IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
OWUSU (MS), JSC
YEBOAH, JSC
ARYEETEY, JSC

CIVIL MOTION
№ J5/19/2010
29TH APRIL, 2010

THE REPUBLIC

VRS

HIGH COURT, TEMA … RESPONDENT

EX PARTE

MY SHIPPING PVT LIMITED … APPLICANT

AND

1. DEE JONES PETROLEUM & GAS LTD

2. TROMOS SHIPPING CO. LTD … INTERESTED PARTIES

3. THE ENTIRE CARGO OF 9,949

4. THE VESSEL, M/T "MY ARCTIC"

R U L I N G

YEBOAH, JSC:-

The supervisory jurisdiction of this court has been invoked by the applicant herein to quash the ruling of the High Court, Tema, dated the 18th day of December, 2009 and for a further order prohibiting the same court from proceeding to hear a consolidated suit pending before it.

In an affidavit sworn to by one AKUA SARPOMAA AMOAH on behalf of the applicant herein, it does appear that the facts culminating in this application are not in controversy. Dee Hones Petroleum & Gas Ltd sued Tromso Shipping Co. Ltd and The Vessel M/T "MY ARCTIC" in suit Nº E2/149/09 before the High Court, Tema. Another suit was commenced as TROMSO SHIPPING CO. LTD V THE ENTIRE CARGO OF 9,949,799 of GAS OIL ON BOARD THE MV "MY ARCTIC" and two others as defendants. A third suit was also commenced, this time at the High Court, Commercial Division, Accra as suit Nº CGS/14/09 between MY SHIPPING PVT LTD V CARGO OF IL CURRENTLY CARRIED BY THE VESSEL MY ARTCTIC, THE OWNERS AND ALL PERSONS INTERESTED IN THE CARGOCL and CREST GRADE OIL GAS LTD. It is on record that the two suits at the High Court, Tema referred to above were consolidated given the nature of the facts in the two cases. The Applicant herein whose case was pending at the High Court Commercial Division, Accra successfully applied and joined the consolidated suit at the High court, Tema. After going through the implementary process pursuant to the order for joinder, the applicant filed a statement of defence and counter-claimed for a declaration that it had right lien against the cargo of gas oil currently on board the "MY ARCTIC" and other ancillary reliefs. After close of pleadings, the plaintiff in the consolidated cases filed an application for directions which was taken. The record in this application shows that it was subsequent to the taking of application for directions that the applicant filed a motion for stay of proceedings and

referred to arbitration in London. The application was heard before His Lordship Offei at the High Court, Tema on 18/12/2009 and His Lordship dismissed the application and proceeded to hear the consolidated cases.

The refusal of the application to stay proceedings and referral to arbitration in London prompted the applicant to mount this application to invoke our supervisory jurisdiction to quash the ruling and prohibit the judge from proceeding to hear the consolidated suits.

Learned counsel for the applicants filed three main grounds for the application which for sake of clarity are reproduced as follows:

a. The learned judge erred in law when he ruled that the proper interpretation of section 40(1) and (2) of the Arbitration Act 1961 Act 38 is that, application for stay of proceeding and References of the matter to arbitration must be made to the court before a date fixed for hearing and by this error, assumed jurisdiction to hear the suit which by reason of the said Arbitration Act, the court did not have.

b. The learned trial judge serious misdirected himself as to the validity and therefore enforceability of the said Head Charter Party (shall Time 4 CP) and by that misdirection assumed jurisdiction which he clearly did not have by reason of section 40 of the Arbitration Act, 1961 , Act 38.

c. The learned trial judge erred in law when he erroneously equated law and jurisdictional clause with international Arbitration clause in contract and by this error assumed jurisdiction which he did not have.

It must be pointed out that all the parties to the consolidated suit and this application for that matter, admit unequivocally that there was an arbitration clause

in clear and unambiguous terms in the Head Carter Party out of which these cases emerged.

The trial judge was thus called upon to interpret the arbitration clause and exercise his powers under the statute to either refer the matter to arbitration or proceed to hear the matter. Counsel based his submission on the recent case of BCM GHANA LIMITED V ASHANTI GOLDFIELDS LIMITED [2005-06] SCGLR 602.

He contended that the court that is the High Court, Tema had no option than to refer the case to an arbitration. Contracts that contain arbitration agreement may take two forms; a domestic arbitration and non-domestic arbitration agreement. This depends on the nature of the agreement which may contain the contract document.

From the nature of the agreement which is in evidence as exhibit "AS 2" it is quite clear that the parties to the action had entered into a contract which called for a non-domestic arbitration in case of a dispute arising out of the contract.

This distinction has been acknowledged by case law and text writers. In this case, there is no doubt whatsoever, that exhibit "AS2" contained a non-domestic arbitration clause. Learned counsel therefore relied heavily on section 40(1) of The Arbitration Act, Act 38 of 1961 to submit that the learned judge was in error by assuming jurisdiction. Learned counsel for the interested party argued that the applicant took several fresh steps to deny itself the benefit of the arbitration.

It must, however be pointed out that in any pending case whether the arbitration agreement is domestic or non-domestic, the filing of the action and taking steps in the action does not oust the jurisdiction of the High Court to hear the action. It is the duty of the party who wants the action to be referred to arbitration to timeously raise the objection by the proper procedure provided by law. It is also the duty of the plaintiff who wants to proceed with the case to convince the court why the arbitration clause should be disregarded to enable the court to hear the case.

In domestic arbitration agreement, a party served with legal proceedings from a court may at any time after acknowledging service and before filing of any pleading or taking any other steps must apply to the court to stay the proceedings.

In non-domestic arbitration agreement, which is the one applicable in this case, the procedure for reference to arbitration does not appear to be very different from the domestic arbitration agreement. Both require that a party who is invoking the courts statutory power or inherent jurisdiction to refer the matter to arbitration and thus stay proceedings must not be seen as taking fresh steps in the action. In the case of PITCHERS LTD V PLAZA (QUEENSBURY) LTD [1940] 1 ALL ER 151, the defendant who had wanted the action stayed filed an affidavit in opposition to resist an application for summary judgment under Order 14 of the English rules without filing a substantive application for stay of proceedings. Goddard LJ at page 156 said as follows:

> "It seems to me that if a defendant who is sued wants an action stayed, he should take out a substantive application at the earliest possible moment" [Emphasis ours].

Slesser CJ at page 154 was more emphatic when he said as follows:

> "I entertain myself no doubt whatever that they took a step in an action when they appeared before the master and asked for leave (quote their affidavit) to defend the action….In truth and in fact, however, a step in action is taken when the summons to sign final judgment was answered by affidavit and no application was made to stay the action on the ground of the arbitration clause" (Emphasis ours)

The principle in the above case was followed in TURNER & GOUDY (a firm) v McCONNELL & OR [1985] 2 ALL ER 34 CA which held inter alia that the decision to apply for stay of proceedings ought to be taken promptly before any step in those proceedings is taken by the defendant.

As regards a non-domestic arbitration, the learned authors of Aikins Enchyclopeadia of Court Form in Civil Proceedings stated at page 68 of volume 6 (1989 issue) as follows:

> "In the case of a non-domestic arbitration agreement, if the party applying for the stay has acknowledged service and has not delivered any pleadings or taken any other step in the action and if the proceedings concern any matter agreed to be referred, the court must grant stay unless it is satisfied that the arbitration agreement is null and void or is inoperative or incapable of being performed or that there is in fact no dispute between the parties with regard to the matter referred"

However, in Ghana, the procedure is statutorily provided under section 40(1) of the Arbitration Act, Act 38 of 1961 as follows:

> "where a party to an agreement to which the convention set out in the schedule applies or a person claiming through that party commences legal proceedings in a court against any other party to the agreement, or a person claiming through that party in respect of a matter agreed to be referred, a party to those legal proceedings may at any time after service of the writ of summons and before the date fixed for hearing, apply to that court to say proceeding".

In our opinion, the timing of the objection is very crucial. A hearing of a case may take the form of an application for judgment in default of appearance, default of defence judgment on admissions, and summary judgment under Order 14 of the High Court [Civil Procedure] Rules C1 47. Any of the above applications may successfully terminate proceedings. Hearing of a case may also occur after application for directions by adduction of evidence from both parties.

In such a case in which time is of the essence, we think that objection to the hearing of the case for reference to an arbitration should be timeously raised after appearance and not before the date fixed for hearing when application for directions had been taken pursuant to the close of pleadings. This would in our opinion make the interpretation more purposive and in consonance with business practice in an admiralty case of such nature.

The uncontroverted evidence in a chronological order in this application has established that the applicant after the joinder as a defendant filed a statement of defence and counter-claim on 26/10/2009. The interested party herein on 13/10/09 filed an application for directions fixed for 16/10/2009. Learned counsel for the

applicant also filed Additional Issues and raised five contentious issues for determination.

The application for directions, however, was taken on 3/11/09 and the trial judge made orders for filing and exchange of all documents and prospective exhibits the parties would tender in the course of the trial. The learned judge there and then adjourned the case to 17th, 18th and 20th of November 2010 for hearing on 16/11/09, the day before the hearing of the case, learned counsel for the applicant filed the application to stay the proceedings for the case to be referred to arbitration. Given the time the application was field , the learned judge was of the opinion that the application was not promptly made as required under section 40(1) of the Arbitration Act of 1961 Act 38. His Lordship stated in his ruling as follows;

> "Section 40 of the Act however contains conditions precedent to the enforcement of international arbitration clause. The first condition is that the applicant may apply for stay of proceedings at anytime after the service of the writ of summons and before the date fixed for hearing"

He proceeded to conclude, by adopting a simple approach to interpretation of section 40 of Act 38 and held that the application was brought outside the statutory period fixed by the Act itself, and then refused to grant the application to stay proceedings.

It should be pointed out at this stage that the courts would always respect the agreement by parties to submit their dispute to arbitration and would not stand in the way of the parties desirous of adopting alternative dispute resolution mechanism in resolving disputes pending before the courts.

This informed our sister Adinyirah JSC in the BCM GHANA LTD V ASHANTI GOLDFIELDS LTD (supra) when she said at page 611 as follows;

> "The courts must strive to uphold dispute resolution clauses in agreement, which I consider to be sound business practice"

The courts, however, would refrain from staying proceedings of a pending action when the applicant who seeks a stay of proceedings failed to timeously apply to the court for the stay even though the court has an inherent jurisdiction to stay its own proceedings.

Another argument advanced by learned counsel for the applicant was the construction placed on section 40 of the Arbitration Act, Act 38. According to counsel the judge misconstructed section 40 (1) and erroneously assumed jurisdiction to proceed to hear the case. On our part the statute is plain and calls for no interpretation. It merely sets a statutory period for any party to apply to a court for stay of proceedings under the Act. The question which had been asked in this court on regular basis is: whether errors which appear on the face of the record which do not go to jurisdiction or render the proceedings a nullity should warrant our intervention by resort to Article 132 of the 1992 Constitution?

Several authorities from the time the case of the REPUBLIC V HIGH COURT ACCRA EX PARTE CHRAJ (KWAME ADDO) INTERESTED PARTY [2003 – 04] SCGLR 312 was decided have established conclusively that those errors which do not nullify proceedings should be redressed by resort to the appellate jurisdiction of the Court of Appeal instead of invoking the supervisory jurisdiction of the Supreme Court. In this case, assuming that the learned trial judge misconstrued the statutory

provisions of the Arbitration Act, Act 38 of 1961, the effect of the error (if even it was proved to be so) did not destroy his jurisdiction to proceed to hear the case. In our opinion, resort to an appeal would have been appropriate in this case.

In any case the mere present of an arbitration cause in an agreement does not oust the jurisdiction of a High Court. The courts duty, if an application is made is to consider it an in appropriate case and make an order to stay its own proceedings.

See IN RE GHANA PRIVATE ROAD TRANSPORT UNION (GPRTU); TETTEH V ESSILFIE [2001-2002] 786.

The other remaining grounds canvassed for this application are serious attacks on the learned judge's interpretation of the Head Charter Party and the construction placed on International Arbitration Clause in contract. As had been said earlier in this opinion, the alleged misdirection do not themselves call for our intervention by certiorari and prohibition unless the orders made are a nullity or so patent on the record to make the orders void.

We have examined the orders made in the ruling of the learned judge and we are convinced that even if the interpretation placed on the Head Charter Party agreement and the International Arbitration clauses are erroneous, the errors could not be said to be a nullity. The application is thus refused for the reason canvassed in this opinion.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

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