08-3477-cv(L)

08-3758-cv(XAP)

To Be Argued By:
Rahul Wanchoo

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

v.

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR DEFENDANT-COUNTER-CLAIMANT-APPELLEE-CROSS-APPELLANT

LAW OFFICES OF RAHUL WANCHOO
Attorneys for Defendant-Counter-Claimant-Appellee-Cross-Appellant
357 Westfield Avenue
Ridgewood, New Jersey 07450
201-882-0303

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Preliminary Statement

The Defendant-Appellee, JALDHI OVERSEAS PTE, LTD. ("Defendant" or "Jaldhi"), submits this Memorandum of Law in Reply to the Plaintiff-Appellant's Opposition to the Defendant's Cross-Appeal. For the reasons set forth below, the Defendant's Cross-Appeal should be granted.

Argument

The Plaintiff suggests – without arguing, because it cannot – that the Defendant was obligated to "preserve" its reliance on *Willamette Transport, Inc. v. CIA Anonima Venezolana de Navegacion*, 491 F.Supp. 422 (E.D. La. 1980)(Plaintiff's Opposition, p. 9). Of course, the Plaintiff provides no legal "authority" for its suggestion that a party is obligated to cite all cases in the trial court that it intends to cite on appeal. This suggestion is meritless and should be disregarded.

Substantively, the Plaintiff attempts to portray the Defendant's reliance on *Willamette* as an attempt to somehow "ignore[ ]" cases such as *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 212 F.3d 138 (2d Cir. 2000); or casually discount cases like *Stephens v. Natl. Distillers & Chem. Corp.,* 69 F.3d 1226 (2d Cir. 1995). As made amply clear by its Brief, the Defendant neither "ignored" nor discounted the above cases, but very specifically requested that the *Stephens* holding "should be limited to the specific facts before it" (Defendant's Brief, p.

11). Indeed, *Stephens* held that the *Willamette* reasoning could not be adopted in light of *S&S Machinery Co. v. Masinexportimport*, 207 F.2d 411 (C.A.N.Y. 1983), which, however, specifically examined whether a waiver of immunity from "other liability" waived immunity from prejudgment attachment. *Id*. at 417. The *S&S* court held that the "other liability" language "does not unequivocally express the will of the parties to waive immunity from prejudgment attachment." *Id*.

The Plaintiff, of course, itself "ignore[s]" the point raised in the Defendant's Brief that this Circuit has recognized the existence of "doubt" as to whether "an order requiring the posting of security is an 'attachment' of a foreign state's property within the meaning of the FSIA" (*Id*. at p. 12). The Plaintiff more importantly ignores the fact that, while *Stephens* dealt with the narrow issues of whether a state statute requiring prejudgment attachment was *valid*, this case deals with whether a counterclaim defendant demanding counter security under Admiralty Rule E(7) against a plaintiff sovereign is permissible under the Foreign Sovereign Immunities Act §1607.

Furthermore, *British Intl., supra*, examined the very narrow issue of whether a statutory requirement that an unauthorized foreign or alien insurer must post a bond or other security before filing any pleading was equivalent to a prejudgment "attachment" of the insurer's property, for purposes of the due process analysis. *Id*. at 143. Thus, the Defendant's failure to analyze it is not

dispositive. Moreover, even there, the Court held that the statute at issue complied with constitutional safeguards. *Id*. at 143-44.

The Plaintiff's attempt to factually distinguish *Willamette* from the instant case falls flat. While the Plaintiff argues that *Willamette* is inapplicable because the Court determined that the CAVN was not entitled to immunity under 28 U.S.C. §1605 (Plaintiff's Opposition, p. 13). In fact, the *Willamette* case is fully instructive:

> . . . . Congress never stated that admiralty suits against foreign sovereigns are to be treated in all respects like admiralty suits against the United States. No other language in the Act or in its legislative history even implies that it was Congress' intent to extend immunity from posting any bond in an admiralty proceeding to foreign sovereigns. . . .

491 F.Supp. at 442. There, thus, the defendant vessel owner, an agent or instrumentality of a foreign jurisdiction, was held not entitled to immunity from countersecurity.

Lastly, the Plaintiff's argument that the cases the Defendant cited "requiring counter-security do not address the FSIA Immunity Exceptions" clashes with its own admission, one paragraph later, that "two of the cited cases involve the FSIA" (Plaintiff's Brief, p. 13).

Finally, and as an endpoint, the Plaintiff makes note of the Defendant's failure to cite the applicable standard of review in its Cross-Appeal (Plaintiff's Opposition, p. 3). That failure aside, it is worth stating that, though aware that the

Plaintiff failed to do so in its Brief on Appeal, the Defendant made no moment of the Plaintiff's failure to include a jurisdictional statement which contained specifically "the filing dates establishing the timeliness of the appeal or petition for review" and "an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis." Fed. R. of App. Pro. VII, 28(4)(C)-(D)(*See*, Plaintiff's Brief on Appeal at pp. 2-3). The Defendant determined that bringing this obvious oversight on the Plaintiff's part to the Court's attention was needless and potentially petty. In light of this, it is particularly interesting to note that the Plaintiff chose to bring the Defendant's obvious, minor oversight in its Brief to the Court's attention, which, as the Defendant did with the Plaintiff, it could have instead silently corrected.

Conclusion

For the reasons set forth and in its moving papers, the Defendant's Cross-Appeal should be granted.

Dated: New York, New York
December 15, 2008

Respectfully Submitted,

LAW OFFICES OF RAHUL WANCHOO
Attorneys for Defendant-Counter-Claimant-
Appellee-Cross-Appellant
JALDHI OVERSEAS PTE, LTD.

By: _____
Rahul Wanchoo (RW-8725)

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: The Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte, Ltd.

DOCKET NUMBER: 08-3477-cv(L)

I, (please print your name) Kathleen Battiato, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to

- ☐ <agencycases@ca2.uscourts.gov>.
- ☐ <criminalcases@ca2.uscourts.gov>.
- ☑ <civilcases@ca2.uscourts.gov>.
- ☐ <newcases@ca2.uscourts.gov>.
- ☐ <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec AntiVirus, Version 10.0.0.359

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature) _____

Date: 12/15/2008