Siow Soon Kim and Others v Lim Eng Beng alias Lim Jia Le
[2004] SGCA 4

Case Number : CA 44/2003

Decision Date : 30 January 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Choo Han Teck J; Yong Pung How CJ

Counsel Name(s) : Harbajan Singh and Ronald Lee (Daisy Yeo and Co) for appellants; A Rajandran (A Rajandran Joseph and Nayar) for respondent

Parties : Siow Soon Kim; Chua Beng Guek; Siow Soon Geok; Siow Soon Lye; Kim Meng Supplier (a firm); S.S. Kim Enterprises Pte Ltd; ASD Trading Pte Ltd — Lim Eng Beng alias Lim Jia Le

Contract – Illegality and public policy – Contract to commit civil wrong – Whether placing of partnership moneys in separate bank account for tax evasion purposes tainted those moneys with illegality

Evidence – Documentary evidence – Proof of contents – Whether expert evidence based on document reproducing data from CD-ROM not admitted in evidence was admissible

Partnership – Partners inter se – Shares in partnership – Whether former partner in partnership entitled to appropriate share in partnership assets

30 January 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an action by the plaintiff-respondent to claim for an appropriate share in the assets of a partnership following his withdrawal from it. The High Court ruled in favour of the respondent, including making an order for the taking of accounts to determine his rightful share. We heard the appellants' appeal against the High Court's decision and dismissed it. We now give our reasons.

The background

2 The relationship between the parties began in 1985. In that year, the respondent and the first appellant (or "SSK" as may be appropriate) formed a partnership called "Kim Eng Supplier" (the fifth defendant and the fifth appellant herein), to engage in the business of supplying frozen food and provisions to restaurants and other enterprises. The first appellant managed the business, including the making of purchases as well as maintenance of its accounts. As for the respondent, he was essentially a field man, taking charge of delivery of goods to customers.

3 Besides the first and fifth appellants, there were five other defendants to the action, who were also the appellants in the appeal. The second defendant ("the second appellant") was brought into the firm in 1991/1992 as a part-time accounts clerk and she later became a full-time employee and the *de facto* manager of the office. It was the respondent's evidence that the second appellant never became a partner.

4 In 1991, the third defendant ("the third appellant"), a brother of SSK, became an equal partner with SSK and the respondent. In the same year, the fourth defendant ("the fourth appellant"), another brother of SSK, was brought into the firm by SSK as an employee.

5 The sixth defendant ("the sixth appellant"), a private limited company, was incorporated by

the first to fourth appellants in September 2001, after the respondent had withdrawn from the partnership on 18 July 2001. The company operated from the same premises as the partnership and took over the business of the partnership.

6 The seventh defendant ("the seventh appellant") was incorporated as a wholly owned subsidiary of the partnership. Its initial directors were the fourth appellant and one Wong Kok Wah. It was understood by the respondent that he was also to be made a director, but was never made one.

The pleadings

7 By the action, the respondent claimed for his just entitlement of the partnership assets upon his withdrawal from it. He averred that besides himself, there were only two other partners, namely, the first and the third appellants. He alleged, *inter alia*, that:

(a) the first to third appellants had failed to give a proper account of the financial affairs of the partnership and account to him his due share in the assets of the partnership upon his withdrawal;

(b) moneys of the partnership were diverted from the firm and deposited into an account in the names of the first and second appellants ("the separate account") and some of those moneys were transferred back to the firm as "loans" when, in fact, they had always belonged to the partnership, and accordingly, the alleged debt of $1,307,050.48 owing to the first appellant and others was, in fact, non-existent;

(c) the first appellant, in collaboration with the second and third appellants, had diverted moneys of the firm for their own use or misappropriated them;

(d) the first to third appellants refused to recognise that the respondent had a share in the money in the separate account and sought to dissipate those moneys for their own purposes;

(e) his requests to inspect all relevant documents pertaining to the accounts of the partnership had not been acceded to.

8 However, the respondent also pleaded that he was told by the first appellant that funds of the partnership would be set aside periodically and put into a separate bank account to be drawn out when needed. He was made to understand that this would result in savings for the partnership and for convenience this separate account would be handled by the first and second appellants.

9 As for the sixth appellant, when it was first incorporated it had a paid up capital of only $4. This was later raised to $1m. The respondent alleged that this money must have come from the partnership assets.

10 The defence of the appellants was one of denial of the allegations. At the conclusion of the plaintiff's case (now the respondent's), the defendants submitted that there was no case to answer and thus did not adduce any evidence.

Respondent's evidence

11 In his testimony, the respondent told a tale of how he and the first appellant started the partnership on a very modest basis with hardly any capital. They went through some very trying times. It was only in 1989 or 1990 that they acquired premises at Textile Centre for the business.

Thereafter things got better and the second appellant was brought in on a part-time basis to attend to documentation and accounts. The first appellant was then involved in a relationship with the second appellant, who later worked full-time for the firm and took charge of all its financial and administrative matters. At all relevant times, to use the words of the trial judge, the first appellant was the "brain" of the firm and the respondent the "work-horse", attending to all activities outside the office or store.

12 The respondent said that because he was a field man, being invariably out of the office, he would often pre-sign cheques in blank for the needs of the firm.

13 Also around that period, the respondent agreed to the firm engaging the fourth appellant as an employee and taking in the third appellant (who would bring into the partnership $45,000 as capital) as an equal partner but who would not play an active role in the business of the partnership. The respondent said that he would not know whether, in fact, the third appellant injected $45,000 into the partnership, as the affairs and finance of the partnership were very much in the hands of the first appellant whom he trusted. He also believed that the third appellant was paid a monthly allowance of $1,000. It did not occur to him then that the bringing into the firm of the second to fourth appellants would pose a threat to his own position in the firm.

14 In 1992/1993 the first appellant suggested to the respondent that moneys from cash sales be kept aside in a separate bank account. This was to be the savings of the partnership which could also be used to purchase goods at a cheaper price if payments were to be made in cash. The respondent assumed that this new account would be opened in their joint names. However, when he was later told by the first appellant that the new account was opened in the joint names of the first and second appellants, he did not make an issue of it as he had faith in the first appellant.

15 From discoveries made pursuant to an Anton Piller order, the respondent came to know that the first appellant did not, in fact, open just one new account, but two new accounts, with the Standard Chartered Bank ("SCB"). One was in the first appellant's own name and the other in the name of the second appellant ("the two new accounts"). From the documents discovered, it would seem that from 1995, some $6m was paid into the two new accounts, of which $1.4m was paid into the account in the second appellant's name.

16 The respondent averred that all the annual accounts of the partnership were prepared by the second appellant on the instructions of the first appellant. He signed the documents, relying on the approval of the first appellant. He said that much later, after the "new account" had been opened, he noticed an item "loans" in the accounts of the partnership. Upon his inquiry, he was told that this referred to the moneys taken from the new account maintained at SCB and used to pay in cash for the business of the partnership. It was further explained to him that the funds so taken from the new account were termed "loans" so that the firm need not pay tax on them.

17 The respondent further deposed that from the year 2000, a number of events occurred which caused him to be concerned about the good faith of the first appellant. The most significant event occurred in July that year when an employee of the firm asked the respondent to repay money to the partnership on account of the partnership settling the respondent's income tax liability which gave rise to an overpaid situation. Normally the respondent's tax returns would be prepared by the second appellant and his tax liability would be met from the partnership. Because the request for a refund was unusual, he asked his wife to clarify with the staff. His sister, Lim Eng Luan, an accounts clerk, followed his wife to the office and from that meeting, she gathered that the partnership was a very profitable concern. The respondent's sister mentioned this to him but he denied having made a lot of money. His sister explained to him what she discovered. He then realised how ignorant he was of the

affairs of the firm.

18 Another incident was in mid-2001. Upon being requested by an employee to sign a few blank cheques, he asked that the names of the recipients of those cheques be inserted. When the first appellant learnt of this, he became upset and even told the respondent that the moneys in the new account at SCB did not belong to the respondent.

19 On 18 July 2001, the respondent went, with the first and second appellants, to the World Trade Centre branch of DBS Bank. The third appellant joined them there. The respondent was asked to sign some documents, including a guarantee for the purposes of obtaining letters of credit from the bank, which he did. On this occasion, the first appellant also opened a fixed deposit account in his own name for a sum of $500,000 by issuing a cheque for the said sum drawn on SCB. The first appellant told the respondent that of that sum, $150,000 was from the partnership, $150,000 from the first appellant and $200,000 from the second appellant. This again caused the respondent to wonder how the first two appellants could accumulate the two sums because, other than the partnership business, they were not engaged in any other business or employment.

20 Later, in the office on the same day, the first appellant asked the respondent to sign a guarantee in favour of DBS Bank for the purposes of obtaining banking facilities. He signed the documents with much apprehension. He then decided to withdraw from the partnership. In the evening he went back to the office to retrieve the guarantee form which he had signed earlier in the day.

21 Also on the same day, 18 July 2001, the respondent's solicitors sent a notice to the first and third appellants indicating his wish to withdraw from the partnership with immediate effect.

22 Since the giving of the notice of withdrawal, the respondent sought, without success, to obtain documents to ascertain the partnership affairs and assets. It was only on 27 December 2001 that the first appellant falsely alleged that the documents were already in the possession of the respondent.

23 As for the sixth appellant, the respondent reiterated what was stated in the statement of claim, *ie*, that he believed the assets and goodwill of the partnership had been transferred to the sixth appellant. Reliance was placed on copies of notices, bearing the name of the partnership, which were sent out to customers informing them that "Kim Eng Supplier" had been renamed "S S Kim Enterprises Pte Ltd" and that everything else was substantially the same. The respondent also believed that the paid up capital of $1m in the sixth appellant would have come from the partnership assets as there was no evidence that the first to the fourth appellants could each have accumulated $250,000 from any other source. Similarly, the respondent said that the alleged loan of $1,307,050.48, as shown in the accounts of the partnership, was a fiction. Indeed, the various expenses reflected in the accounts were also inflated.

24 As the cash diverted into the two new accounts at SCB were not reflected in the partnership accounts, the respondent asserted that a scrutiny of the partnership accounts against primary documents must be carried out to ascertain the true position.

Question of admissibility of certain evidence

25 At this juncture, it would be necessary for us to touch on an evidential point. Soon after the institution of the writ by the respondent, an Anton Piller order was obtained. The respondent's brother-in-law, Mr Lua Kim Teng ("Lua"), an Associate Professor at the National University of

Singapore's Department of Computer Science, was present during the execution of the order. The data contained in the computers and floppy diskettes found in the partnership's premises was downloaded by Lua into a portable hard drive and, some days later, transferred into a CD-ROM by him. At the request of the respondent, Lua retrieved the relevant data concerning sales, profits and margins from the CD-ROM which was then reproduced into a 600-page document.

26 During the discovery process, a copy of the CD-ROM was given to the appellants' solicitors. The 600-page document was also identified as "documents extracted from the CD-ROM pertaining to data retrieved from the [fifth appellant's] computers on 27.2.02".

27 Based on the CD-ROM, one Ameen Ali Salim Talib ("Ameen"), another expert witness called by the respondent, and who is a Chartered Accountant and a teaching staff of the Accounting and Finance Department of the National University of Singapore's Business School, opined that the partnership had understated its sales by approximately $7.8m for the period 1989 to 2000.

28 The evidence which the appellants objected to was that of Ameen where he opined that there was an understating of sales by some $7.8m. The basis of the objection was that as the CD-ROM, whether in the form of a physical copy or a transcript of its contents, was not admitted into evidence at the trial, Ameen's opinion should thus be excluded as it was based on unproven evidence. Even though Lua was at the last moment called as a witness for the respondent, he did not introduce the CD-ROM into evidence; neither was a full transcript of it tendered to the court.

29 However, the judge seemed to have regarded the CD-ROM as having been admitted into evidence wholly on the basis that a copy of the CD-ROM was, in fact, extended to the appellants' solicitors some eight months before the commencement of the trial. While this point may appear highly technical, the fact of the matter was that the CD-ROM was indeed never introduced into evidence in court. The fact that the appellants knew of the existence of the CD-ROM could not make up for this omission. As stated by this court in *Sek Kim Wah v PP* [1987] SLR 107 at 111:

> It would be pertinent at this point to add that the facts on which an expert's opinion is based must be proved by admissible evidence, just like any other fact relevant to the case. The expert's role is to explain to the judge the application of the necessary scientific or medical criteria so as to enable the judge to come to his own judgment by the application of these criteria to the facts proved in evidence.

30 Accordingly, we held that the opinion of Ameen, which was based on the materials in the CD-ROM, should be disregarded as it was based on unproven facts.

31 The next question to consider was whether, even though there was an erroneous impression that the CD-ROM was admitted into evidence, it necessarily followed that the findings of the judge must therefore be upset. The answer to this question must depend on whether there was other evidence to support the judge's decision: see s 169 of the Evidence Act (Cap 97, 1997 Rev Ed). Here, it should be borne in mind that the judge did not accept Ameen's evidence that the accounts of the partnership had been suppressed to the tune of $7.8m. The only specific sum which he ordered the appellants to pay the respondent was $221,894.75 and that was the sum which the appellants themselves admitted as due from the partnership to the respondent upon his withdrawal. In short, what was said by Ameen had no real bearing on the judge's findings.

32 The other main order made by the trial judge was that the Registrar was charged to inquire into the accounts and determine the exact amount which was due from the partnership to the respondent. Again, this order bore no relation to the evidence of Ameen.

33 Before we move on to consider the other issues raised by the appellants, we ought to mention in passing that there is in fact a separate provision in the Evidence Act governing the admission of "computer output" into evidence. This is s 35. As neither the appellants nor the respondent had raised the question of the applicability of this section to the admission of the CD-ROM into evidence, and in view of our decision above that the CD-ROM was not put into evidence, we would not at this time make any further comments on the question whether the CD-ROM was a "computer output" and whether it would have satisfied the conditions specified in s 35(1) for it to be admitted into evidence.

Other issues of this appeal

34 Apart from the issue concerning the CD-ROM and the wrongful admission of the evidence of Ameen, two other main issues were raised by the appellants and they were:

(a) As the respondent was privy to the scheme to defraud the Inland Revenue Authority of Singapore by setting aside moneys from cash sales into a separate bank account, the moneys so set aside were tainted with illegality and the court should not assist the respondent to recover the same.

(b) In any event, there was no satisfactory evidence adduced to substantiate the respondent's claim.

The question of illegality

35 The argument of the appellants was that as the diverted funds in the accounts of SCB were for the illegal purpose of evading tax, they should be irrecoverable.

36 This argument wholly missed the essential nature of the action. The claim of the respondent was for his entitlement to the assets of the partnership upon his withdrawal from it as a partner. The business of the partnership was perfectly legitimate. The respondent was not suing on an agreement which was tainted with illegality. Neither was he suing for the refund of moneys paid under an illegal contract. His claim was not founded on the agreement made in 1992 to set aside the funds of the partnership in a separate account. This setting aside of funds of the partnership in a separate account was purely an internal financial arrangement.

37 Thus, the present case must be distinguished from *Napier v National Business Agency, Ltd* [1951] 2 All ER 264 where the defendant engaged the plaintiff as secretary and accountant at a salary of £13 per week, together with £6 a week for expenses. The parties knew that the plaintiff's expenses could never reach that amount and, in fact, they never exceeded £1 a week. Sometime later, the plaintiff was summarily dismissed from his employment and in consequence he claimed for his salary of £13 a week for a certain period. The English Court of Appeal, affirming the decision of the High Court, held that as one of the aims of the service agreement was to evade tax, the whole agreement was therefore contrary to public policy and as such was unenforceable. The court also held that the terms of the agreement of paying £13 as salary and £6 as expenses were not severable.

38 The circumstances of the present case clearly fell within the purview of the decision of this court in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 which held that the test to apply to determine whether the court should assist a plaintiff to enforce an agreement was whether the plaintiff was able to establish his cause of action independently of the illegality. On this test, the present respondent clearly satisfied it. The respondent was not asking the court to enforce an illegal arrangement but a wholly legitimate partnership agreement. This would suffice to

dispose of the issue.

39 Moreover, we would add that whenever the question of illegality is raised, it is necessary to examine the intention of the parties: see *Suntoso Jacob v Kong Miao Ming* [1986] SLR 59. Here we would quote the evidence of the respondent given in his affidavit of evidence-in-chief:

> Sometime in 1992/1993, the 1st Defendant approached me and suggested that monies received from cash sales be kept aside in a separate bank account. The rationale for the same as related to me by the 1st Defendant was that this money could be set aside as a partnership savings for the benefit of the partners and further, that the same could be used from time to time for the purpose of business dealings in cash with the 1st Defendant giving an example that the partnership could purchase stocks at a cheaper rate should we pay in cash, instead of purchasing the same on credit.

40 There was nothing illegal in these objects of putting the cash in a separate account. The respondent was not informed that the scheme was for the purposes of evading tax. It was only later in 1999/2000, when he was questioning the entry "loans" in the accounts of the partnership that he came to realise that the whole scheme of putting money in a separate account had tax evasion as the objective. Neither did he know, until discovery was obtained, that the "separate account" opened was not just one account, but two. Thus, as far as the respondent was concerned, the putting aside of funds in a separate account was not for an illegal purpose. The culprit was really the first appellant, and he should not be allowed to rely on an illegal scheme hatched by himself, and unknown to the respondent, to deny the latter his just entitlement.

Has the respondent established a prima facie case?

41 The thrust of the appellants' contention on this issue was that the respondent had not been truthful in his evidence when he said that he had not received his share of the moneys set aside in the two separate accounts.

42 The evidence adduced by the respondent to substantiate his claim has been enumerated above. It stood uncontradicted as the appellants chose not to call any evidence by submitting that they had no case to answer. A defendant could submit that there is no case to answer on two alternative bases. First, that even accepting the plaintiff's evidence at its face value, no case is established in law. Second, that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged (see *Storey v Storey* [1961] P 63). In the present case, the appellants were not relying on the first basis but on the second. A number of rhetorical questions were raised in the Appellants' Case to contend that what the respondent claimed to be the position could not be true. However, these should have been put to the respondent at the trial. Some minor inconsistencies were also pointed out. Be that as it may, the fact of the matter was that the judge had heard the evidence of the respondent and come to the conclusion that a *prima facie* case had been established. He was obviously satisfied as to the credibility of the respondent. This being a finding of fact, there was, in the circumstances, hardly any basis for this court to interfere in that finding.

Conclusion

43 In the result, we dismissed the appeal with costs and the usual consequential orders.