Ong Kay Eng v Ng Chiow Tong
[2001] SGCA 16

Case Number : CA 68/2000

Decision Date : 13 March 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Dwayne Tan Kok Heng (Chor Pee & Partners) for the Ong; Leslie Yeo Choon Hsien (LJ Wong & Yeo) for the Ng

Parties : Ong Kay Eng — Ng Chiow Tong

Partnership – Dissolution – Receivers appointed – Whether partner can bring an action in his own name on behalf of partnership under receivership – s 38 Partnership Act (Cap 391, 1994Ed).

Partnership – Partners inter se – Accounts – Whether former partner of dissolved partnership placed in receivership can seek order for account – Sufficient reasons

(delivering the judgment of the court): ***The facts***

The appellant and the respondent (hereinafter referred to as `Mr Ong` and `Mr Ng` respectively) were, until 1998, partners in the firm Silver Stream Air-Conditional Restaurant (`the partnership`). The partnership was set up in 1988 and was in the business of running a food court at Block 180 [num]01-571 Toa Payoh Lorong 2 as well as operating a beverage stall in that food court. Its main sources of income were: (i) cash sales of beverages; (ii) rental of stalls (iii) coin-a-phone collection.

In 1997, differences arose between Mr Ong and Mr Ng. At this juncture we ought to explain that on the first day of operation of the food court, which was in June 1988, Mr Ong was arrested and subsequently convicted and served his sentence in prison. Mr Ong was only released from prison in October 1993. During that period, and up to 5 June 1995, Mr Ng was managing the business. Only from 6 June 1995 did Mr Ong take over from Mr Ng the management of the business. Mr Ng then commenced an action in DC Suit 50404/77 praying for, inter alia, an order that the partnership be dissolved and its affairs wound up.

On 29 April 1998 by a District Court order, the partnership was ordered to be dissolved and its affairs wound up. The court also appointed three members of the accounting firm, M/s Cooper & Lybrand, as joint and several receivers, to collect and receive the debts due and other assets belonging to the partnership. Under the judgment the parties were required to disclose to the receivers information which the receivers might reasonably require regarding the assets and liabilities of the partnership. The receivers were also given the power to bring or defend any action in the name of the partnership and, for the purposes of taking possession or collecting or getting in the property of the partnership, to take such proceedings as might seem to them expedient. However, the order expressly reserved to the parties (para 11):

> *the rights ... to apply for any order for accounts or inquiries in relation to the dissolution of the partnership in the event that any disputes arise as to the rights and liabilities between the parties which shall not be settled with the receivers.*

Mr Ong appealed against the order to the High Court. Except for certain aspects which were varied, but which have no relevance to the present appeal before us, the order of 29 April 1998 of the

District Court was affirmed.

In the light of the records which came into the possession of the receiver, the receivers came to the conclusion that there was a shortfall of $339,200. As prior to the dissolution of the partnership, the business was being managed by Mr Ong, the receivers brought the present action against Mr Ong to recover the $339,200 due to the partnership.

In the defence filed by Mr Ong, he denied that the sum claimed belonged to the partnership and denied that he was in breach of his duties as a partner. On the same day that Mr Ong filed the defence, he also issued a third party (`TP`) notice against Mr Ng stating that the outstanding sums due from the partners to the partnership should be determined `not only as between the (partnership) and (Mr Ong) but also as between either or both of them and (Mr Ng).`

In the TP statement of claim Mr Ong alleged that at various dates in 1993 and 1994, Mr Ng, without the consent of Mr Ong, withdrew the following sums from the partnership accounts:

Profit of partnership in 1993	$	140,497.00
Profit of partnership in 1994	$	137,010.61
Deposit for all the stalls	$	92,100.00
	$	369,607.61

In addition, Mr Ong alleged that Mr Ng also took a sum of $25,620.50 which was due to the partnership from Provincial Insurance Asia Pte Ltd, representing compensation payable under a fire policy taken by the partnership. In all, Mr Ng took $395, 228.11 from the partnership.

Mr Ong alleged that Mr Ng`s explanation for taking the four sums was that Mr Ng had lent money to the partnership to cover losses incurred by the partnership from 1988 to 1991. Mr Ong also alleged that Mr Ng had failed to furnish complete accounts to show that the partnership suffered losses in those years. Accordingly, Mr Ong claimed for the following reliefs against Mr Ng:

1. An order that the sum of $395,228.11, or such other sums as found due, be paid by (Mr Ng) to the partnership forthwith.

2. An account of all profit made by the partnership during the period (Mr Ng) was managing the business.

The trial of the main action, as well as the third party claim, came before the High Court. Judgment was granted in favour of the partnership against Mr Ong for the sum of $339,200. However, the High Court dismissed the TP claim made by Mr Ong against Mr Ng. Basically, the court accepted the evidence of Mr Ng that during those four years (1988-1991) the partnership business suffered losses and Mr Ng had to give personal loans to the partnership to overcome the financial straits which the partnership found itself in.

Mr Ong did not appeal against that part of the judgment of the High Court relating to the main action where judgment was given in favour of the partnership (represented by the receivers) against him. However, he has appealed against the order dismissing his TP claim against Mr Ng.

Question of locus standi

Before we proceed to consider the merits of the appeal, there is a preliminary point of law which has to be addressed. It is the question of locus standi. In the TP action, Mr Ong is claiming against Mr Ng for, inter alia, the return of $395,228.11 to the partnership. This point of law was not raised by either party at the hearing below. At the hearing of the appeal before us on 15 January 2001 we directed the parties to make their written submission on it, as we felt that Mr Ong might not have the locus standi to make the claim on behalf of the partnership. We would add that locus standi is not a matter of procedural irregularity which the parties could waive.

Under s 38 of the Partnership Act (Cap 391, 1994 Ed) (`the Act`), upon dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, will continue only so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution. But such post-dissolution authority of the partners will cease upon the appointment of receivers. There does not appear to be any explicit authorities on this very point. Perhaps the point is so well settled, following from first principles, that no previous litigant had thought it necessary to raise it. The following works subscribe to this view.

In ***Underhill`s Principles of Law of Partnership (12th Ed)*** the author states at p 88:

> *The continuing authority of the partners may be taken away by the court if the parties fall out, or if special grounds are shown by the personal representatives of a deceased partner, or the trustee in bankruptcy of a bankrupt partner either by the appointment of (1) a receiver to get in the outstanding assets; or (2) a receiver and manager to conduct the entire winding up.*

Lindley & Banks on Partnership (17th Ed) at [para]23-149, puts the effect of the appointment of receivers as follows:

> *The object of having a receiver appointed by the Court is to place the partnership assets under the protection of the Court, and to prevent everybody, except the officer of the Court, from in any way intermeddling with them.*

In Yeo Hwee Ying`s ***Partnership Law in Singapore (2000)*** , the author states at p 264:

> *The appointment of a receiver results in the removal of the partner`s control of partnership assets as well as the right to recover all debts owing to the firm. The right is vested in the receiver who effectively possesses the same powers as a partner.*

Accordingly, in so far as Mr Ong seeks in the TP action to claim on behalf of the partnership the return of the sum $395,228.11, he has no locus standi to do that. Only the receivers have the authority to act and commence proceedings on behalf of the partnership. The position would have been different if Mr Ong had in the TP proceeding merely sought an indemnity from Mr Ng on the ground that the shortfall of $339,200 which the receivers were claiming against Mr Ong, arose not because Mr Ong himself withdrew the money, but because Mr Ng had unilaterally taken that amount from the partnership.

Ratification

We should add that subsequent to the hearing on 15 January 2001 Mr Ong obtained the ratification of the receivers to his continuing with the TP action against Mr Ng. However, the TP action was brought by Mr Ong in his personal capacity against Mr Ng. Ratification only cures the lack of authority of an agent. Here, there is, as such, nothing for the receivers to ratify.

In this regard there may be a need to consider a related question, which is, whether the receiver can empower an agent to bring an action on behalf of the partnership in the agent`s own name. If the receivers could so empower an agent, then the ratification of the receivers would have regularised Mr Ong`s lack of authority in commencing the TP action. But there is nothing in the general law on partnership which accords such a power to the receivers. Furthermore, the order of court appointing the receivers does not give such a power. The receivers are empowered to bring and defend any action in the name of the partnership. We note that the order of the court also empowers the receivers to `appoint any agent to do any business which they are unable to do themselves or which can more conveniently be done by an agent.` But this provision has nothing to do with the institution of an action to protect the interest of the partnership or to recover assets of the partnership. It relates to the carrying on of the business of the partnership. It is an established principle that an agent cannot further delegate unless specifically authorised by the principal. Thus, the ratification of the receivers, allowing Mr Ong to continue with the TP action to claim for the return of the money to the partnership, is of no avail.

Here, it may be necessary for us to refer to O 6 r 2 of the Rules of Court. This rule prescribes that where the plaintiff sues in a representative capacity, the writ must be endorsed with a statement of the capacity in which he sues. This merely means that when the receivers sue they must indicate that they are not suing in their personal capacity but for the partnership. While the rule does not explicitly deal with the question whether a partner can bring an action in his own name on behalf of a partnership under receivership, it does indicate that a person who sues in a representative capacity must always expressly say so. Undisclosed principals in legal proceedings are not permitted.

Accordingly, we hold that the TP action, is so far as it seeks to recover the sum of $395,228.11 on behalf of the partnership, must fail on the ground that Mr Ong lacks the locus standi to bring the action.

To account

We now turn to the alternative relief prayed for by Mr Ong, which is to ask Mr Ng to account in respect of the period while Mr Ng was managing the business. Section 28 of the Act provides that:

> *Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.*

In [para]3 above, we have quoted [para]11 of the order of 29 April 1998 where the court expressly reserved to the parties the right to apply for any order for account in relation to the dissolution of the partnership. Therefore, it is open to either party to apply to court for such an account. Of course, it does not follow that just because such an application is made by a partner that the court must grant the application. Sufficient reasons must be shown why an accounting should be ordered.

In the court below, the learned judge found that Mr Ng had from 1988 to 1991 advanced moneys as loans to the partnership as follows:

1988	$	83,130.15
	$	60,181.50
1989	$	120,052.42
1990	$	78,117.16
1991	$	48,814.84
	$	390,296.07

Mr Ng admitted that he had from 1992-1994 repaid himself for those advances made by him from the funds of the partnership totalling $391,266.51. He acknowledged that he had over-reimbursed himself by $970.44 and was prepared to refund the excess to the partnership.

The judge in his Grounds of Decision set out the arrangements under which the business was run. There were two shifts. On each shift there was a person representing Mr Ong and Mr Ng overseeing the business. Thus, the accounts maintained by Mr Ng must have been accurate. When Mr Ong took over the management of the business, all previous records of the business were left in the office at the premises. While the judge thought that in all probabilities Mr Ong did not check those accounts, he said that Mr Ong could have done so if he had wanted to. The judge also `presumed` that the receivers had checked the accounts.

The judge was fully aware, based on the returns submitted by Mr Ng to IRAS for the years 1988 to 1991, that the losses suffered by the partnership were only $124,802.15 and yet the loans allegedly advanced by Mr Ng to the partnership was $390,296.09. He accepted Mr Ng`s explanation that on the advice of the book-keeper he under-declared the losses suffered by the partnership for fear, rightly or wrongly, that if he were to set out the actual losses, the IRAS would query him as to the sources of the funds. He found Mr Ng to be `simple and truthful`. The judge remarked that the under-declaration of the losses did not result in any fraud on the Revenue but would, in fact, enhance the tax liability of the partnership if the partnership `were allowed to offset past losses against current profits.` He could not see what advantage could be gained by Mr Ng in under-declaring the losses.

The judge said that the receivers, being professional accountants, would have examined the records before instituting the present action against Mr Ong. They made no similar claim against Mr Ng.

Is explanation credible

Before us, counsel for Mr Ong, Mr Tan, pointed out that in the course of Mr Ng`s testimony in court, he changed his evidence as to the reasons for under-declaring the losses suffered by the partnership to IRAS. On the first day (28 April 2000) on which Mr Ng appeared in the witness stand, he answered in cross-examination that he under-declared the sales income so as to avoid paying tax and that the money saved could be used to pay suppliers. If this is true then it is entirely contradictory to the comment made by the judge that the under-declaration would not result in any fraud on the Revenue. We note that here Mr Ng was talking of under-declaring sales income and not losses.

On the next day of the trial (which was 2 May 2000), on being further cross-examined, Mr Ng said:

> *The partnership suffered losses when it first commenced business. When I handled the account the bookkeeper, for purpose of preparing account for submission to IRAS, told me that if I declared the actual losses, IRAS might query me as to where I got the money to run the business. That was why I under-declared the figures to avoid trouble.*

The reason for the under-declaration is quite different from that given on 28 April 2000. On being asked to explain the contradiction, Mr Ng said that he was `confused` earlier. We would observe that the book-keeper, one `Kee Wan`, was not called by Mr Ng to corroborate his evidence.

Mr Tan, suggested that Mr Ng had to change his evidence because having had time to reflect over the weekend, he realised that the reason he gave was not good because: (i) it was inconsistent with the pleaded case; and (ii) to avoid paying tax would mean that the partnership earned income on which tax was payable. On our part, we find the entire situation strange. If a business was running at a loss, why should there be any reason for under-declaring sales income or losses? No tax is payable in any event.

It might be useful to look at some of the figures. Below is a table based on the figures shown in the record books maintained by Mr Ng for the years 1988 to 1991:

1988	$ 888,804.90	$ 741,765.00	$ 147,039.90	$ 69,559.35
1989	$ 1,772,836.99	$ 1,666,481.00	$ 106,455.99	$ 18,963.60
1990	$ 1,913,678.40	$ 1,740,658.00	$ 173,020.40	$ 15,311.90
1991	$ 1,987.033.82	$ 1,927,615.00	$ 59,418.82	$ 20,967.30

Year(A) **Record books Sales and Rental Income(B) Sales and Rental Income declared to IRAS(C) Amount under-declared [A-B] (D) Net loss declared to IRAS** What this table shows is that the amounts of losses declared to IRAS are less than the amounts under-declared to IRAS in respect of sales and rental income. Prima facie, it would follow from this that if the sales and rental income were correctly declared to IRAS, then the figures given to IRAS would have shown that the partnership made a profit in those years.

But we must hasten to add that that is not the whole picture, as there is a need to bring into the computation the expenses incurred by the partnership. The expenses would fall into two categories: HDB rental and others.

1988	$400,421.00	$551,587.40	$888,804.90	(-$63,203.50)

1989	$677,266.00	$1,204,659.65	$1,772,836.99	(-$109,088.66)
1990	$712,002.00	$1,228,884.20	$1,913,678.40	(-$27,207.80)
1991	$763,200.00	$1,290,783.53	$1,987,035.82	(-$66,949.71)
			Total:	(-$266,449.67)

Years **HDB rental Other expenses Stall rental received and sales Profit or loss** On the basis of this table, the partnership business suffered a loss every year from 1988 to 1991 and the total losses for those years amounted to $266,449.67. Still, this figure is way below $390,296.07, which Mr Ng claimed he advanced to the partnership. There does not appear to be any apparent answer for that.

Our decision

In the light of the foregoing we find that there are ample grounds to order an account. The reason for under-declaring the losses does not make any business sense. It would be to the disadvantage of the partnership as the latter would not be able to offset the under-declared losses against future profits of the business. Furthermore, why should there be any concern that the losses declared were large? It could easily be explained that the business was being supported by advances made by partners. We are unable to see anything irregular about that. As a matter of common logic, under-declaration is invariably associated with profit rather than losses and with a desire to pay less tax. Thus, the explanation of Ng that the under-declaration was to avoid query by IRAS is rather incomprehensible. It would deprive the partnership of the right to set-off the losses under-declared against future profits.

A second ground for an order to account is that the figures do not tally (see [para]34 above). A managing partner is under a duty to keep proper accounts at all times. If a managing partner says that the partnership business suffers a loss, the burden is on him to establish that.

Accordingly, we are of the view that the learned judge below erred in accepting Mr Ng`s evidence which he gave in court.

This court recognised that an appellate tribunal should be slow to upset findings of fact of a trial judge, especially where the findings are based on the credibility of witnesses. However, in relation to the circumstances of the present case we find the following pronouncement of Lord Shaw in **Clarke v Edinburgh and District Tramways Co** (Unreported) to be apt:

> *When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided, witnesses without any conscious bias towards a conclusion may have in their demeanour,*

> *in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in these circumstances is for each judge of it to put to himself, as I now do in this case, the question. Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.*

In this case, what the trial judge had to confront was the evaluation of the quality of the evidence given by Mr Ng and to test his evidence against inherent probabilities or against uncontroverted facts. In this exercise, to quote the words of this court in **Teknikal dan Kejuruteraan Pte Ltd v Resources Development Corp (Pte) Ltd** [1994] 3 SLR 743 at 756, we would be `in as good a position as the court of first instance, although we must, where appropriate, give due allowance to the fact that we have not had the advantage of seeing the witnesses which the trial court had.`

Here, the judge below seemed to have assumed that the receivers did examine the records maintained by Mr Ng while he was managing the business. But looking at the affidavit of evidence in chief of Mr Chan Ket Teck, one of the receivers, we do not think they did so. The receivers had only examined the profit and loss accounts of the partnership. Mr Chan Ket Teck did not know if anyone in his firm had checked the record books. The judge had also not taken note of the fact that Mr Ng had given two different reasons why he had under-declared the losses. Neither was the judge`s attention drawn to the fact that the figures do not tally. Thus, we are obliged to interfere and order Mr Ng to account.

Mr Ng, has, through his counsel, contended that this court should not order any further accounting or inquiries because (i) the receivers were empowered under the order of 29 April 1998 to investigate into the assets of the partnership and they must have done so; and (ii) Ong had ample opportunity to examine the 1988-1991 accounts and had not raised anything in relation thereto because he had checked them and found them to be in order. In our opinion, the answers to these two points are really this. First, apart from what we stated in the last paragraph, the receivers had, in their letter of 18 October 1999, addressed to the solicitors for Mr Ng, stated that they were `unable to express an opinion on the completeness and accuracy of the accounting records that were forwarded to the receivers.` Second, the fact that there was delay on the part of Mr Ong in seeking an account from the managing partner does not mean that Mr Ong loses that right unless limitation has set in, which is not the case.

In the result the appeal succeeds in respect of the alternative prayer sought in the TP action. Mr Ng shall render an account of the profits of the partnership for the years 1988-1991. Mr Ong shall have half of the costs here and below (in respect of the TP action). The security for costs shall be refunded to Mr Ong (with accrued interest, if any). The costs of taking account, ordered herein by us, shall be reserved to the Registrar.

Outcome:

Appeal allowed in part.