JJ. AGRO INDUSTRIES (P) LTD (A FIRM) v TEXUNA INTERNATIONAL LTD - [1994] HKCU 0184

High Court (in Chambers)
Kaplan, J.

Miscellaneous Proceedings No. 751 of 1992

20, 27 May 1992, 29 May 1992

Kaplan, J.

Preliminary ruling

On 29th May 1992 I gave brief oral reasons as to why I had decided that this application had to be adjourned for oral evidence to be adduced on the factual issue raised by this application. I now amplify those reasons by this preliminary ruling.

The plaintiffs were successful claimants before a GAFTA Tribunal in London. They came before me ex parse pursuant to Order 73, rule 10 and I gave leave to enforce the awards as judgments of the High Court of Hong Kong on 24th March 1992.

The defendants then availed themselves of the provision that within 14 days they could apply to set aside the leave granted by me.

On 29th April I gave directions for the filing of evidence. On 15th May I gave further directions and decided to hear some preliminary issues the hearing of which was fixed for 20th May. At the end of the hearing on 20th May I indicated that I would require submissions on the quality of the evidence and I fixed that for 27th May.

I have thus heard detailed legal submissions over 3 days. The defendants contend that the award was procured by fraud in that one of their witnesses, a Mr. Savla, was kidnapped and forced to swear an affidavit contradicting what he had previously said in a letter. His evidence went to mitigation of loss in that he said originally and he now confirms that he offered the plaintiffs 2000 mt of beans when the defendants found themselves unable to deliver. It appears that in fact only 1500 mt is relevant because the balance was not ready for delivery within the contractual time scale. The total contract quantity was 3500 mt so this defence is not a complete defence but no effort has yet been made to explain the overall consequences of this defence if in fact it is a good one.

The first issue was whether the facts alleged came within the meaning of "public policy" which is the only ground relied on by the defendants. It is a ground set out in the New York Convention replicated in s. 44 of the Arbitration Ordinance.

The second issue was whether the defendants were precluded from raising the point as a result of it having been raised before the Tribunal and featuring in an action commenced by the defendants in the Commercial Court in London.

Thirdly I heard argument on the quality of the evidence to see whether it met the threshold to justify ordering an issue to be tried.

I confess now to regretting ordering these issues to be tried on a preliminary basis. I had hoped that it would save time but in the end I am not satisfied that this admirable aim has been achieved

The defendants submit that it would be contrary to public policy to enforce this award if these allegations are made out. They submit that the only way I can be satisfied is to hear the *viva voce* evidence from all concerned on this issue and then to rule on the facts and the legal consequences flowing therefrom.

Mr. Stevenson who appeared for the plaintiffs has exhibited commendable industry by referring to a number of interesting cases and he has placed before me some well thought out submissions.

It is clear that the issue of Savla's kidnapping was before the Tribunal. It was pleaded and his letter and affidavit were before them. Although it was stated that he would be their lead witness in fact he was not called Reasons for that decision have been given and it would not be right to comment on these any further at this stage. The Tribunal ignored his evidence as he was not called and they found nothing in the allegation that there had been a failure to mitigate.

Before the award was rendered the defendants instituted proceedings in the Commercial Court in London claiming that the Tribunal had no jurisdiction because of an alleged Bombay exclusive jurisdiction clause. They further alleged that the plaintiff's had repudiated the arbitration agreement by the kidnapping of Savla.

The plaintiffs sought to strike out that action under 0.18, r. 19 and the matter came before Webster, J. who did strike it out. On the repudiation issue he held that it had not been made out in particular because it was clear to him that the alleged repudiation had not been accepted by the defendants.

The defendants appealed and Parker, L.J. as a single judge of the Court of Appeal refused leave. I have been told that the application is being made to the full court but as yet it has no been heard. Mr. Stevenson has submitted that the defendants have got nowhere near to establishing fraud which would justify me in refusing to enforce the award on the grounds of public policy either on 1 the facts or as a matter of law. Mr. Bunting submits that I can only decide this matter after hearing the viva voce evidence.

Public policy

I am quite satisfied that if the facts alleged are made out they are capable of coming within the ambit of public policy. In other words it would be contrary to the public policy of Hong Kong to enforce an award which had been obtained in the circumstances alleged. I quite agree with Mr. Stevenson that public policy has been given a narrow meaning by various court considering the New York Convention. He cited a number of American cases which expressed this narrow interpretation. However narrow the interpretation I fail to see how i can be denied that to enforce an award obtained in the circumstances alleged would be in breach of the public policy of Hong kong. For instance, if an arbitrator had been corrupt i would be in breach of public policy to enforce his award. I recognise that there is a discretion in s.44 but the time has not yet arrived for me to consider the exercise of that discretion. must hear the evidence first and reach conclusions on the disputed facts.

Res judicata

Mr. Stevenson relies heavily on the fact that the issue of kidnapping was raised before the Tribunal and that they commented on it. He further relies on the fact that the kidnapping issue featured large in the Commercial Court proceedings in London. He submits that the issue has been raised and dismissed and that it is not now open to the defendants to re-litigate this issue I have considerable sympathy with this submission but I believe that I am precluded from upholding it by a recent decision of the House of Lords in *Owens Bank v. Bracco* [1992] 2 WLR 621 which decided that under the Administration of Justice Act 1920 and the 1933 Foreign Judgments (Reciprocal Enforcement) Act the English rule relating to res judicata did not apply. I' that case it was held permissible to raise at the enforcement stage the very same ground of fraud raised in the foreign jurisdiction. The House specifically held that the English rule that fresh evidence was required to set aside a judgment on the ground of fraud did not apply when considering the enforcement of a foreign judgment. Mr. Stevenson attempted to distinguish this case by noting that it was under different legislation which provided that fraud was a ground for refusing enforcement. It is to be noted that public policy was also a ground.

There is nothing in the New York Convention which precludes an enforcing court from looking at matters which were decided by the Tribunal. It is true that the enforcing court should no re-hear the merits as its jurisdiction is limited to the matters set out in the Convention. But the defendants are entitled to raise the public policy ground and I am charged with deciding whether it has been made out. I therefore conclude that I am not prevented from considering these matters merely because they were raised before the Tribunal and the Commercial Court.I was also referred to *Jet Holdings v. Patel* [1990] 1 QB 335 where the Court of Appeal

also followed the long line of authority referred to by Lord Bridge in **Owens Bank** (e.g. *Abouloff v Oppenheimer* (1882) 10 QBD 295 and *Vadala v. Lawes* (1890) 25 QBD 310)

I was also referred by Mr. Stevenson to *Interdesco v. Nullifire* [1992] 1 Lloyd's Rep 180 which was a case under the Brussels Convention. Phillips, J. noted that the Convention specifically provided that "Under no circumstances may a foreign judgment be reviewed as to its substance." Under that Convention the enforcing court is precluded from reviewing the foreign courts judgment and thus the rule exemplified by the decision in **Owens Bank** cannot be applicable to that Convention. This case is thus of no assistance to a consideration of the New York Convention. It follows that if I be wrong in concluding that the doctrine of res judicata does not apply in the present case, I would have certainly exercised my discretion in favour of enforcing the award and dismissing this summons to set aside the judgment.

The evidence

I am satisfied that if the kidnapping of Mr. Savla is established that fact could give rise to the argument that this award should not be enforced on the public policy ground If that fact is established then I have to exercise my discretion under s. 44.

All that I have to decide at this stage is whether sufficient evidence has been placed before me, which if believed, could establish this allegation. I have listened to Mr. Stevenson's submission with some care and I have considered all his points directed towards showing that the Savla story is inherently unbelievable. I was much concerned by the apparent inconsistency between one version where he stated that he was held captive over night and a later version where he stated that he was released the same evening. I allowed fresh evidence to be put in at the latest possible moment and this attempted to explain the inconsistency as a translation problem. After very careful consideration I do not feel able to conclude that there is no such evidence before me. In all the circumstances, it would not be right for me to say anymore about the evidence as I will have to listen to the viva voce evidence on this topic and reach a concluded view at a later stage. In particular, I will have to consider the reasons given for the inconsistency to which I have just referred In arriving at the conclusion that the evidence is sufficient to meet the necessary threshold I have taken the test suggested by Mr. Stevenson namely whether this evidence would persuade me to set aside a regular judgment. In other words, I applied the *Saudi Eagle test* ([1986] 2 Lloyd's Rep 221).

Conditions

Mr. Stevenson invited me to consider ordering the defendants to pay the sum in dispute into court to abide the event. Much as I might wish to make such an order I have doubts that I have jurisdiction to do so. The procedure for enforcement of a Convention award is covered by Order 73, rule 10 of the Rules of Supreme Court. Under sub-rule (6) the defendant is given 14 days to apply to set aside the ex parse order but that order is not to be enforced until after the application is finally disposed of. The application has not been disposed of and the order is thus not to be enforced I do not have to exercise any discretion with regard to the stay as it is built in. Had the defendants sought to set the award aside in England then under s. 44(5) of the Arbitration Ordinance I could adjourned the enforcement proceedings and would have had power to order security. The absence of such a power in the rules and its mention in the Ordinance only in the circumstances just referred to are in my judgment strong grounds for concluding that I have no such power however desirable that power would have been. I do not believe that I have any inherent jurisdiction to order the sum in dispute or any part thereof to be paid into court to abide the event. Clearly Mr. Stevenson's clients are concerned about this extra delay and are concerned about what might happen in the meantime. Bearing in mind the somewhat unusual sequence of events in this case, I would have ordered security had I been satisfied that I had jurisdiction so to do. I would have ordered half the award to be paid in because, in very broad terms, the mitigation defence would appear to go only to about that proportion. Mr. Stevenson has reserved his position on this issue and I will of course hear him if he wishes to attempt to displace my provisional view on jurisdiction to order security.

Conclusion

It follows therefore that, yet again, I will have to adjourn this application to enable time to be found to hear the viva voce evidence upon which this application is based I wish to make it clear that I will brook no delay in this matter. This matter has been dragging on for far too long and I am determined to resolve it as soon as

possible. I will expect both sides to use their utmost best endeavours to get the witnesses here as soon as dates can be arranged. I will ensure, as best I can, that expedited dates are made available.

I ought to make it plain that there were in fact 5 awards in favour of 5 separate plaintiffs. The issue in each case is identical and both sides agreed to take the present case as the lead case and the result in this will automatically follow in all the others.

I am very conscious that this judgment does not do full justice to the careful and detailed submissions addressed to me by both sides. I was however anxious to resolve these issues as quickly as possible in order get on with the hearing of the evidence. A full and detailed reserved judgment would have delayed matters for some time especially as I will be absent from Hong Kong for 10 days in early June. I hope however that I have made my views clear on the issues raised and that, if so minded, the plaintiffs will be able to test them in another place. Whether they wish to do this before or after I have made findings on the evidence is a matter for them.

Directions

The parties are going to try and agree some directions for the future conduct of this matter and if they cannot I will hear them soon to make the appropriate directions to bring this long drawn out affair to a conclusion. Serious allegations are made against a number of people including an Indian solicitor and I therefore acceded to Mr. Stevenson's submission that the evidence should be heard in open court.

Costs

I made an order, after hearing the parties, that the costs between 29th April and 29th May 1992 be costs in the originating summons.