
1957

Mar. 20

Apr. 15

QUEBEC ADMIRALTY DISTRICT

CLEMENT TREMBLAY .....PLAINTIFF;

AND

HENRY C. DRUCE .....DEFENDANT.

Shipping—Admiralty jurisdiction—Arbitration—Charterparty breached outside limits of registry—The Admiralty Act, 1934, S. of C. 1934, c. 31, s. 18(1).

Defendant moved for dismissal of an action to recover demurrage on the ground that the Court lacked jurisdiction because a clause in the charterparty provided that all disputes should be settled by arbitration and further, because the alleged breach took place outside the territorial limits of the registry.

Held: That the Court had jurisdiction *ratione materiae* and, since the cause of action and the defendant were personally within the limits of the registry, it also had territorial jurisdiction. *Johnson v. Taylor Bros. & Co. Ltd.* [1920] A.C. 144 at 154; *In re Smith et al.,* 1 P.D. 300 at 301. *Held,* also, that since the defendant at no time had offered or declared his readiness to submit plaintiff's claim for arbitration, he could not now be heard to do so.

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MOTION to dismiss the action for want of jurisdiction.

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

William Tetley for the motion.

Maurice Jacques contra.

SMITH D.J.A.:—The undersigned seized of the defendant's motion for the dismissal of plaintiff's action for lack of jurisdiction, having heard the parties, examined the proceedings and documents of record and having duly deliberated:

The defendant moves for the dismissal of the plaintiff's action on the ground that this Court is without jurisdiction for two reasons:

(i) because of a clause in the charterparties which form the basis of the action by which the parties agree to submit all disputes to arbitration;

(ii) because the breach of contract which gave rise to the present action took place outside of the limits of this registry;

The undersigned is convinced that the defendant's motion is unfounded.

The arbitration clause contained in the charterparties reads as follows:

14. Any dispute that may arise under this charter shall be settled at Montreal by arbitration. In case of arbitration, one arbitrator shall be appointed by the master, owners, or agents, one arbitrator shall be appointed by the charterers, and a third arbitrator shall be appointed by the two arbitrators so chosen. The decision of a majority of the arbitrators shall be final.

There is no doubt that when such a clause clearly and expressly stipulates that there must be arbitration before any resort to recourse before the Court may be had the effect may be to postpone the right of such recourse and in certain special cases even to deprive the claimant of his right to sue. The arbitration clause however contained in the charterparties upon which the present action is based is not in such terms and merely amounts to an agreement between the parties to arbitrate disputes which may arise.

The undersigned was referred to a number of reported cases all of which however are clearly distinguishable from the present case, since they deal with arbitration clauses drawn in terms very different from those in which the clause now under consideration is expressed.

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The authorities appear to be clear to the effect that in order to deprive the Court of jurisdiction such a clause must express the intention to do so clearly and equivocally.

Russell on Arbitration, 14th Edit. p. 61:

> It would seem that even in a case where it is provided in the contract that no action shall be brought until an award is made or except upon the award of the arbitrator, a party still has a right to bring an action and the jurisdiction of the Court is not ousted. The Court may stay the action either under section 4 of the Arbitration Act, 1889, or on the ground that it is frivolous and vexatious. If the action proceeds, the Court may even then exercise the discretionary power given it by section 3(4) of the Arbitration Act, 1934, of ordering that the provision making the award a condition precedent cease to have effect.

Halsbury Laws of England, Vol. 8, (2d. Ed.) p. 532, para. 1177:

> An agreement purporting to oust the jurisdiction of the courts is illegal and void on grounds of public policy, but an agreement that no right of action shall arise unless and until the difference of the parties have been settled in some way, *e.g.* by arbitration, is valid and enforceable. The right of the subject to have access to the courts may be taken away or restricted by statute but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension.

The second ground upon which the defendant's motion is based is that the Court of this registry has no jurisdiction because the breach of contract upon which the action is based occurred beyond the territorial limits of this registry.

In the first place, it should be noted that the plaintiff's action is not based upon any alleged breach of contract. It is rather a claim for demurrage alleged to be due and owing under the said charterparties, both of which were entered into by the parties within the territorial limits of this registry where the defendant was personally served with the present action.

That the plaintiff's claim *ratione materiae* falls within the jurisdiction of the Admiralty Court is not and cannot be questioned having regard to s. 18, s-s. 3 of the *Admiralty Act.*

The question of whether or not the plaintiff's action is within the territorial jurisdiction of the court of this registry must be determined in accordance with the laws of England governing such matters. (S. 18, s-s. 1 of the Admiralty Act) and under that law it has long been recognized that personal service of the Writ of Summons is the basis for the territorial jurisdiction of the Admiralty jurisdiction of the High Court.

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Halsbury Laws of England, Vol. 8, p. 536, para. 1187:

Personal actions of a transitory nature, on the other hand, whether in contract or in tort, are within the jurisdiction of the English Courts, even though the cause of action arose abroad, and even an action in respect of an assault committed by a foreigner on a foreigner abroad may be tried by the Courts of this country if process can be properly served.

Johnson v. Taylor Bros. & Co. Ltd. (1), Lord Dunedin, at p. 154:

I understand that jurisdiction according to English law is based on the act of personal service and that if this is effected the English law does not feel bound by the Roman maxim *Actor sequitur forum rei.* It is far otherwise in other systems where service is in no sense a foundation of jurisdiction . . .

In Re: Smith et al. (2), Sir Robert Phillimore:

In this case the Court would, if the *Insulana* could have been arrested within the territorial jurisdiction have had jurisdiction, so far as the res was concerned; but it would, under the old law, have possessed no jurisdiction in personam over the owners of the res unless they could have been served with a citation within the territorial jurisdiction. I do not think that the legislature, in enacting the 1st Rule of Order XI, in the 1st Schedule to the Judicature Act, 1875, contemplated any alteration of the law in cases similar to the present . . .

In the present case, the Court of this registry has jurisdiction *ratione materiae* and since the cause of action arose, and the defendant was personally served within the limits of this registry, it has also territorial jurisdiction.

The defendant's demand therefore that the plaintiff's action be dismissed for lack of jurisdiction is unfounded.

It was suggested by counsel for defendant that even if the Court should decide that the demand for the dismissal of plaintiff's action ought not to be granted, it should nevertheless order said action stayed until the dispute had been arbitrated. This is a proposition to which the undersigned is unable to accede in the circumstances of the present case. At no time, either in his present motion or otherwise, has the defendant offered, or declared his readiness, to submit the plaintiff's claim to arbitration and the only conclusion of his motion is that the action should be dismissed with costs.

The Court finds therefore that the defendant's motion is unfounded and accordingly it is dismissed with costs.

Motion dismissed with costs.

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(1) [1920] A.C. 144.

(2) (1876) 1 P.D. 300 at 301.