Banque Nationale de Paris v Ng Kit Har and another action (Yii Chee Ming, Third Party) [2007] SGHC 101

Case Number : Suit 344 /1999, Suit 605/1999, RA 600001/2007, RA 600002/2007

Decision Date : 28 June 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Thio Shen Yi and Adeline Lee Huay Yen (TSMP Law Corporation) for the defendants; Cheah Kok Lim and Keh Kee Guan (Ang & Partners) for the third party

Parties : Banque Nationale de Paris — Ng Kit Har — Yii Chee Ming

28 June 2007

Choo Han Teck J:

1 These were appeals by the respective defendants in the consolidated actions in the above suits ("the Suits") against the order of the Assistant Registrar Ms Denise Wong ("the AR") made on 3 January 2007, in which she set aside a previous order made on 17 November 2005 in which the defendants' third party notices against the third party were reinstated. The third party notices were originally issued on 20 and 25 May 1999 (in the two Suits respectively) but had not been served. In the meantime, the consolidated action was tried between the plaintiff and the defendants before Amarjit Singh JC on 1 June 2000. The trial ended on 9 June 2000 and judgment was handed down in favour of the plaintiff. The defendants were ordered to pay US$4.7m to the plaintiff. Counsel informed me that as at the time of the hearing of these appeals before me, the judgment debt had not been paid but the plaintiff had not taken enforcement proceedings. No reason was given to explain why the defendants wished to resume their claim against the third party now and under the present circumstances where no enforcement proceedings had been taken or even threatened against them. No reason was given as to why the defendants took their time to proceed against the third party except Mr Thio's submission that set out the difficulties the defendants had in effecting service against the third party. The question on this point is whether there is any reason or justification in accepting that the defendants had acted diligently and that the circumstances excused the delay.

2 The writs were filed on 3 March 1999 and 22 April 1999 respectively. Defence was filed on 3 May 1999 and the third party notices issued on 20 and 25 May 1999 respectively. In July 1999, a memorandum of appearance was filed on behalf of the third party and on 14 July 1999, the third party applied to set aside service of the third party notices. On 30 August 1999 the court set aside the service out of jurisdiction against the third party. On 13 March 2000 the defendants obtained an order for substituted service of the third party notices. On 16 May 2000 a pre-trial conference was held and there, the defendants agreed to proceed for trial without waiting for third party proceedings to be finalised. The trial ended with the judgment of Amarjit Singh JC on 9 June 2000. On 22 August 2002 the defendants purported to serve the third party notices by substituted service and an application was made on 23 September 2003 to enter judgment against the third party. That application was heard on 6 October 2003 and was not allowed on the grounds that the action was deemed to have ended. However, on 15 December 2003 the defendant in Suit 344 of 1999 applied and was given leave to issue a fresh third party notice. Two years later on 6 September 2005 the defendant in Suit 605 of 1999 applied for a fresh third party notice to be issued. On 23 September 2005 an assistant registrar directed that the previous notices should be reinstated instead of fresh

notices being issued, presumably because a fresh notice may be invalid by reason of *res judicata* and objections based on the limitation of action. An order granting the reinstatement of both previous third party notices, namely the ones issued in May 1999, were made on 17 November 2005. Since then, no significant step took place until 3 January 2007 when the AR set aside the order for reinstatement of 17 November 2005. The AR set aside the order of 17 November on the ground that the third party would have been unduly prejudiced by the long delay.

3 Mr Thio submitted on behalf of the defendants that a third party action "has a life of its own" even after the main action is over. He relied on *Stott v West Yorkshire Road Car Co* [1971] 2 QB 651 in which the Court of Appeal in England allowed the third party claim to proceed even though the plaintiff had settled his claim against the defendant. In that case the third party had already been brought as a party to the action and the matter was settled on 30 April 1970 after the third party action was set down on 2 July 1969 to be tried together with the main action. In the present case, the main action proceeded without any direction as to third party proceedings. In such circumstances, when there is a judgment, all pending matters are deemed to have closed and the all actions under the suit are extinguished by the doctrine of *res judicata*. If the defendant has any cause of action remaining he has to proceed afresh if the law permits him. The third party action that had lain dormant cannot continue without any express order from the trial judge, assuming he had the power to do so, preserving that action notwithstanding the main trial's conclusion. *Res judicata* is a doctrine that ensures finality. In *Chong Yew Kee and Anor v Wah Chang International Corp Pte Ltd and Anor* [1995] 1 SLR 153 the third party action was ordered to be stood down pending the action of the main action. I accept that a third party action has a life of its own, but it does not have an afterlife.

4 In the present case, the defence of the defendants against the plaintiff's claim was that they were the agents of the third party. That may or may not be the case before the trial, but at the conclusion of the trial the court found against them and rejected that defence. The defendants had taken the position that the plaintiff knew that the defendants were acting as agents of a disclosed principal. If they were allowed to continue this assertion against the third party now, it can only at best, attract an inconsistent finding of fact. There may be nothing against different courts arriving at opposing findings of facts on the same evidence, but there must be good reasons why such an invitation ought to be extended. No material reason was offered and I do not see any merit in law or on the facts (in respect of the history of the Suits) in letting the third party claim proceed.

5 Further, and in any event, I am in full agreement with the decision of the AR that the circumstances show that the defendants had not acted with due diligence in proceeding against the third party, and after a lapse of more than six years from the trial, the defendants cannot now hope to commence a third party claim. No leave would in any event be permitted under O 16 rule 7 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) to enter judgment against the third party where the plaintiff has not, as in this case, enforced his judgment against the defendants.

6 For the reasons above, the appeals were dismissed. Only the defendant in Suit 344 of 1999, namely, Ng Kit Har, had appealed against my dismissal of the appeals.