Ong Eng Kae and another *v* Rupesh Kumar and others
[2015] SGHC 163

Case Number : Originating Summons No 979 of 2014

Decision Date : 25 June 2015

Tribunal/Court : High Court

Coram : Aedit Abdullah JC

Counsel Name(s) : Vijai Parwani (Parwani Law LLC) for the plaintiffs; Gunaseelan S E Selvadurai (S. Gunaseelan & Partners) for the 1st defendant.

Parties : Ong Eng Kae and another — Rupesh Kumar and others

Civil Procedure – Costs – Personal cost order against solicitor

25 June 2015 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 Originating Summons No 979 of 2014 ("OS 979/2014") was the Plaintiffs' application for specific performance of an Option to Purchase entered into between the Plaintiffs and the 1st Defendant, Rupesh Kumar ("Rupesh"), in relation to a property owned by Rupesh at 60 Chestnut Avenue #23-02 Treehouse Singapore 679517 ("the Property"). The Plaintiffs' application for specific performance was made on the ground that they had satisfied the conditions under the Option to Purchase, which are the payment of an option fee and the payment of a deposit to exercise the option, thereby giving rise to a binding sale and purchase agreement of the Property. Having heard the parties, I granted the Plaintiffs' application on 13 January 2015 and ordered the property to be transferred to the Plaintiffs upon payment of the balance sum under the Option to Purchase. I also made the following orders to facilitate the transfer of the Property:

(a) Rupesh to pay interest, including late completion interest under Condition 9 of the Law Society of Singapore's Conditions of Sale 2012, to the Plaintiffs;

(b) Rupesh to deliver vacant possession of the Property to the Plaintiffs free of all encumbrances upon completion of the sale of the Property;

(c) 4th Defendant to withdraw his caveat on 21 January 2015 or on the completion of the sale of the Property, whichever date occurs earlier;

(d) Costs, damages, late completion interest, and any other expenses incurred by the Plaintiffs to discharge any obligations of Rupesh in respect of the Property to be deducted from the balance sum of sale proceeds due to Rupesh; and

(e) There shall be liberty to apply.

2 Having rendered my decision on the substantive matters, it remained for me to decide on the issue of costs for OS 979/2014. On this matter, the Plaintiffs, who had succeeded in OS 979/2014, made an oral application during the 13 January 2015 hearing for a personal cost order against

Rupesh's solicitor. I reserved judgment after hearing the Plaintiffs and Rupesh's solicitor on this issue.

Facts

Background facts of OS 979/2014

3 The Plaintiffs were a married couple looking to purchase a condominium close to the 1st Plaintiff's mother's house. A friend of theirs by the name of Nagasaravanan s/o Uttamasegeran ("Saravanan") informed them that his friend, Rupesh, wanted to sell the Property on an urgent basis. Rupesh asked for a selling price of $1.45m, but as he needed the funds urgently, he requested for half the sum to be paid on or before exercising the Option to Purchase and for the balance sum to be paid upon completion of the sale. The Plaintiffs agreed and entered into an Option to Purchase with Rupesh on 23 September 2013 ("OTP") reflecting this arrangement:

> IN CONSIDERATION of the sum of Singapore Dollars Six Hundred and Seventy Five Thousand Only (S$675,000.00) (hereinafter called "the option money") received by (Mr. Rupesh Kumar …) (hereinafter called "the Vendor") from the Purchaser this day by way of option money, the Vendor hereby grants the Purchaser and/or Nominee(s) this Option to Purchase the above described property … upon the terms set out below. …

4 Under the OTP, the Plaintiffs had to pay an additional sum of $50,000 before 4.00pm on 24 October 2013 in order to exercise the OTP. The clause bearing out this obligation read as follows:

> … This Option shall be exercised by the Purchaser by signing at the portion of this Option marked "ACCEPTANCE COPY" and delivering the same duly signed together with a cheque for the sum of [$50,000] paid to the Vendor …

5 The parties intended for a sale and purchase agreement to arise upon the Plaintiffs' exercise of the OTP, as is evident from the following clauses in the OTP:

> This Option and the Acceptance Copy signed by the Purchaser shall constitute a binding contract of the sale and purchase of the property. The option money shall form part of the purchase price paid upon proper exercise of this Option in the manner stipulated therein.
>
> …
>
> The sale price shall be [$1,450,000].

6 The Plaintiffs' case was that they had paid Rupesh two separate sums of $675,000 and $50,000, and that upon which, a binding sale and purchase agreement arose between the parties. They tendered the following documents to support their case:

> (a) Two separate notes bearing Rupesh's signature, acknowledging that he had received sums of $675,000 and $50,000 from the Plaintiffs for the purchase of the Property.
>
> (b) A letter dated 22 October 2014 from Rupesh's former solicitors, Wong, Gopal & Rai ("WGR"), who had represented him in the sale and purchase of the Property, confirming that Rupesh had received the sums of $675,000 and $50,000 from the Plaintiffs.

7 Unfortunately, completion was not forthcoming. The original completion date of 15 November 2013 was delayed and postponed a number of times. Rupesh was adjudged a bankrupt on 18

September 2014, following which the Plaintiffs decided to commence OS 979/2014 on 17 October 2014 against him to facilitate the completion of the sale and purchase agreement.

Facts pertaining to the issue of costs

8 I pause to point out the significance of Rupesh's status as a bankrupt. Under s 131(1)(*a*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("the BA"), a bankrupt is incompetent to maintain any action without the sanction of the Official Assignee ("OA"). The prerogative in deciding whether to defend an action against the bankrupt and if so, when and how to go about doing that rests entirely with the OA unless otherwise sanctioned by the OA. What this means is that once Rupesh was declared a bankrupt on 18 September 2014, he would have had to seek the OA's authorisation in order to defend himself against the Plaintiffs.

9 Rather than leaving the OA to determine the appropriate course of action to take in OS 979/2014, Rupesh wanted to defend the action by himself. He instructed Mr Gunaseelan S E Selvadurai ("Mr Gunaseelan") to represent him. Mr Gunaseelan, who was aware of Rupesh's status as a bankrupt, knew he had to obtain the OA's consent before he could do so. He wrote to the OA on 3 November 2014 seeking the requisite consent:

> We have been approached by [Rupesh] to act for him …
>
> We confirm that a third party has agreed and accepted to pay all our fees and disbursements in this matter.

10 On the same day, the OA emailed the Plaintiffs' solicitors, Mr Vijai Parwani ("Mr Parwani") informing him that the OA had authorised Mr Gunaseelan to act for Rupesh:

> The bankrupt's solicitors, [Mr Gunaseelan], had written to our office today to obtain the [OA's] consent to act for the bankrupt in OS 979/2014. As a third party is paying for the bankrupt's legal costs incurred in this matter, the Official Assignee has granted [Mr Gunaseelan] consent to act for the bankrupt in OS 979/2014. Please note that parties are not to look to the [OA] or the [bankrupt's] estate for costs incurred in the matter.

11 The first Pre-Trial Conference ("PTC") was held the next day. Mr Parwani and Mr Gunaseelan appeared in the PTC whereas the OA was absent. Later on in the evening, the OA sent a follow-up email to Mr Gunaseelan stating as follows:

> We wish to clarify that the [OA's] sanction for you to act for your client, [Rupesh], in the matter of OS 979/2014 is on the basis that a third party is bearing all costs incurred in this matter, including any adverse costs made against the bankrupt.

12 Mr Gunaseelan did not issue a response to the OA's clarification in the preceding paragraph. On 12 November 2014, the OA sent another email to him, requesting him to forward the OA a third party undertaking that indemnifies the OA of all costs incurred in defending OS 979/2014. A subsequent email was sent to Mr Gunaseelan on 21 November 2014 wherein the OA reminded Mr Gunaseelan of the same, although in the same email the OA requested Mr Gunaseelan to appear in the next PTC scheduled on 25 November 2014 on its behalf.

13 At the PTC held on 25 November 2014, the Assistant Registrar directed a reply affidavit and response affidavits from Rupesh and the Plaintiffs respectively to be filed and served. Accordingly, Mr Gunaseelan updated the OA of these developments on the same day.

14 The OA continued to make no appearance in the third and final PTC held on 16 December 2014. On that same day, Mr Gunaseelan requested a template copy of the deed of indemnity from the OA. The OA obliged his request on 31 December 2014.

15 OS 979/2014 came before me on 13 January 2015, during which all parties, including the OA, were present. By then, the OA had yet to receive the third party undertaking. Following an oral judgment granted in favour of the Plaintiffs during the hearing, the Plaintiffs applied for their costs to be borne personally by Mr Gunaseelan.

16 A signed copy of the deed of indemnity finally arrived at the OA's office on 16 January 2015 – three days after I had delivered judgment on the substantive matters in OS 979/2014. In response to this development, the OA took the position that throughout the proceedings the sanction given was a conditional one, and the absence of a third party undertaking rendered the sanction ineffective. The OA further declared that it had no power to grant "retrospective sanction" in respect of a deed of indemnity tendered after the disposal of the matter.

Discussion and decision

17 The Plaintiffs' case for Mr Gunaseelan to bear their costs rests upon *Tan King Hiang v United Engineers (Singapore) Pte Ltd* [2005] 3 SLR(R) 529 ("*Tan King Hiang*"). In *Tan King Hiang*, a bankrupt filed a motion seeking an extension of time to file his notice of appeal against a summary judgment entered against him in a suit commenced by the respondent. The bankrupt's solicitors proceeded to serve the papers on the respondent's solicitors without obtaining the sanction of the OA. Almost two months later, and ten days before the motion was due to be heard, the bankrupt's solicitors wrote to the OA for approval to continue with the proceedings. The OA gave unconditional consent at first, but three days later the OA qualified its earlier consent by requiring the bankrupt to deposit a sum of $40,000 as the OA's security for costs in relation to the motion. No security for costs was furnished by the date of the hearing of the motion. In the circumstances, the Court of Appeal dismissed the motion on the ground that the bankrupt was incompetent to pursue the matter as he had failed to satisfy the precondition to the OA's consent. Further, in the absence of security furnished by the bankrupt, the Court of Appeal ordered the bankrupt's solicitors to bear the respondent's costs of the motion pursuant to O 59 r 8(1)(*c*) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), which reads as follows:

> Subject to this Rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may make against any solicitor whom it considers to be responsible (whether personally or through an employee or agent) an order directing the solicitor personally to indemnify such other parties against costs payable by them.

18 The reason for imposing personal costs against the bankrupt's solicitors was that the solicitors contravened the prohibition against bankrupts maintaining any action (other than for damages in respect of a personal injury) by pursuing the motion on behalf of their client without the prior sanction of the OA despite knowing that their client was a bankrupt (see s 131(1)(*a*) of the BA). Having been adjudicated a bankrupt, the bankrupt's cause of action vested in the OA and as such only when the bankrupt, or in turn his solicitor, has received the OA's sanction can he take further steps in the proceedings. Given that the motion was pursued without the OA's sanction, the Court of Appeal found that the solicitor in question had wasted costs by his "failure to conduct proceedings with reasonable competence", and accordingly ordered personal costs against him.

19 Insofar as the issue of whether a solicitor acting on behalf of a bankrupt should be made

personally liable for costs is concerned, I am satisfied that that the principles in *Tan King Hiang* are applicable, and would adopt them to analyse the present case. In my judgment, the principal issue arising for determination is whether Mr Gunaseelan failed to conduct proceedings with reasonable competence and expedition.

20 As mandated by s 131(1)(*a*) of the BA, a bankrupt, or in turn his solicitor, may take further steps in proceedings after the commencement of bankruptcy only upon receipt of the OA's sanction. The Plaintiffs, relying on the authority of *Tan King Hiang*, argue that consent had not been given by the OA. They argue that the condition upon which the OA's consent rests – which was for Mr Gunaseelan to furnish a third party undertaking – was not satisfied and accordingly consent was not given. Mr Gunaseelan argues that the OA had already issued its consent, and seen in this light, the request for him to issue a third party undertaking was more of a formality rather than a precondition.

21 What was relevant to my mind in these proceedings was whether from the surrounding circumstances, including the words and conduct of the OA in evidence, the Plaintiffs can show that Mr Gunaseelan's conduct of the proceedings was wanting. In *Tan King Hiang*, the Court of Appeal looked to the issue of existence of actual consent, and nothing was raised in that case about reasonable conduct and expedition arising out of a reasonable interpretation of events.

22 An email sent by the OA on 3 November 2014 which allowed Mr Gunaseelan to act for Rupesh in OS 979/2014. This email did not contain any qualification of the permission to act. However, the next day, the OA proceeded to, in its own words, "clarify" its previous email to Mr Gunaseelan that such consent was given "on the basis that a third party [would be] bearing all costs incurred in this matter". About a week later on 12 November 2014, the OA sent another email requesting for a signed indemnity bearing all costs incurred in OS 979/2014. The Plaintiffs' (and the OA's) position is that these two emails, taken together, had the effect of suspending the OA's earlier consent until Mr Gunaseelan submits a third party undertaking. While that might be true on the face of it, it is equally important to note that the OA's subsequent conduct may be taken as being inconsistent with the intent expressed in these two emails. Most significant is its email sent to Mr Gunaseelan on 21 November 2014, as follows:

> 2 We understand that there is a PTC fixed for OS 979/2014 on 25 November 2014 at 9.30am. *Please assist to mention on our behalf at the PTC.* Please also provide us with an update on the directions given by the Judge and the next hearing dates.
>
> 3 Please let us have the undertaking from the third party that we have requested in our email of 12 November 2014 *as soon as possible*.
>
> [emphasis added]

23 The 21 November 2014 email could reasonably be interpreted as the OA authorising Mr Gunaseelan to represent Rupesh in the proceedings on its behalf, and such authorisation was not attached with a precondition of a third party undertaking. On this interpretation, if the OA had intended otherwise, the OA would have asked for the third party undertaking to be submitted *before* Mr Gunaseelan attends the next PTC instead of asking for it to be submitted "as soon as possible". It continued to be absent from the subsequent (and final) PTC held on 16 December 2014, allowing Mr Gunseelan to represent Rupesh on its behalf despite not having received the third party undertaking. In doing so, I find that the OA was essentially permitting Mr Gunaseelan to take further steps in the proceedings. It bears emphasis that such conduct on the part of the OA must be viewed in the light of the fact that Mr Gunaseelan had yet to submit a third party undertaking throughout this period of time. That being the case, it seems immaterial to me whether or not the 4 and 12 November 2014

emails had the effect of qualifying the OA's consent. Even if they did, I am satisfied that the OA's email dated 21 November 2014 could be interpreted as having waived such a precondition, and there is no evidence of substantial work done in the interim period. Indeed, it was only at the 25 November 2014 PTC that the AR directed reply and response affidavits from Rupesh and the Plaintiffs to be filed.

24 In my judgment, it is useful to analyse the question of the apparent consent against the statutory background of s 131(1)(*a*) of the BA. The provision vests in the OA the right to control proceedings on behalf of the bankrupt, and having been so empowered, the OA was in a position to do a number of things. It could apply to stay the proceedings and request the Plaintiffs to file a proof of debt in bankruptcy; it could contest the Plaintiffs' application; it could ask for an adjournment if it required more time to consider what position to take; or it could simply concede to the Plaintiffs' application before the matter even comes to the courts. On what was before me, the OA did none of these. A total of three PTCs were conducted before the matter came before me of which the OA attended none. Several affidavits were filed by both sides, which the OA was kept informed of, and yet it did not say anything. It did not exercise the powers vested in it by virtue of s 131(1)(*a*) of the BA, allowing and even requesting Mr Gunaseelan to carry on with the proceedings. It further gave Mr Gunaseelan no directions whatsoever, giving the plausible interpretation of leaving him with the conduct of this matter.

25 Looking at the context of this case as a whole, while the requirements stipulated by the OA were not in the end fulfilled by the time of the hearing of the substantive application, I could not find in light of the reasonable interpretation that could be given to the OA's communications at the time with Mr Gunaseelan that there was lack of reasonable competence on his part.

26 I now turn to examine the Plaintiffs' second argument. The second plank relied on by the Plaintiffs to mount the negligence allegation is that Mr Gunaseelan did not furnish the deed of indemnity in good time, which goes to the issue of reasonable expedition. This, as they emphasised in their oral submissions on 6 April 2015, purportedly prejudices their right to file a proof of debt against the bankrupt's estate with the OA. I agree that Mr Gunaseelan could have been more expeditious in furnishing the third party undertaking. He furnished the deed on 16 January 2015, some two months after the OA first requested for it on 12 November 2014. However, while this may suggest some form of delay on his part, it is important to view this not in isolation but in the context of all the circumstances of the case. More important is the fact that the OA had at no point in time prescribed a deadline for Mr Gunaseelan to furnish the deed of indemnity. I further consider that Mr Gunaseelan was in constant contact with the OA, asking for a template of the deed on 16 December 2014 to which the OA obliged on 31 December 2014. Even by 31 December 2014, the OA did not hurry Mr Gunaseelan to submit the deed by a certain date, knowing full well of the steps Mr Gunaseelan had taken in OS 979/2014 by then. Against this background, I am not satisfied that the length of time Mr Gunaseelan took to procure a deed of indemnity is sufficiently inordinate as to justify a personal cost order against him on the ground that he had been incompetent or negligent.

27 The Plaintiffs further argue that the disposal of the matter renders Mr Gunaseelan's application for the OA's sanction nugatory, and on the authority of *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569, the OA was in no position to grant a "retrospective sanction" for the deed that came in only after the matter had already been disposed of. Given my conclusions above, the issue of whether the OA has powers to grant "retrospective sanction" is now moot.

28 In summary, I find that Mr Gunaseelan's representation of Rupesh in the proceedings could not be said to be without reasonable competence or expedition, and as such I refuse the Plaintiffs' application for the costs of OS 979/2014 to be ordered against him. Given the OA's authorisation for Mr Gunaseelan to take further steps in the proceedings, I order costs of OS 979/2014 out of Rupesh's

estate. I note that the OA took a different position in its latest correspondence with the Plaintiffs on this matter, wherein it stated that its costs would not be admitted as a provable debt against Rupesh's estate as these costs were incurred after the commencement of bankruptcy. At present, I am not inclined to agree with the OA as its position appears to be out of line with the law stated in cases such as *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274, which suggest that the Plaintiffs' costs are to be taken as the OA's expenses in the distribution of Rupesh's estate, and thus payable in accordance with the priorities provided for under s 90(1) of the BA. I would however say no more on this issue at this time as the OA was not before me at the hearing on costs. Whether or not the Plaintiffs' costs ranks as the OA's expenses should only be determined after the OA's arguments are heard. In that event, whether or not the OA may recover the sum payable to the Plaintiffs from Saravanan on the basis that he had undertaken to indemnify the OA of the same will also have to be determined separately.

Conclusion

29 I therefore dismiss the Plaintiffs' application.