Itochu Steel Asia Pte Ltd v CV Wira Mustika Indah and Others
[2000] SGHC 259

Case Number : Suit 526/1999

Decision Date : 30 November 2000

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Low Chai Chong and Raistlina Kwek (Rodyk & Davidson) for the plaintiffs; George Lim, Jinny Tan and Valerie Yang (Wee Tay & Lim) for the third defendant

Parties : Itochu Steel Asia Pte Ltd — CV Wira Mustika Indah

Bills of Exchange and Other Negotiable Instruments – Dishonour – Dishonoured bills of exchange – Claim by drawer of bills against acceptor – Whether payment on bills made by drawer – s 59(4) Bills of Exchange Act (Cap 23)

Bills of Exchange and Other Negotiable Instruments – Dishonour – Dishonoured bills of exchange – Claim against accommodation party – Whether claimant holder for value of bills – s 28(2) Bills of Exchange Act Cap 23)

Bills of Exchange and Other Negotiable Instruments – Dishonour – Dishonoured bills of exchange – Defence of release and waiver – Whether defence proved

Tort – Misrepresentation – No prejudice caused or reliance on misrepresentation – Whether claim made out

: This is an action between the plaintiffs and the third defendant. The plaintiffs` claims against the first and second defendants were not due for hearing before me. No process has been served on the first defendant and the claim against the second defendant has been stayed by an order of court.

The plaintiffs, Itochu Steel Pte Ltd, a company incorporated in Singapore dealt with steel products. The first defendant CV Wira Mustika Indah (`CV Wira`) is a partnership established under the laws of the Republic of Indonesia carrying on business there. The second defendant is a partner in CV Wira. The third defendant is the son of the second defendant and was at the material time carrying on business under the name of Tri Niaga Enterprise (`TNE`) in Singapore.

Between September 1996 and October 1997 sales contracts were entered into between the plaintiffs and CV Wira for cold rolled steel sheets which were shipped to CV Wira in Indonesia. The plaintiffs would draw bills of exchange for the price of the goods sold and the third defendant would accept the bills. Payment on the bills were due on future dates specified.

This action relates to 35 bills that the plaintiffs drew between 24 April 1997 and 16 January 1998. The payees were the Industrial Bank of Japan (`IBJ`) or order. The third defendant accepted each of the bills. The total sum payable on the bills was US$5,992,375.18.

When the plaintiffs presented the bills for payment, they were dishonoured. After giving the third defendant notice of dishonour they commenced legal proceedings. As payment of US$533,063.00 was subsequently received, they claimed the balance of US$5,459,312.18 against him.

The bills of exchange claims

The plaintiffs asserted in para 4 of the re-amended atatement of claim that:

> *Pursuant to and in accordance with the Sales Contracts and the agreement pleaded above, the plaintiffs drew upon the third defendant, Bills of Exchange payable to the Industrial Bank of Japan Ltd. or order. The third defendant accepted the Bills of Exchange, payable at ING Bank NV Singapore.*

They also claimed that the third defendant was liable to them as the accommodation party to the bills. In para 4A of the re-amended statement of claim they alleged that:

> *Further and/or in the alternative, the third defendant is liable to the plaintiffs as the accommodation party to the Bills of Exchange.*

The claim as drawer

The plaintiffs` claim as the drawer of the bills was founded on s 59(4) of the Bills of Exchange Act (`the Act`):

> *Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill.*

It was common ground that each of the 35 bills was drawn by the plaintiffs, that it was payable to a third party, namely, the Industrial Bank of Japan or order, and the third defendant was the acceptor.

The dispute was whether the plaintiffs had paid on the bills. That was not pleaded or asserted to by any of the plaintiffs` witnesses.

In the course of arguments counsel for the plaintiffs sought to rely on s 30(1) that:

> *Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.*

This would not do. Counsel for the third defendant rightly pointed out that giving value for a bill is not synonymous with making payment on it.

To enable the claim to be determined on its substantive merits, I allowed the plaintiffs to recall their Sales Manager, Hirokazu Murata to give evidence on this matter.

Mr Murata produced a set of letters relating to the return of the 35 bills to the plaintiffs. It started with three letters from ING Bank to IBJ, the first two dated 27 May and the third dated 30 June 1998. In these letters ING Bank informed IBJ that the bills accepted by the third defendant remained unpaid and that they were returning them to IBJ.

IBJ must have informed the plaintiffs about these letters because the plaintiffs instructed IBJ in their letter dated 8 July 1998 that:

With reference to ING Bank NV`s letter dated 27 May 98 and 30 June 98, we will settle all these outstanding bills with the buyer. Therefore please treat all the following accounts as closed.

On 13 July 1998 IBJ replied to the plaintiffs that:

As per your letter dtd 8/7/98, we have closed our file for all the items as per attached list. We enclose herewith all the bill of exchange for your retention.

These letters showed that the plaintiffs did not pay on the bills when they were returned by ING Bank to IBJ.

The plaintiffs also led oral evidence from Mr Murata. Their counsel was very brief with Mr Murata, asking him:

Q: Did anyone pay IBJ for the bills of exchange?

A: Yes. Itochu paid.

Q: Was that before or after 13/7/98?

A: Before IBJ returned the bills of exchange.

Counsel for the third defendant went into greater detail with Mr Murata. He elicited from him that the plaintiffs paid the manufacturers of the goods sold to CV Wira by letters of credit issued under credit facilities obtained from IBJ. Then counsel sought clarification on the return of the 35 bills :

Q: You told IBJ you will settle the bills with the buyers?

A: Because we were having discussion with Wira and Tri Niaga on rescheduling the debts.

Q: You are telling the bank you will deal with the buyers?

A: Yes.

Q: You are saying close your accounts with us with regard to the bills of exchange?

A: Yes.

Q: You did not require the bank to take action in these matters?

A: We told IBJ we were having discussions. We told them for the time being not to take any action.

Q: You told the bank to treat the accounts as closed?

A: Yes.

Q: You did not expect them to take any further action?

A: Yes.

Q: P3/1 - the bank confirmed they were closing their files?

A: Yes.

Q: In doing so they returned the bills of exchange to you?

A: Yes.

Q: There is nothing in this letter to show that Itochu had paid for the bills of exchange?

A: Nothing.

Q: Your counsel asked you and you said Itochu made payment to IBJ?

A: Yes.

Q: What payments Itochu made was to repay the loan, not for the bills of exchange?

A: I don`t think so.

Q: You told us that the bank had closed the accounts in the bill of exchange?

A: Yes.

Q: When you made payment to the bank, it was not for the bill of exchange, but to repay the bank for the loans made under the facilities?

A: It depends if we have enough money, we don`t have to take a loan. If we have no money, we take a loan.

The evidence was well short of proof of payment on the bills. Contrary to Mr Murata`s answers to his counsel, the plaintiffs did not pay on the bills before they were returned to them. IBJ released the bills to the plaintiffs without payment because the plaintiffs agreed to seek payment on the bills themselves. The plaintiffs did not have to make payment for the bills after they had them back. If for some reason they paid, they should have records showing when, how and to whom payments were made. No information of this nature was produced.

In the circumstances, the claim as drawers fails because the plaintiffs have failed to show payment to entitle them to sue under s 59(4).

The claim against the third defendant as an accommodation party

The third defendant admitted that he was an accommodation party. Any liability he may have as an accommodation party arises out of s 28(2) of the Act:

> *An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.*

An accommodation party is liable to the holder for value of the bill he accommodated. To be a holder for value, a party must be a holder. `Holder` is defined in s 2 of the Act as `the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.` The plaintiffs were the drawers, not the payees or indorsees of the bills. They were also not the bearers, as a bearer is defined in s 2 as `the person in possession of a bill or note which is payable to bearer`, and the bills were not bearer bills.

The plaintiffs have not established that they have a claim against the third defendant under s 28(2).

The third defendant had also pleaded that:

> *It is averred that the third defendant was an accommodation acceptor because he received no consideration for his acceptance. As an accommodation acceptor, the third defendant is entitled to be indemnified by the plaintiffs as drawers against any liability on the Bills of Exchange. Accordingly, if (which is denied), the plaintiffs are holders for value of the Bills of Exchange, their claim fails for circuity of action.*

Reference was made to ***4(1) Halsbury`s Laws of England*** (4th Ed) para 481:

> ***Duty to provide funds or indemnity****. Where the instrument is an accommodation bill, it is the duty of the party for whose accommodation it was drawn to provide funds to meet the bill at maturity, or in default of that to indemnify the acceptor or any other party who has been compelled to pay the holder. The indemnity to be given may be extended to include the costs of an action fought unsuccessfully against the holder, if there was a prima facie ground of defence.*
>
> *The duty to provide funds or to indemnify is a contract which may be expressed or implied. It is not required to be in writing.*

The plaintiffs` response is:

> *According to the third defendant, he accepted the bills of exchange in order to accommodate the plaintiffs. This submission is not only absurd, but flies in the face of clear evidence of the third defendant that he accepted the bills because he was told to do so by his father.*

There is a defect in that retort. The third defendant may have accepted the bills on the instructions

of his father. Nevertheless when he became an acceptor to the bills, he was accommodating the principal debtors on the bills, the plaintiffs who drew the bills. If the bills came into the possession of a holder for value, he would be liable under s 28(2), and he may be entitled to be indemnified by the plaintiffs.

On the facts, however, the question of indemnity does not arise because the third defendant did not incur any liability through accommodating the plaintiffs.

The plaintiffs` alternative claim

In paras 7, 7A, 7B and 7C of their re-amended statement of claim the plaintiffs alleged that:

> *7. Further and/or in the alternative, by letters dated March 1995 and 1 April 1996 addressed to the plaintiffs, the third defendant represented and warranted to the plaintiffs that:*
>
> *7.1 `the Principal (Tri Niaga Enterprise) is a duly registered sole proprietorship in accordance with Singapore law,`*
>
> *7.2 `I am a true and sole owner of such sole proprietorship,`*
>
> *7.3 `I am fully liable to you for any and all liabilities arising from transactions with you in the name of Tri Niaga Enterprise; and`*
>
> *7.4 `the Principal (Tri Niaga Enterprise) is a subsidiary of C.V. Wira Mustika Indah (`CV`), a Indonesian partnership and I shall cause the CV to make sure a business of the Principal and further to inject cash into the Principal in case of a shortfall in funds of the Principal.`*
>
> *7A By means of the aforesaid representations and warranties and acting on the faith thereof and believing them to be true, the plaintiffs were induced and continued to deal with the first Defendants.*
>
> *7B he representation set out in para 7.4 above was in fact false in that Tri Niaga Enterprises was not a subsidiary of the first defendants.*
>
> *7C Alternatively, in breach of his warranty as set out in para 7.4 above the third defendant did not cause the first defendant to inject cash into Tri Niaga Enterprises when there was a shortfall of funds by the latter.*

The third defendant admitted that he wrote the letters.

Mr Murata deposed in his affidavit of evidence-in-chief that:

> *These documents formed part of the agreed terms for the credit facility. The plaintiffs would not have extended credit to CV Wira if the two documents had not been signed. The plaintiffs relied on these two documents in extending credit to CV Wira.*

The representations set out in paras 7.1, 7.2 and 7.3 of the re-amended statement of claim were factually correct and unexceptional. Any complaint of the plaintiffs arises out of the representations in para 7.4.

The first representation in para 7.4 was that TNE was a subsidiary of CV Wira. This was a misrepresentation in that TNE was not a subsidiary of CV Wira in any sense of the word. None of the witnesses stated that the plaintiffs would not have accepted the undertaking if the plaintiffs knew that TNE was not a subsidiary of CV Wira, or explained the plaintiffs` understanding of TNE`s status as a subsidiary in the face of the third defendant`s declaration that he was the sole owner of TNE, a sole-proprietorship. The second representation was ambiguous. It is either that the third defendant will cause CV Wira to inject cash into TNE when TNE has a shortfall of funds, or that he will inject the cash into TNE himself, but nothing turned on this.

This is because although the first representation was wrong, the plaintiffs were not prejudiced by it. They failed in their claim against the third defendant because they could not substantiate their claim and not because TNE was not a subsidiary of CV Wira, or that it was short of funds to meet its liabilities to them. The alternative claim therefore fails.

Release and waiver

The third defendant relied on an agreement dated 1 May 1998 between him, the plaintiffs and CV Wira to raise the defence of release and waiver. As the agreement did not refer to release or waiver specifically, the circumstances leading to the agreement, and the parties` conduct in relation to it came under consideration.

In 1998, CV Wira was falling behind in their payments to the plaintiffs. The parties met to try to find a solution. The third defendant deposed in his affidavit of evidence-in-chief that:

> *36. The plaintiffs agreed to transfer the invoices from TNE to Wira, and to release TNE from any liability. In late April 98, the plaintiffs sent Wira a draft agreement entitled `Letter of Request`, and requested us to sign the Agreement.*
>
> *38. The agreement entitled `Letter of Request` was signed by Wira and me and forwarded to the plaintiffs on or about 1 May 1998. The plaintiffs` Managing Director, Mr Hitoshi Sato, signed the agreement on behalf of the plaintiffs. Before the plaintiffs signed the Letter of Request, they asked my father to confirm that the plaintiffs would be reflected as a trade creditor of Wira once they signed the Letter of Request. My father confirmed this, and I faxed a copy of a statement (which I received from my father) to the plaintiffs reflecting the plaintiffs as a trade creditor for US$5,992,373.18.*
>
> *39.* ***Although the agreement was termed a letter of request from Wira and TNE to the plaintiffs, it was drafted by the plaintiffs, and actually arose from the Plaintiffs` concern about not being listed as a trade creditor of Wira in Wira`s balance sheet.*** *(Emphasis added)*

The executed agreement reads:

Date:	1 May 1998
To:	Itochu Steel Asia Pte Ltd
Attn:	Mr. Hitoshi Sato

For and On Behalf of	For and On Behalf of:
CV Wira Mustika Indah	Tri Niaga Enterprise
signed	signed
[lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar]	[lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar] [lowbar][lowbar][lowbar][lowbar][lowbar][lowbar]
By: Tan Beng Hoei	By: Tan Peng Boen
	@ Tansri S Benui
We, Itochu Steel Asia Pte Ltd, confirm and agree to the above	
For and on behalf of:	
Itochu Steel Asia Pte Ltd	
Signed	
By: Mr Hitoshi Sato	

Letter of Request Request to Issue Invoices to CV Wira Mustika Indah

We, CV Wira Mustika Indah (the `buyer`) have from time to time purchase steel products from Itochu Steel Asia Pte Ltd (`ISA`) but the invoices are to be sent to Tri Niaga Enterprise as our paying agent.

For these purchases ISA has at our request issued invoices to Tri Niaga Enterprise who has been acting as our paying agent for and on behalf of the buyer for the purchase of the steel products above mentioned.

The buyer hereby requests ISA to issue invoices to the buyer with immediate effect and agree to the following:

1. The buyer hereby irrevocably and unconditionally undertake to ISA the due and punctual payment of all sums of whatsoever nature due and/or to become due under or pursuant to all sales contracts (`Sales Contract`) entered into between ISA all sums of whatsoever nature from time to time due and payable (but unpaid) at any time under or pursuant to the Sales Contract in the currency and in manner required thereunder.

2. The original invoices issued by ISA to Tri Niaga Enterprise from 10 April 1997 to 29 December 1997 shall remain valid and enforceable against the buyer and

the buyer shall make payment thereunder. (Italics added)

3. The buyer indemnify ISA against any loss, cost or expense which it may sustain or incur as a consequence of issuing the invoices as requested by the buyer.

Yours truly,

At the trial, it was established that the text approved by the plaintiffs with the words in italics were added into the copy for signature on the initiative of the third defendant`s solicitors after the draft letter was approved, and without reference to the plaintiffs. I had expressed my disapproval during the hearing. It was well that the insertion did not affect the outcome of these proceedings.

The plaintiffs denied that the agreement was a release or waiver. Mr Murata in his affidavit of evidence-in-chief deposed that:

16 Around or about March or April 1998, the second and third defendants approached the plaintiffs and requested for our assistance. They explained to me that the first defendants were being investigated by the police or customs in Jakarta and that the police had questioned them on the outstandings due to the plaintiffs and also as to why the invoices were not made out to the first defendants.

24 The plaintiffs did not at any point of time agree or intend to acknowledge or represent by the letter of request that we release the third defendant from his liability of payment under the bills of exchange or the sales contracts. Neither did the plaintiffs agree or intend to acknowledge or represent by the letter of request that we waived our rights against the third defendant. The third defendant is well aware of this at all times. Even subsequent to 31 May 1998, the plaintiffs continued to send statements of account to the third defendant.

The parties` subsequent conduct and documents bear out the plaintiffs` contention but not the third defendant`s.

After the agreement was signed the plaintiffs sent statements of accounts to TNE, and subsequently to CV Wira at TNE`s request. CV Wira noted on the confirmation copies of the statements for August, October and November 1998 `the mentioned figure is fully understood not in Wira Mustika Indah`s books but in other/internal books.`

If the purpose of the agreement was to have the plaintiffs listed as a trade creditors in CV Wira`s accounts as the third defendant alleged, the notations were entirely contrary to the purpose, but there were no complaints from the plaintiffs. Their acquiescence was however consistent with Mr Murata`s explanation on the purpose of the agreement.

The third defendant`s subsequent actions went counter to a release or waiver. TNE claimed to have issued a debit note dated 30 October 1998, six months after the agreement, to the plaintiffs for the

sum of US$5,992,375.18. The note, which the plaintiffs denied receiving, was for a `payment by CV Wira Mustika Indah on our behalf to you` of that sum, and a credit note to CV Wira for a payment in the same amount `made on our behalf to Itochu (S) Steel Asia Pte Ltd` although no payment was made to the plaintiffs.

The third defendant deposed in para 51 of his affidavit of evidence-in-chief that:

> *In the event, before TNE`s financial year closed in December 1998, I arranged for TNE to issue a debit note to the plaintiffs to reflect the fact that TNE had no liabilities to the plaintiffs. The plaintiffs did not object to the debit note.*

without explaining why it was necessary to issue a debit note for a payment that was not made.

If a release or waiver was agreed to, TNE could simply have cancelled the debt on that basis. Its reliance on that dubious debit and credit notes to try to cancel the debt shows that there was no release or waiver.

If the plaintiffs have proved their claim, the third defendant cannot avoid liability on the basis that he has been released from liability or that the plaintiffs had waived their claim against him.

The defence of release and waiver which took a significant part of the trial was lacking in merit and good faith, and should be reflected in the award of costs of the proceedings. With that in mind, I dismiss the plaintiffs` claim and award the third defendant half the costs of the action.

Outcome:

Plaintiffs` claim dismissed.