(36)

IN THE SEYCHELLES COURT OF APPEAL

STATE ASSURANCE CORPORATION **Appellant**

VERSUS

SEYCHELLES SHIPPING LINE LITD **Respondent**

Civil Appeal No: 23 of 1999

[Before: Ayoola, P., Pillay & Matadeen, JJ.A]

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Mr. R. Scott for the Appellant
Mr. P. Boulle for the Respondent

JUDGMENT OF THE COURT

(Delivered by Pillay, J.)

This is an appeal against a decision of the Supreme Court which held that the appellant, then the defendant, which is an insurance company, was liable to reimburse to the plaintiff, now the respondent, in respect of loss and expenses sustained as a result of damages caused to the respondent's ship "*on a loaded*" voyage from Durban to Victoria, arising from an insured peril. The Court made the following awards –

(1) towage costs from the port of breakdown of ship to Majunga including standby charges – the equivalent of ECU 17,500.00;

(2) towage costs from Majunga to Victoria – equivalent of ECU 10,890.00;

(3) costs for standby vessel – equivalent of ECU 3551.61;

(4) costs of a new turbocharger – the equivalent of US$29,000;

(5) costs of general spares – SR3,214.06.

There were originally four grounds of appeal but at the hearing only three of them were pressed, the last one relating to award (5) was dropped. Award (2) also was not questioned by the appellant. In essence, the appellant's grounds of appeal question the findings of fact of the learned Judge that –

(a) the damage caused to the respondent's ship consisted of a single and continuous event;

(b) there was no negligence on the part of the crew of the respondent's ship;

(c) the turbocharger could not be repaired but had to be replaced.

There is also a cross-appeal by the respondent in respect of the award made in relation to the cost of a new turbocharger since it did not reflect the actual price paid for it by the respondent, namely SR246,358.26.

With regard to findings (a) and (b) above, the learned Judge who had the advantage of hearing and seeing the witnesses deponing on behalf of the respondent, including the ship's captain and greaser, and witness K. Lowes who had deponed for the appellant rejected, as he was entitled to, the latter's evidence that the crew failed to identify initially the mechanical failure of the inlet valve of A5 cylinder, which would have been routinely detected and rectified by a simple technical procedure, thus allowing the ship to proceed on its way at reduced speed with its damaged turbocharger.

The learned Judge gave a valid reason, in our opinion, for rejecting Mr. Lowes' evidence, namely that his views on the true sequence of events was speculative at most, having had the advantage of examining beforehand the damaged parts of the cylinder.

The learned Judge instead accepted the evidence led on behalf of the respondent that when cylinder head of B4 was found damaged, its exhaust and inlet valves were replaced and when the engine was thereafter restarted, only three out of 10 cylinders were firing. The standby fuel pump was used and the engine was restarted, with its speed increasing to an abnormal extent. The engine was shut down and fire came out from the funnel of the engine. No attempts were then made to restart the engine and the ship was ultimately towed to Majunga.

By accepting the evidence led on behalf of the respondent, the learned Judge found that the crew had not been negligent for the following reasons.

First, the crew worked on what they thought was the root of the problem, namely cylinder B4 and believed they had solved the problem when they replaced its exhaust and inlet valves. It is significant that Mr. Lowes, in cross-examination, conceded that the crew could not have been negligent in starting with an examination of B4.

Second, the crew realised that they had not succeeded only when their attempt to restart the engine showed that all the cylinders were not firing. This was eventually followed by fire coming from the engine. The captain then took the decision not to restart the engine, because of the risk of fire and in the interests of the ship and its crew, given that its cargo consisted of, among other things, explosives. Although the process might have taken many hours, it was a continuous single event.

Third, the crew admittedly failed to detect the default in cylinder A5 but they were not negligent in so doing because "*it is easier to detect a problem and suggest plausible solution after the incident*" than in the heat of the moment.

We see no reason to interfere with the findings of fact of the learned Judge nor with his appreciation of the evidence on record. Indeed, Mr. Lowes' evidence did not refer to a standard of normal practice that when an irregular noise is heard coming from the engine room of a ship, the first thing to do is to examine the inlet valve of a particular cylinder, let alone cylinder A5 out of 10 cylinders. What Mr. Lowes was stating was an opinion expressed after the event which the learned Judge was right and entitled to reject in the particular circumstances of the case.

Since the crew of the respondent was not negligent, the respondent is entitled to the towage costs from the point of breakdown to Majunga i.e. SR113,446.99, learned Counsel for the appellant having conceded that the principle of general average does not apply on the authority of **Arnould's Law of Marine Insurance and Average, Volume** II at paragraph 917. The respondent is entitled to be reimbursed by the appellant in respect of its total loss and it is up to the appellant later, by subrogation, to make its claim against the cargo and freight insurers – vide also Article 11. 1 of Annex A.

We turn now to the claim in respect of the damaged turbocharger. The learned Judge in awarding the cost of a new turbocharger stated that he accepted the evidence of Dr. Gendron on behalf of the appellant that it was a heavy piece of equipment (340 kg) which could not be repaired, the more so as Majunga had poor facilities. Moreover, although Mr. Schmid, deponing on behalf of the appellant, stated that his company based in South Africa, ABB, could repair the equipment, the learned Judge considered that there was no guarantee that the turbocharger would function properly after repairs had been effected.

There was also evidence (a) from Dr. Gendron that a reconditioned turbocharger was looked for by the respondent but none was available and (b) from Mr. Schmid himself that it was only after the damaged

turbocharger had been brought to Durban and dismantled that it was thought that repairs could be made to the turbocharger.

We consider, therefore, that the learned Judge, on the evidence before him, was right to conclude in the circumstances that the "*only logical conclusion*" was for the respondent to have the turbocharger replaced by a new one.

We agree, however, with learned Counsel for the respondent that there was unchallenged evidence that the respondent bona fide paid to the manufacturer of the turbocharger the sum of US$49,410, which was accepted by Mr. Schmid himself as being "*most probably*" the correct price sold by the manufacturer for such a piece of equipment. Moreover, it was open to the appellant to have offered to pay for a new turbocharger at the selling price of US$29,000 from ABB in South Africa but not after a new one had already been bought by the respondent, as rightly observed by the learned Counsel for the respondent.

The cross-appeal is allowed and for the award made in the judgment in respect of the turbocharger, we substitute the sum of SR176,554.26 i.e (SR246,358.26 – which was the equivalent of US$ 491,410, less SR69,804.00 already paid to the respondent).

We otherwise affirm the judgment of the learned Judge and dismiss the appeal of the appellant, with costs.

E. O AYOOLA
PRESIDENT

A. G. PILLAY
JUSTICE OF APPEAL

K. P. MATADEEN
JUSTICE OF APPEAL

Delivered at Victoria, Mahe this 16 th. day of December 1999.