

Lim Kaling v Hangchi Valerie
[2004] SGHC 257

Case Number : Suit 525/2004
Decision Date : 12 November 2004
Tribunal/Court : High Court
Coram : Yeong Zee Kin AR
Counsel Name(s) : Edmund Kronenberg (with Adrian Ng) (Tan Peng Chin LLC) for plaintiff; Ms Loh Wai Mooi (with Ms Neda Namazie) (Bih Li and Lee) for defendant
Parties : Lim Kaling — Hangchi Valerie

12 November 2004

Judgment reserved.

AR Yeong Zee Kin:

1. The plaintiff is suing for the return of a sum of US\$1.5 million transferred by the plaintiff to the defendant. This is the plaintiff's application under O 29 r 2 of the Rules of Court for an interim preservation order over moneys amounting to about \$891,462.82 in an offshore bank account held by the defendant.

Summary of facts

2. It is not disputed that a sum of US\$1.5 million was transferred by the plaintiff to the defendant. It is also no disputed that this sum was transferred before they were married. There are separate divorce proceedings between the parties in addition to the current suit for the return of this sum of moneys.

Plaintiff's version

3. The plaintiff's account of why this sum was transferred to the defendant was that he was, at the time of the transfer, diagnosed with a serious medical condition which required protracted costly medical treatment. He transferred the moneys to the defendant for two reasons: first, that the moneys may be used to pay for his treatment and second, to make advances to Fortress Holdings Pte Ltd (a company which the plaintiff was a director and shareholder) in the event that the company needed urgent funds, eg to pay employee salaries and administrative expenses.

4. Based on this understanding, the plaintiff procured the transfer of US\$1.5 million to the defendant through Jewell Venture Limited.

Defendant's version

5. The defendant's account is that the plaintiff was diagnosed with naso-pharyngeal cancer and she took care of him. The plaintiff caused the transfer of the US\$1.5 million in order to thank her for looking after him and to ensure that she was provided for. The defendant's assertion is that this transfer was a gift from the plaintiff.

The flow of the moneys

6. When the plaintiff procured the transfer of the moneys in 1995, the US\$1.5 million was

deposited into the defendant's Bank of America account bearing number 00333-27933, which already contained a sum of US\$3,000 belonging to the defendant. Subsequently, a sum of US\$500,000 was withdrawn and deposited into a Citibank account bearing number 040008772838 held jointly by the plaintiff and the defendant. Moneys from this joint account were eventually used to renovate the matrimonial home, amongst other expenses.

7. Prior to their marriage in 2000, the defendant withdrew another US\$300,368.35 from her Bank of America account as a loan to the plaintiff.

8. After their marriage, the plaintiff and defendant were in the USA for fertility treatment. During this period, the defendant made multiple withdrawals ranging from US\$2,000 to US\$10,000 from her Bank of America account for this purpose and for living expenses in the US after the plaintiff returned to Singapore.

9. In 2002, after their marriage broke down, the defendant closed her Bank of America account and transferred the balance of US\$891,392.82 into another offshore bank account held in her sole name which, prior to this deposit, already held moneys belonging to her.

10. The plaintiff does not dispute the flow of the moneys recounted by the defendant. The plaintiff's application is for the US\$891,392.82 now residing in the defendant's offshore bank account to be the subject of an interim preservation order under O 29 r 2 of the Rules of Court.

The issue

11. The issue before the court is whether an interim preservation order under O 29 r 2 may be made over the moneys now residing in the defendant's offshore bank account.

Interpretation of Order 29, rule 2(1)

12. Order 29 r 2 of the Rules of Court states:

Detention, preservation, etc., of subject-matter of cause or matter (O. 29, r. 2)

2. —(1) On the application of any party to a cause or matter, the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

(2) For the purpose of enabling any order under paragraph (1) to be carried out, the Court may by the order authorise any person to enter upon any immovable property in the possession of any party to the cause or matter.

(3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into Court or otherwise secured.

13. This order was interpreted in the Court of Appeal decision in *Bocotra Construction Pte Ltd and others v Attorney General* [1995] 2 SLR 523. While the case dealt with the interpretation of Rule 18(g) of the Arbitration Rules of the Singapore International Arbitration Centre, the Court of Appeal opined that O 29 r 2(1) should be interpreted in the same manner. Delivering the judgment of the Court of Appeal, Karthigesu JA held, at [51], that:

51 The arbitrator evidently thought that he was empowered to order the preservation of the proceeds of payment under the guarantee. May LJ reasoned convincingly in *Potton Homes* that such proceeds cannot be frozen under O 29 r 2(1), as they were not the subject matter of litigation in specie. The same reasoning would apply to r 18(g), which, contrary to what the appellants suggested, is indeed closely analogous to O 29 r 2(1) RSC. *We are of the opinion that r 18(g), like O 29 r 2(1) RSC, can only apply to enable the preservation of physical items which form the subject matter of arbitration in specie* or are otherwise relevant thereto. The preservation of these items should be essential to rights of parties being determined under the arbitration. Whether the 'property' was characterized as the right to call (ie a chose in action) or the proceeds of payment, we do not find the appellants' submissions persuasive. In the premises, we agree with the reasoning of the learned judge, who correctly held that r 18(g) applies only to physical items and not choses in action. ... [Emphasis added.]

14. While currency notes and coins kept segregated in a safe deposit box may qualify as physical items to which O 29 r 2(1) may, in appropriate circumstances, apply, the subject matter of the present application for an interim preservation order is moneys in an offshore bank account. This is indisputably a chose in action and not physical items in specie. It would thus appear that this application falls squarely out of the bounds of O 29 r 2(1).

Interpretation of Order 29, rule 2(3)

15. Counsel for the plaintiff drew the court's attention to O 29 r 2(3) which refers to a specific fund in dispute and sought to persuade the court that, notwithstanding the holding in *Bocotra Construction v AG*, there are instances when moneys in a bank account can be the subject of an interim preservation order under O 29 r 2(3). Counsel relied on a commentary in Goldstein, Wilkinson & Kershaw, *Commercial Litigation: Pre-Emptive Remedies* (3rd Ed, 1997) paragraph 6 at p 293, where the authors stated:

"Property" extends to money—that is a specific fund which is in dispute in the action: Ord 29, r 2.

In my view, this commentary is no more than a paraphrase of the wording of O 29 r 2(3). It does not help in determining what qualifies as a specific fund.

16. Counsel for the plaintiff also relied on the case of *Lee Sai Poh and others v Vejayakumar and another* [1997] 3 SLR 612, where CR Rajah JC granted a Mareva injunction over moneys in a Maybank account. The learned Judicial Commissioner opined, at [19], that:

19 As the moneys ... could be traced to the moneys ... in the first defendant's account with Maybank, the third plaintiff has a genuine proprietary claim to these moneys, which moneys can be readily identified. The injunction granted herein should therefore be taken to operate also as an injunction for the interim preservation of property under O 28 of the Rules of Court [1996]. I therefore dismissed the second defendant's application to discharge the interim injunction.

17. A perusal of the headnotes of the report of this case reveal that the court was not referred to the Court of Appeal decision in *Bocotra Construction Pte Ltd v AG*. Be that as it may, the circumstances of the flow of funds in *Lee Sai Poh v Vejayakumar* are different from the present case: the first and second plaintiffs were shareholders in the third plaintiffs, which was set up to purchase an oil tanker from the defendants. The purchase was to be financed by a loan granted by the fourth plaintiffs secured on the oil tanker to be purchased. Before the sale could be completed, the oil tanker was arrested. The loan of \$5 million was paid into two accounts with Maybank—\$3,857,000 into one

account and \$1,143,000 into the other. The former account was used as collateral for a guarantee for the release of the oil tanker; one instalment payment of \$71,321 was paid out of the latter account. The Mareva injunction was granted over the moneys remaining in the latter account, over which the plaintiffs asserted a claim in constructive trust.

18. In *Lee Sai Poh v Vejayakumar*, the funds over which a claim of constructive trust was made was clearly identifiable and segregated from the time the moneys were disbursed under the loan until the time the moneys were subject to the Mareva injunction and interim preservation order. It was a specific fund in that there was no intermingling; only one withdrawal was made for a single instalment payment. As such, the defendants' right to the whole fund was in dispute.

Approach taken in applying Order 29, rule 2

19. Reconciling the authorities before me, I approach O 29 r 2 in the following manner:

(a) An interim preservation order under O 29 r 2(1) may only be granted over physical items that are the subject matter of the dispute in specie. Choses in action cannot be the subject matter of an interim preservation order under O 29 r 2(1): *Bocotra Construction Pte Ltd v AG*.

(b) Where the property involves rights to a specific fund in dispute, an interim preservation order under O 29 r 2(3) may be made for the fund to be paid into court or otherwise secured. The precondition for such an order would be that the funds should be clearly identifiable in that there has been no intermingling of funds: *Lee Sai Poh v Veyayakumar*.

20. Applying the approach to the present case, the subject matter over which an interim preservation order under O 29 r 2 is prayed for is moneys in an offshore bank account. This being a chose in action, an interim preservation order cannot be made under O 29 r 2(1).

21. An interim preservation order may thus only be made under O 29 r 2(3) if the moneys in the offshore bank account qualify as a specific fund to which the defendant's right is in dispute. The facts as deposed in the defendant's affidavit reveal at least two occasions when the moneys were intermingled with her own funds:

(a) first, when the US\$1.5 million was initially deposited into the defendant's Bank of America account which already contained a sum of US\$3,000 belonging to her; and

(b) second, when the Bank of America account was finally closed and the balance of US\$891,392.82 was transferred into the defendant's present offshore bank account which also held moneys belonging to her.

22. Given the intermingling of the subject matter of the dispute with the defendant's own funds, the disputed sum of US\$891,392.82 present in the offshore bank account can no longer be clearly identifiable. It cannot be said that her rights to the whole fund in the offshore bank account is in dispute as she is clearly entitled to the moneys which belonged to her prior to the intermingling. From the moment intermingling occurred, the plaintiff's claim against the defendant was no longer a claim for a specific fund but for the return of a sum of US\$1.5 million. While it may be the case that after the merits of the case has been substantially dealt with, the plaintiff's right to recover the disputed sum may be traced to the defendant's offshore bank account, it would be inappropriate to conduct any form of tracing exercise for the purpose of granting an interim preservation order. An interim preservation order under O 29 r 2(3) should only be granted over a specific fund in which the disputed moneys are clearly identifiable in that there has been no intermingling.

Balance of convenience lie in not granting order

23. In the event that the approach I have taken to O 29 r 2 is wrong and an interim preservation order may be granted over the moneys in the defendant's offshore bank account, I am of the view that this is a case in which the balance of convenience lie in not granting an interim preservation order.

24. Counsel for the defendant submitted that the jurisdiction for granting an interim preservation order under O 29 r 2 is separate from the jurisdiction to grant a Mareva injunction. The reason for this is that the basis for an interim preservation order is that the plaintiff asserts that the property concerned belongs to him and seeks an order for its preservation while claiming for its return. A Mareva injunction is granted on the premise that it operates on the property belonging to the defendant and is meant to prevent the defendant from dissipating assets which belong to him. Counsel submitted that the principles to be applied in determining whether an interim preservation order under O 29 r 2 should be granted are the principles of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396: *per* Ough & Flenley, *The Mareva Injunction and Anton Pillar Order: Practice and Precedents* (2nd Ed, 1993), paragraphs 4.7.1 and 4.7.2, at pp 75–76.

25. The principles governing the grant of an interim injunction were set out in the Court of Appeal decision in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729, where Warren Khoo J held, at [88], that:

... a fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong at trial in the sense of granting relief to a party who fails to establish his rights at the trial, or of failing to grant relief to a party who succeeds at the trial.

26. There is no dispute that a sum of US\$ 1.5 million was transferred by the plaintiff to the defendant. The dispute lies in the purpose of the transfer. The plaintiff's case is that the transfer was for specific purposes which have now expired and the defendant holds this sum on trust. The defendant's case is that the transfer was intended to be a gift from the plaintiff. There appears to be a serious question to be tried. The question is whether the balance of convenience lie in granting the interim preservation order or in disallowing the application.

27. The dispute is over a sum of US\$ 1.5 million. This would suggest that should the plaintiff succeed, an award of damages would be an adequate remedy. Counsel for the plaintiff submitted that the defendant is a housewife and there was a risk that she would not be able to pay the damages awarded if the moneys remaining from the initial transfer is dissipated, hence the application for the interim preservation order. The question then becomes whether granting an interim preservation order would carry a lower risk of injustice should it eventually turn out that the plaintiff is unable to establish his claim at trial or whether disallowing the application would carry a lower risk of injustice should it eventually turn out that the plaintiff succeeds in establishing his claim.

28. The moneys were transferred to the defendant in 1995, before the plaintiff married her. The defendant has deposed that she had made use of the moneys for various purposes (other than for the plaintiff's medical treatment and to make advances to his company) with the plaintiff's knowledge:

(a) She had withdrawn US\$500,000 during their marriage for use in a joint account out of which monthly dues for an apartment in San Francisco and expenses for their matrimonial home was paid;

(b) A sum of US\$300,368.35 was withdrawn and transferred to the plaintiff as a loan when he needed funds urgently; and

(c) When the defendant was in the US for fertility treatment, she made several withdrawals for her living expenses.

29. The Plaintiff's medical condition went into remission before their marriage in 2000. However, the plaintiff made his first request for the return of the moneys on 30 July 2003, after their marriage broke down and some 8 years after the moneys were first transferred to the defendant.

30. Based on the facts deposed, it is apparent that the plaintiff was content to leave the moneys in the possession and control of the defendant for a significant period of time. It is also apparent that the defendant was permitted a certain measure of latitude in dealing with the moneys. In the circumstances, I am of the view that maintaining the status quo by not granting an interim preservation order is the course of action that will carry the lower risk of injustice.

Plaintiff's application disallowed.

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