963, and on the same day filed an application to have the writ and the service thereof set aside for want of jurisdiction.

The plaintiffs'-respondents' case is that on or about the 14th January, 1960, the Messagerie Eritree S/A as agents of the plaintiffs, loaded on board the defendants'-appellants' steamer " Zenica " at the port of Massawa, Eritrea, 5,000 cartons of 48 round tins of freshly tinned boiled beef to carry safely from Massawa to Famagusta

or Limassol, Cyprus, at ship's option, and there to deliver to the plaintiffs or the National Bank of Greece, Nicosia, as their agents, within a reasonable time, for reward. The plaintiffs allege that a reasonable time for the delivery of the said cartons at Famagusta or Limassol expired at the end of January, 1960, that the defendants did not deliver the goods until the middle of March, 1960, and that by reason thereof the said goods lost or deteriorated in their market value and the plaintiffs suffered damage. The plaintiffs also relied on the allegation that besides the aforesaid condition in the contract of carriage the defendants, through their agents, at the port of loading, represented to the plaintiffs that the goods would be safely delivered by the end of January, 1960, either directly or through transhipment *via* Piraeus, and thus they induced the plaintiffs to ship the aforesaid cargo on the defendants' vessel. The plaintiffs' claim is for £12,330 damages sustained by them on account of the defendants' delay in delivering the goods.

In the course of the hearing of the application to set aside the writ photostat copies of two documents were produced in evidence—

(*a*) "Loading Instructions", dated in Asmara, on the 11th January, 1960; and

(*b*) "Bill of Lading" (original), dated in Massawa, on the 14th January, 1960.

The "Loading Instructions" are signed by Messagerie Africa S/A as, agents of the plaintiffs, requesting the transport of the aforesaid goods on the vessel "ZENICA" "direct to Famagusta (Cyprus)". It is further stated in the body of the document that the cargo is to be "despatched to Famagusta (Cyprus) direct".

In the bill of lading the port of discharge is stated to be "Famagusta/Limassol ship's option". The bill of lading is signed by Contomichalos Sons Red Sea Ltd., as agents of the defendants, but it is *not* signed either by the plaintiffs or their agents. *Inter alia*, the bill of lading provides as follows:

> "In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant . . . . . .

3. *Jurisdiction :* Any dispute arising under this Bill of Lading to be decided in Yugoslavia according to Yugoslavian law.

5. *The scope of voyage :* The contract is for liner service and the voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding thereto the vessel may sail beyond the port of discharge.....

6. *Substitution of Vessel, Transhipment and Forwarding :* Whether expressly arranged beforehand or otherwise the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels ... .or by other means of transport .... .to tranship, land and store the goods . . . . . "

The cargo shall be forwarded as soon as practicable but the Carrier shall not be liable for any delay."

This bill of lading was eventually endorsed by the National Bank of Greece S.A., Nicosia Branch, to the plaintiffs on the 31st March, 1960.

The defendants, in their affidavit filed in support of the application to set aside the writ, submitted that as the action was based on a breach of the said bill of lading alleged to have been committed by the defendants (which the defendants deny), there was a dispute arising under the said bill of lading and that dispute, as expressly agreed by the parties, could only be decided in Yugoslavia according to Yugoslavian Law. The defendants further alleged that it was agreed at Massawa that the said goods were to be carried to Cyprus on the return voyage of the steamer, on which they were loaded, or of its substitute, from the Adriatic ports, which were the steamer's first destination, and that they were so carried. It was also alleged on behalf of the defendants that if there was a delay in the carriage of the goods the said delay must have taken place outside Cyprus and that, consequently, the alleged breach of the contract was committed outside the jurisdiction of the Court. It was not in dispute that the contract was entered into outside the jurisdiction of the Court. Finally, it was contended that the *forum conveniens* was in the Republic of Yugoslavia.

On these allegations the questions which the learned Judge had to decide were—

(1) whether there was jurisdiction in the Court to make the Order for service out of jurisdiction and try the case ; and

(2) assuming there was, whether such jurisdiction ought as a matter of discretion, to be exercised in favour of the plaintiffs ?

As regards the first question, Mr. Potamitis for the appellants (defendants), in arguing the case before us, based it on two grounds, namely (i) that the plaintiffs (respondents) did not have a " good cause of action ", as provided in rule 24 of the Admiralty Rules, and that on the face of the bill of lading itself they should fail *in limine ;* and (ii) that the alleged delay in delivering the goods in Cyprus was caused outside Cyprus which was a breach of the contract committed outside the jurisdiction of the Court.

In support of his first ground, Mr. Potamitis submitted that the bill of lading was *the contract* and that any other alleged conditions beyond the bill of lading could not be taken into consideration, as evidence of an oral bargain in conflict with the bill of lading was not admissible. In making that submission appellants' counsel relied on the following cases : *Armour and Co.* v. *Leopold Walford* (1921) 3 K.B. 473 ; 91 L.J.K.B. 26 ; *Fraser* v. *Telegraph Construction Co.* (1872) L.R. 7 Q.B. 571 ; and *The Chartered Bank* v. *Netherlands India S.N. Co.* (1883) 10 Q.B.D. 528.

It should, however, be observed that in *Armour* v. *Leopold Walford* the parties agreed, by the booking slip, that the goods should be shipped under the bill of lading in question ; in the *Fraser* case both parties signed the bill of lading, and in the *Chartered Bank* case the contract was reduced into the form of a bill of lading by the consent of the parties. The true view of the authorities may be that depends on the facts of each case whether the bill of lading contains the actual contract. Where a bill of lading has been held to be the contract it was either so by reason of section 1 of the Bill of Lading Act, 1855 (as in the case of *Leduc* v. *Ward* 20 Q.B.D. 475) or the parties appear to have agreed that it should be so.

It appears to be well settled that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence

of its terms : *Sewell* v. *Burdick* (1884) 10 App. Cas. 74, 105 ; and *Crooks* v. *Allan* 5 Q.B.D. 38. As Lord Goddard C.J. said in *S.S. Ardennes* (Cargo Owners) v. *S.S. Ardennes* (*Owners*) (1951) 1 K.B.D. 55 at page 59 :

> " The contract has come into existence before the bill of lading is signed ; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content, or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back ; but he is not, in my opinion, for that reason, prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term. He is no party to the preparation of the bill of lading ; nor does he sign it."

It will thus be seen that the shipper is not prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or containing some additional term.

In the *Ardennes*' case exporters of mandarin oranges shipped a cargo of them in the defendants' vessel at the port of Cartagena, Spain, in reliance on an oral promise by the shipowners' agent that the vessel would go straight to London. In fact, she went first to Antwerp, with the result that, when the plaintiffs' cargo arrived in London, (*a*) there had been an increase in the import duty of mandarins, and (*b*) other cargoes of mandarins had arrived in London, with a consequent fall in the price of mandarins, all of which events would have taken place after the arrival of the defendants' vessel had she gone direct to London. On the shippers' claim for damages, it was held that the bill of lading not being in itself the contract between shipper and shipowner, though evidence of its terms, evidence was admissible of the oral contract of carriage arrived at between the shippers and the shipowners' agent before the bill of lading had been signed ; that the promise that the ship would sail direct to London was a warranty ; and that the shipowners were liable in damages.

The learned Judge who heard the application in the present case was of the view that there was disagreement between the parties as to what was the contract between

them, namely, the defendant (appellant) alleged that the bill of lading was the only contract, while the plaintiff (respondent) contended that there was a collateral agreement regarding the time of delivery, that is to say, that it was agreed that the goods should be delivered at a Cyprus port not later than the end of January, 1960. In fact, they were delivered in the middle of March, 1960. In these circumstances, the learned Judge was of the view that the plaintiff had a " good arguable case " and left the question to be decided at the trial holding that he was not the proper Court to resolve the question at that stage (see *Vitkovice Horni* v. *Korner* (1951) 2 All E.R. 334, at page 338).

Appellants' counsel, however, argued before us that rule 24 of our Admiralty Rules, is different from Order 11 of the English Rules of the Supreme Court on which it was held (in the *Vitkovice* case and other English cases) that it was sufficient for the plaintiff to show that he had a " good arguable case ".

Having considered our rule 24 along with rule 237 and sections 19 (*a*) and 29 (2) (*a*) of the Courts of Justice Law, 1960, which confer on the Cyprus Court the Admiralty jurisdiction of the High Court of Justice in England and provide that English Law shall be applied (as may be modified by a Cyprus law), we do not think that our rule 24 (which was made in 1893) should be interpreted in a different way. It suffices if the plaintiff alleges a breach which, if proved, would be held to have occurred within the jurisdiction, provided that the Court is satisfied that the allegation was not on the face of it false or frivolous (see the *Vitkovice* case (*supra*) at page 338, and " *The St. Eleftherio* " (1957) P. 179 at pages 185 and 186).

As Lord Davey said in *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabriks* (1904) 90 L.T. 733 at page 735 :

> " This does not, of course, mean that a mere statement by any deponent who is put forward to make the affidavit that he believes that there is a good cause of action is sufficient. On the other hand, the court is not, on an application for leave to serve out of jurisdiction . . . . called upon to try the action or express a premature opinion on its merits . . . . "

As regards the second ground of appellants' submission that the alleged delay in delivering the goods in Cyprus was a breach of the contract committed outside the jurisdiction,

it is sufficient to state that although the contract was made in Massawa the alleged agreement was that the goods would be delivered by the defendants at Famagusta or Limassol not later than the end of January, 1960. Irrespective of where the delay occurred in the voyage of the vessel, it would seem that the plaintiffs rely on the allegation that the defendants failed to comply with one of the conditions of the performance of the contract of carriage of the goods regarding the time of delivery at the Cyprus port. The alleged delivery was to take place at a Cyprus port by the end of January, 1960. If the defendants failed to deliver as aforesaid, then it is abundantly clear that the breach of the contract was committed in Cyprus even though such breach was preceded or accompanied by a breach out of Cyprus which rendered impossible the performance of the part of the contract which ought to have been performed in Cyprus.

In the circumstances the learned Judge, on the evidence before him, rightly held that the plaintiff had a "good cause of action" and that he had jurisdiction to make the order for service out of jurisdiction.

The second question which we have to consider is whether such jurisdiction ought, as a matter of discretion, to be exercised in favour of the plaintiffs. In deciding this question the Judge had, among other things, to consider where the balance of convenience lay and whether it would be right in this case in any event to bring the defendants to this country (see "The Metamorphosis" (1953) 1 All E.R. 723, at page 728).

We have, therefore, to consider whether the learned Judge exercised his discretion on right principles, and the burden is on the appellants to satisfy this Court that he failed to do so. If the learned Judge erred in any way in exercising his discretion then the Court of Appeal will intervene, but otherwise it is not for this Court to substitute its discretion for his if he has not erred in any way in exercising his discretion ; *The Athenee* (1922) 11 Ll. L. Rep. 6 ; *The Fehmarn* (1958) 1 All E.R. 333 at page 336 ; and *Vitkovice Horni* v. *Korner* (1951) 2 All E.R. 334, at page 336 (H.L.).

Counsel for the appellants, in submitting that the learned Judge erred in the exercise of his discretion in favour of the plaintiffs, relied on two grounds—

(*a*) that the Courts will insist on the parties honouring

their bargain in cases where they have agreed that disputes should be referred to a foreign tribunal ; and

(*b*) that the *forum conveniens* was in the Socialist Federal Republic of Yugoslavia.

In support of ground (*a*), Mr. Potamitis cited the *Carpantina Societé Anonyme* v. *The Firm P. Ioannou & Co.* (1942), 18 C.L.R. 30 at page 37 ; and *Racecourse Betting Control Board* v. *Secretary for Air* (1944) 1 All E.R. 60 at p. 65 ; and he distinguished the case of the *Fehmarn* (*ubi supra*) on which the learned Judge relied in this case. He submitted that the facts in the two cases differed considerably : in the *Fehmarn* case the contaminated goods were surveyed in London and the evidence was obtainable there ; the case was more closely connected with England than with Russia ; the defendant objected to security but not to being tried in England ; it was a dispute between English and German parties, and Russia, the agreed forum, had no connection at all with the case.

On the authorities there is a *prima facie* presumption that the Court will insist on the parties honouring their bargain in cases where they have agreed that all disputes arising under a contract should be determined by a foreign court. The court will, however, consider whether there are sufficient grounds for displacing this *prima facie* presumption so as to entitle the parties to take advantage of the jurisdiction of the court. Such a presumption may be displaced on good and sufficient reasons (The *Fehmarn*, *ibid.* at page 337). It should be observed that in the *Fehmarn* case the shipowners moved the Court (*a*) to set aside the writ for want of jurisdiction ; and (*b*) alternatively, to stay the proceedings, on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R.; and it was held that (*a*) the Admiralty Court had jurisdiction ; and (*b*) the Court should not exercise its discretion to stay the proceedings.

In the present case, however, the defendants applied to the learned Judge to set aside the notice of the writ for want of jurisdiction but they did not apply to the Court to stay the proceedings on the ground that the parties agreed that all disputes under the contract should be decided in Yugoslavia according to Yugoslavian law. It should also be borne in mind that the plaintiffs (respondents) in this case dispute the defendants' (appellants') allegation that they agreed to clause 3 in the bill of lading providing

that disputes should be determined in Yugoslavia according to Yugoslavian law, and at this stage of the proceedings it is not for the Court to try the action or make a finding as to what was the contract between the parties.

With regard to ground (*b*), the "*forum conveniens*", Mr. Potamitis submitted that the only connection of this case with Cyprus is the question of damages ; and that the evidence with regard to the formation of the contract would have to be brought all the way from Massawa to Cyprus. It is true that the witnesses with regard to the formation of the contract will have to be collected and brought to this country from Massawa but even if the case were tried in Yugoslavia, the same witnesses would have to be taken to Yugoslavia, which is still more distant from Massawa than Cyprus. In any event, the evidence with regard to the alleged damages suffered by the plaintiffs is to be found in Cyprus exclusively and it is preferable, more convenient and less expensive to have this evidence heard in Cyprus rather than take all the witnesses to Yugoslavia.

As we do not wish in any way to prejudice any issue which may come before the Court for determination at the hearing of the action, we have confined our remarks within the narrowest limits as it is not for us to express any opinion, at this stage, on the merits of the plaintiffs' claim.

For all these reasons we are of the view that the action is a proper one to be tried in Cyprus and that the learned Judge did not err in the exercise of his discretion. The appeal is accordingly dismissed with costs.

Appeal dismissed with costs.