Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose and Another
[2001] SGHC 76

Case Number : DC Suit 6743/1998

Decision Date : 17 April 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : S Gunaseelan (S Gunaseelan & Partners) for the plaintiffs/judgment creditors; Defendants/Judgment debtors in person

Parties : Hitachi Leasing (Singapore) Pte Ltd — Vincent Ambrose; Another

Civil Procedure – Injunctions – Post-judgment Mareva injunction – Injunction against HDB flat belonging to judgment debtors – Whether necessary preconditions for issuing injunction exist – Whether grant of injunction would contravene s 51(3) of Housing and Development Act (Cap 129, 1997 Ed)

: Hitachi Leasing (Singapore) Pte Ltd (`Hitachi`) carries on the business of providing credit through hire purchase and factoring arrangements. One form of commercial activity which it finances is the renovation of flats constructed by the Housing and Development Board (`HDB flats`) pursuant to a factoring arrangement with a renovation contractor. The contractor, having secured a contract to renovate a flat, will agree with the flat owner that the contract price is to be paid in instalments. The contractor sells this debt to Hitachi who collects the instalments directly from the flat owner. This appeal arises from one such arrangement.

Mr Ambrose Vincent and Madam Rethinambal d/o Ratnam Suppiah Pillay (`the debtors`) are the owners of an HDB flat in Woodlands Avenue 6. In June 1997, they entered into an agreement with a company called Zheng Lian Enterprise (`the contractor`) for certain works to be done to their flat by the latter. It was agreed that the total price to be paid for the works was $29,150. The agreement provided for this amount to be paid by 59 monthly instalments and it was specifically provided that each of these instalments was to be paid to Hitachi. In September 1997, the contractor assigned to Hitachi all amounts due from the debtors.

As the debtors did not pay any of the monthly instalments the total amount fell due. In November 1998, Hitachi took action in the subordinate courts to enforce recovery. The debtors failed to enter appearance to the action. As a result, on 9 December 1998, Hitachi obtained judgment against them. The judgment sum was $30,305.80 and interest was awarded thereon at 6% p[thinsp]a from the date of the writ. At the time of the appeal, the debtors had paid only $1,346 towards settlement of the judgment sum and interest.

In March 2000, Hitachi filed an application in the District Court seeking an order to restrain the debtors from selling, transferring or otherwise disposing of or mortgaging, charging or otherwise encumbrancing their Woodlands flat. The application was heard by District Judge Earnest Lau together with two other identical applications by Hitachi in two other actions against two other sets of debtors. The judge dismissed all three applications. Hitachi lodged an appeal in this case. I am not aware if it has also lodged appeals against the other two decisions.

The background to Hitachi`s application and the appeal is that it has found the usual remedies open to judgment creditors against recalcitrant judgment debtors to be unsatisfactory in situations in which it has financed the renovation of HDB flats. The owners of such flats who avail themselves of the opportunity to pay for their renovation works on an instalment basis are usually from the lower income group. Accordingly, writs of seizure and sale often fail to realise sufficient proceeds to settle the

judgment debt enforced and sometimes the cost outweighs the proceeds. Secondly, garnishee relief is seldom available as there are few debts to attach. Thirdly, the debtors` major asset, the HDB flat itself, is protected from attachment by s 51(3) of the Housing and Development Act (Cap 129, 1997 Ed). Finally, changes in bankruptcy law permitting bankrupts who owe less than $500,000 to apply to the Official Assignee for a discharge after three years mean, says Hitachi, that resorting to bankruptcy proceedings does not result in any recovery.

Hitachi and its solicitors therefore considered that a new method of enforcing judgments was necessary for this type of case. They came up with the idea of obtaining a post-judgment Mareva injunction to prevent the debtors from selling the HDB flat in which the renovation work had been carried out. Their rationale was that this step would aid in execution of the judgment in that if at any time after the injunction had been obtained, the debtors wished to sell the flat, they would have to go to court to have the injunction lifted. At that stage, Hitachi would be able to ask the court to make the discharge of the injunction subject to repayment of the judgment debt out of the sale proceeds.

Hitachi considered that one justification for such an application was that once the flat had been renovated, the owners would be able to sell it for a higher price. Thus if the injunction was not granted, the owners would benefit from the work done without having paid for it. I understand from counsel for Hitachi that 50 such applications have been made successfully in the subordinate courts and that the HDB, which in all cases has been served with a copy of the injunction, has not registered any disapproval of this procedure.

Two main submissions were made by counsel for Hitachi when he appeared before the judge. First, he submitted that the court should grant an injunction to protect Hitachi`s equitable interest in the value of the HDB flat enhanced by the renovation works. Since Hitachi had paid for those works, it had an equitable interest in the sales proceeds representing the enhanced value of the flat. This argument was not accepted by the judge. He noted that counsel could not explain the legal basis of Hitachi`s claim to such equitable interest and went on to say:

> *11. I am certain that the Plaintiffs [Hitachi] have no ownership interest in the Defendants` [debtors] HDB flat, the renovation works therein, or the proceeds of sale should the said HDB flat be sold. Prior to judgment, the Plaintiffs were, at best, legal assignees of a debt under the factoring agreement with the renovation contractors. This affords the Plaintiffs a simple debt action against the Defendants. In other words, they only possess in personam or personal rights against the Defendants and never in rem or proprietary rights against the Defendants` property. Moreover, in paragraph 13 of the Affidavit, the Plaintiffs concede they have no proprietary interest in the Defendants` HDB flat to file a caveat under Section 8(1) of the Registration of Deeds Act.*
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> *12. After judgment is obtained, all debts owed by the Defendants to the Plaintiffs giving rise to the action would have merged into the judgment debt leaving the Plaintiffs with execution remedies against the Defendants. A judgment obtained in a debt action does not confer any proprietary rights to the Plaintiffs against the Defendants` executable property. Admittedly, the Plaintiffs as judgment creditors may apply for a Court seizure and sale of the Defendants` movable and immovable property under execution remedies. However, execution remedies themselves do not convey proprietary rights whether legal or equitable to the Plaintiffs as judgment creditor. Even when attachment proceedings are instituted against a judgment debtor`s property,*

none of the judgment debtors` ownership proprietary rights in the attached property are transferred to the judgment creditor. At best, the possessory interest in a debtor`s property seized under a writ of seizure and sale resides with the bailiff or sheriff.

With respect, I entirely agree.

Hitachi did not pursue the submission relating to an equitable interest when it appeared before me. It concentrated on its second main submission that related to the reasons why it considered the court should come to its aid and grant the injunction applied for. The main point was that the usual remedies available to a judgment creditor were not of assistance in its particular situation since the most effective one, the right to attach and sell the debtors` immovable property, could not be used against an HDB flat. Counsel also submitted that pursuant to recent amendments to the bankruptcy legislation, a judgment debtor even if adjudicated bankrupt, may be permitted by the Official Assignee to carry on his trade and he need only sit out the ensuing three years and wait for the Official Assignee to discharge him whereupon all his existing debts would be extinguished. This would deny the judgment creditor any satisfaction from the judgment.

Counsel went on to submit that while Hitachi was left with no effective remedy against the judgment debtors, the latter would be able to sell their flat for a profit and move away and Hitachi would not be able to trace their whereabouts. Since the placing of a caveat against the flat was precluded by the legislation, Hitachi would have no way of knowing when the debtors entered into an agreement to sell the flat and thus it would be easy for the debtors to elude Hitachi upon completion of the sale. Hitachi as judgment creditor, being deprived of the usual remedies, was thus compelled to seek the injunction asked for in order to protect its interest in the judgment debt. Hitachi needed the court`s aid to avoid becoming a victim of any attempt by the debtors to sell their flat and move away taking with them the proceeds of sale, including the value of the renovations which Hitachi had paid for.

As was noted below, the injunction applied for was a post-judgment Mareva injunction. The judge accepted that O 29 r 1(1) of the Rules of Court allowed applications for Mareva injunctions to be made even after trial. The judge observed that there has been no decision in Singapore on a post-judgment Mareva injunction but pointed out that there are at least two English decisions on the matter, ie **Stewart Chartering v C & O Managements SA; The Venus Destiny** [1980] 1 All ER 718 and **Orwell Steel (Erection and Fabrication) v Asphalt and Tarmac (UK)** [1985] 3 All ER 747. These were cases cited by the judge himself and not counsel who did not appear to be aware of them. Having considered the authorities, the judge concluded that the legal elements governing pre-judgment Mareva applications continued to apply in post-judgment applications, ie there is a need for the judgment creditor to show that he has good grounds to believe that the judgment debtor will dispose of his assets to avoid execution and secondly, that the court must consider that it would be in the interests of justice to grant the application. The cases also suggested that a post-judgment Mareva injunction should be allowed only if it would aid the execution process.

In the present case, the judge reasoned that since execution proceedings could not be levied against the HDB flat, the injunction could not be granted. Secondly, Hitachi`s application also failed the dissipation test applicable to all Mareva injunctions. There was no evidence in Hitachi`s affidavit that showed that the debtors were attempting to dissipate their HDB flat. Finally, the judge considered that it would be against the interests of justice to exercise his discretion in Hitachi`s favour. There were three reasons for this. First, he viewed the application as being, fundamentally, an attempt to attach the debtors` HDB flat. He considered that the court should not exercise its discretionary

powers under subsidiary legislation (ie O 29 r 1) to circumvent an express prohibition contained in a statute, ie s 51(3) of the Act. Secondly, the judge thought that if Hitachi obtained the injunction it would have an early warning device to gain an advantage over the other unsecured creditors of the debtors so that they could attach the future net proceeds of sale before any of the others could do so. This would be allowing Hitachi to upset the level playing field amongst all the debtors` unsecured creditors by using the Mareva injunction for a secondary purpose. Finally, the judge was uncomfortable with the factoring facility granted as it appeared to be a loan facility which had to be disguised since Hitachi was not licensed as a moneylender.

Section 51(3) of the Act provides that no flat, house or other building that has been sold by the Housing and Development Board under the provisions of Pt IV of the Act `shall be attached in execution of a decree of any court`. Before me, counsel for Hitachi stressed that Hitachi`s application was not an application to attach the flat in execution of the judgment debt. He submitted that whilst such attachment was clearly prohibited by s 51(3), the legislation only affected a proposed compulsory sale by the creditor and did not affect a voluntary sale by the flat owner. Nor did it apply to the balance of the proceeds of sale receivable by the owner after paying off his mortgage loan and reimbursing his CPF account. It was this balance that Hitachi sought to prevent the debtors from dealing with and therefore its application was not prohibited by the legislation.

On a straightforward reading of s 51(3), it appears to operate only to prevent enforcement of a judgment debt due from the owner of an HDB flat by court attachment and subsequent sale of that flat in execution proceedings pursuant to the Rules of Court. The section does not extend to the proceeds of sale derived from the voluntary disposal of the flat by its owner. It does not deal with a voluntary sale at all. The aim of the legislation is to preserve the home of the HDB owner and thus a compulsory sale of the flat by a creditor is prohibited. The injunction sought is designed to prevent even a voluntary sale and, to that extent, is not in conflict with the legislation. As long as the injunction is in place, the debtor would not be able to sell his flat and would have a roof over his head.

Notwithstanding the foregoing, it was the view of the judge that the existence of s 51(3) made it impossible for him to grant the injunction. His reasoning was based on the principle that post-judgment Mareva injunctions are to be allowed only if they aid the execution process. He stated that a fortiori, the court should not grant a post-judgment Mareva injunction if no execution proceeding could be levied on the debtor`s assets. This follows logically where the plaintiff seeks to satisfy his judgment out of the HDB flat since it is immune from execution.

There are two issues here. The first deals with the interpretation of the statute. As far as that is concerned, I accept the submission that it relates to the attachment of the flat in execution proceedings and does not extend, per se, to the actions of the owner in relation to its sale. It would not, in my view, be a contravention of the section if the court were to grant the injunction sought. There is the second issue to be considered, however, and that relates to the principles governing the grant of a Mareva injunction.

The Mareva injunction is a discretionary remedy developed by the court to deal with certain defined situations in order to achieve a just result. It is not an execution procedure which is available to a judgment creditor as of right under the Rules of Court. Obtaining a Mareva injunction is not simply a matter of filing a precipae and paying fees. The court must be satisfied that the necessary preconditions for its issue exist.

The first of these preconditions is that there is a real risk of the debtor dissipating or disposing of his assets with the intention of depriving the creditor of any satisfaction of his debt. Our courts have

given great weight to this precondition in authority after authority. In the present case, there is no evidence to satisfy this precondition, only speculation by the judgment creditor. There is no evidence that the debtors are trying to sell their flat or that the aim of such sale would be to deprive Hitachi of the fruit of its judgment. The debtors have kept quiet throughout the proceedings and it is this very inactivity on their part which has fuelled accusations of fraud by Hitachi. These accusations are baseless and cynical. There has not been a shred of evidence to justify them. It is not logical to infer from the failure of the debtors to pay even one instalment due under the renovation contract that from the very beginning they intended to defraud the contractor or Hitachi.

In the case of a post-judgment Mareva injunction, the other precondition, as pointed out by the judge, is that the injunction must act as an aid to execution. In this case, that purpose cannot be achieved because there is no on-going sale. If there was evidence of a contract of sale in existence or of attempts by the debtors to sell the flat, then the injunction might serve a purpose in preventing the debtors from completing such sale without taking into account the judgment debt. Here, Hitachi seeks an injunction which would only have a purpose if the debtors decided in the future to sell that flat. They might never make such a decision. Having renovated the flat to their satisfaction, they might actually be intending to live in it on a long-term basis. In my view, it would be wrong to use an injunction to prohibit someone from doing an act when there is no evidence of any intention to perform such an action in the foreseeable future or of the likelihood of such an action. Further, if the judgment debtors do sit tight, the injunction could very well be rendered useless by the effluxion of time. By reason of s 6(3) of the Limitation Act (Cap 163, 1996 Ed), an action upon any judgment cannot be brought more than 12 years after the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt can be recovered after the expiration of six years from the date on which the interest became due.

As I pointed out earlier, the remedy sought is a discretionary one. The court should not grant it unless to do so would be in the interests of justice. In my judgment, the interests of justice would not be served by granting the injunction. Hitachi has complained a great deal about its lack of an effective remedy. The basic problem that Hitachi faces is not that there are no legal methods of enforcing its judgment. Its basic problem is that the judgment debtors are poor and therefore the enforcement procedures available may not satisfy the judgment debt. The only asset belonging to the debtors which is substantial enough to satisfy the judgment is their HDB flat and this is out of reach by virtue of s 51(3). This situation, however, is not one which is a surprise to Hitachi. As a financier operating in Singapore, Hitachi must have known from the very beginning that its judgment in the event of the debtors` default could not be enforced against their flat. It must also know that the judgment debt even if `secured` by a Mareva injunction against the disposal of the flat would become unenforceable through the passage of time. The risk of non-recovery should have been computed into the factoring arrangement.

This is not a situation which was thrust upon Hitachi. It is a situation which Hitachi entered with its eyes open. It knew what remedies would be available to it as of right in the event of default. It knew (or should have known) the financial standing and creditworthiness of the prospective debtors. It definitely knew that they would come from the lower income group. It knew (or should have known) the financial standing and creditworthiness of the contractor to whom it extended the factoring facility. It was open to Hitachi to hedge its risk by providing recourse factoring to the contractor so that it would be able to recover the debt from the contractor if the flat owners did not pay it. Whether it did indeed do so in this case, I do not know. I have not seen the documentation between Hitachi and the contractor. In any case, the fact remains that it is for Hitachi to protect itself and decide which risks are acceptable and which are not. In my judgment, in these circumstances, it does not lie in Hitachi`s mouth to ask for extra assistance to recover the amounts owing. It must be satisfied with those remedies that are available to all creditors of debtors who own HDB flats.

In the result, I dismiss this appeal.

Outcome:

Appeal dismissed.