Zheng San Gen v OGG Landscape Pte Ltd and Another
[2009] SGHC 131

Case Number : Suit 823/2008, RA 135/2009

Decision Date : 27 May 2009

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : N Srinivasan (Hoh Law Corporation) for the plaintiff; Danny Ong and Yam Wern Jhien (Rajah & Tann LLP) for the second defendant

Parties : Zheng San Gen — OGG Landscape Pte Ltd; Yong Cheng Eng

Civil Procedure – Costs – Security

27 May 2009

Tan Lee Meng J:

1 The plaintiff, Mr Zheng San Gen ("Mr Zheng"), a Chinese national and a former work permit holder in Singapore, was injured while working for the first defendant, OGG Landscape Pte Ltd ("OGG"), on a landscaping project in the home of the second defendant, Mr Yong Cheng Eng ("Mr Yong"). He appealed against the decision of Assistant Registrar Saqib Alam ("AR Alam") that he furnish security for costs amounting to $10,000 with respect to his claim against Mr Yong. After hearing the parties, I dismissed the appeal and now give the reasons for my decision.

Background

2 According to Mr Zheng's work permit, he was granted permission to work in Singapore for New Century Construction Engineering Limited. Although he was supposed to work in the construction industry, he was, for unexplained reasons, working for the first defendant, OGG Landscape Pte Ltd ("OGG"), a company in the landscaping business, at the time of his injury.

3 On 9 November 2007, Mr Zheng was part of a team of workers deployed by OGG in landscaping projects in a number of places. In the evening of that day, OGG sent Mr Zheng to work in the garden of the second defendant, Mr Yong, who had engaged OGG to carry out landscaping work at his home at No 6, Salam Walk, Singapore 467154.

4 While Mr Zheng was pruning the branches of a mango tree on Mr Yong's property with an electric saw, he fell from the tree. As a result of the fall, he became permanently paralysed from the waist down. He sued his employer, OGG, and Mr Yong for damages with respect to the accident.

5 OGG was sued for negligence in failing to ensure that it had a safe and proper system of work and that its employees were properly instructed to follow that system. As OGG did not enter an appearance, interlocutory judgment in default of appearance was entered against it. However, the likelihood of OGG, which was uninsured, paying any money to Mr Zheng is extremely remote.

6 Mr Yong denied any liability whatsoever to Mr Zheng. He pointed out that OGG was an independent contractor and he was not responsible for its negligence as an employer of Mr Zheng.

7 Mr Yong applied for security of costs to be furnished by Mr Zheng for the claim against him. His

application was heard on 8 April 2009 by AR Alam, who found that there was an "appreciable degree of certainty that there will be a judgment for costs in favour of the defendant" and that there is a possibility that Mr Zheng, who has no assets in Singapore, may not be able to pay the costs awarded to Mr Yong. In view of Mr Zheng's circumstances, AR Alam fixed the amount of security at only $10,000 and ordered that the security for costs be furnished within 21 days from the date of the order. AR Alam also ordered the stay of all further steps in the action until the amount required as security for costs has been furnished by Mr Zheng.

8 Mr Zheng appealed against AR Alam's decision.

The court's decision

9 Mr Yong's application for security for costs was made pursuant to O 23 r 1(1)(a) of the Rules of Court, which provides as follows:

> Where, on the application of a defendant to an action or other proceedings in the Court it appears to the Court that the plaintiff is ordinarily out of the jurisdiction, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks fit.

10 Mr Zheng, who has returned to China after the accident, is undoubtedly ordinarily outside the jurisdiction. It does not follow that a defendant is entitled to security for costs merely because the plaintiff is outside the jurisdiction. In *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427, Chao Hick Tin JA explained the position at [14] as follows:

> It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a complete discretion in the matter: see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. It seems to us that under r1(1)(a), once the pre-condition, namely being "ordinarily out of the jurisdiction", is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered. There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court after balancing the competent factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation. Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.

11 Mr Zheng's counsel, Mr N Srinivasan, candidly admitted that if the action against Mr Yong is dismissed and costs are ordered against his client, the latter would not be able to pay the costs. However, it is trite that the plaintiff's impecuniosity is by itself not a basis for requiring security and more must be established to persuade the court to order that security for costs be furnished.

12 In *Pandian Marimuthu v Guan Leong Construction* [2001] 3 SLR 400 ("*Pandian*"), GP Selvam J summarised the principles governing the exercise of the court's discretion to order security for costs as follows at [12]:

> (i) Security will not be ordered based on the mere fact that the plaintiff is a foreigner with no address or assets within the jurisdiction. The applicant must establish that in all the circumstances of the case it would be just to grant the application.
>
> (ii) In considering the application, the court should be mindful of the underlying principle on which security is ordered – that is the plaintiff should not be permitted to litigate on an unlikely

claim and leave the defendant with a paper judgment for costs. *This means that there must be an appreciable degree of certainty that there will be a judgment for costs in favour of the defendant*. Otherwise, the order for security will be purposeless and will defeat the ends of essential justice when the plaintiff is disabled or unable to secure the security.

(iii) The court should be circumspect to ensure that the defendant's purpose of seeking security for costs is not to quell the plaintiff's quest for justice.

(iv) Ultimately the court should, on a broad view, weigh the merits of the claim and defence and decide whether it would be just to order security.

[emphasis added]

13 Mr Yong's counsel, Mr Danny Ong, asserted that the claim against his client is not *bona fide* and is merely an attempt to pressurise his client into offering Mr Zheng some money to get rid of a nuisance. He submitted that Mr Zheng's claim should be made against OGG, for whom he worked, and not against his client, who had hired OGG as an independent contractor for landscaping work on his property.

14 When deciding whether or not to make an order for security for costs to be furnished, the strength of a plaintiff's claim is one of the relevant factors to be taken into account. In determining whether there is an "appreciable degree of certainty" that there will be a judgment of costs in Mr Yong's favour, it must be noted that Mr Zheng's case against Mr Yong, as stated in his Statement of Claim at [12] is that he was injured "by reason of the breach of the occupier's and/or common law duty of care of [Mr Yong] and/or his employees, servants and/or agents for whom [Mr Yong] is variously liable for".

15 The simple answer to Mr Zheng's claim in relation to OGG's unsafe system of work and occupier's liability is that his counsel, Mr Srinivasan, accepted during the hearing of the appeal that OGG was an independent contractor hired by Mr Yong to undertake landscaping work in the latter's garden. An employer who has employed an independent contractor to do work on his behalf is, without more, not liable for any tort committed by the said contractor while carrying out the agreed work. This general principle was reiterated by the Court of Appeal in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR 613 at [37].

16 As has been mentioned, Mr Zheng's pleaded case against OGG is that his injuries resulted from OGG's unsafe system of work. In relation to the claim against Mr Yong, the particulars of his alleged negligence, as pleaded in the Statement of Claim at [12], are that he had failed to remedy OGG's unsafe system of work or practices and had failed to ensure that there was proper and effective supervision of the work being carried out in the garden. It was further alleged that Mr Yong had failed to devise a safe system to prune the mango tree and that he should have provided Mr Zheng with a proper platform, safety belt, lifelines and anchorages for the latter to work safely. Mr Zheng also contended that the question of occupier's liability arose. Finally, he asserted that the doctrine of *res ipsa loquitur* applied to his case.

17 Whatever duty of care Mr Yong may have owed Mr Zheng, it obviously did not, as the latter contended, extend to having to ensure that his independent contractor, OGG, had a safe system of work or that OGG had a proper and effective supervision of the work being carried out in the garden. More startling was Mr Zheng's unsubstantiated assertion that Mr Yong had a duty to ensure that his independent contractor had properly equipped its workers for landscaping work in his garden. Furthermore, it is clear from the law that Mr Yong did not, as was alleged by Mr Zheng, have a duty

to devise a safe system for OGG's employees to prune the mango tree. Imposing such a duty on a layman who hires an independent contractor to prune a tree is clearly unwarranted.

18 As for the question of occupier's liability, in *Ferguson v Welsh & Ors* [1987] 1 WLR 1553 ("*Ferguson*") Lord Keith said at p 1560 that it "would be going a very long way to hold that an occupier of premises is liable to the employee of an independent contractor engaged to do work on the premises in respect of dangers arising not from the physical state of the premises but from an unsafe system of work adopted by the contractor". In the same case, Lord Goff shed more light on the position when he said as follows at p 1564:

> I wish to add that I do not … subscribe to the opinion than the mere fact that an occupier may know or have reason to suspect that the contractor carrying out work on his building may be using an unsafe system of work can of itself be enough to impose upon him a liability under the Occupier's Liability Act 1957, or indeed in negligence at common law, to an employee of the contractor who is thereby injured, even if the effect of using the unsafe system is to render the premises unsafe and thereby to cause the injury to the employee. I have only to think of the ordinary householder who calls in an electrician, and the electrician sends in a man who, using an unsafe system established by his employer, creates a danger in the premises which results in his suffering injury from burns. I cannot see that in ordinary circumstances, the householder should be held liable under the Occupiers' Liability Act 1958, or even in negligence, for failing to tell the man how he should be doing his work. I recognize that there may be special circumstances which may render another person liable to the injured man together with his employer, as when they are, for some reason, joint tortfeasors, but such a situation appears to me to be quite different.

19 The reasoning in Ferguson was adopted in *Mohd Sainudin bin Ahmad v Consolidated Hotels Ltd & Anor* [1987] SLR 556 ("*Mohd Sainudin*"). In this case, the first defendant, the owner of a building site, appointed a main contractor for the construction of a building on the site. The plaintiff, an employee of the main contractor's scaffolding sub-contractor, was injured when a brick fell on him while he was working at the building site. LP Thean J held that as the main contractor was an independent contractor, any negligence in relation to the falling brick would have been caused by or attributable to the main contractor. He added that the first defendant could not be vicariously liable for the negligence of the main contractor even if he was still the occupier of the construction site. His decision was affirmed by the Court of Appeal: *Mohd Sainudin bin Ahmad v Consolidated Hotels Ltd and Another* [1990] SLR 154.

20 In *Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* ("*Mohd Sapri*") [1996] 2 SLR 505, the respondent, SB, who was engaged to construct and maintain a warehouse, appointed SE as its specialist sub-contractors for the installation of a sprinkler system in the warehouse. The appellant, P, who was hired by Mr Ishak, the independent sub-contractor appointed by SE to install the sprinkler system, was injured when he fell to the ground after the mobile staging platform that he was standing on toppled over. It was found that the accident occurred entirely because of P's own negligence and/or that of his co-workers employed by Mr Ishak. It was held that SB could not be liable to P as the occupier of the building site since the accident had not resulted from any latent hazard existing on the site. The Court of Appeal, which endorsed LP Thean J's earlier decision in *Mohd Sainudin*, reiterated as follows at pp 517-518:

> The only duty [an occupier] owed to the plaintiff was to use reasonable care to prevent damage from unusual dangers which the former knew or ought to have known about. *This relates to the physical condition of the premises, as opposed to current operations at the site*.
>
> [emphasis added]

21 In view of the cases cited above in relation to occupier's liability where an independent contractor is hired, Mr Zheng's allegation that Mr Yong is liable as an occupier of his home does not have a leg to stand on. The mango tree was not inherently dangerous and the accident occurred as a result of operations carried out by the independent contractor at Mr Yong's garden.

22 I turn now to the doctrine of *res ipsa loquitur*, which was pleaded for unfathomable reasons. It is patently clear that this doctrine has no application in the present case because Mr Zheng had asserted material facts as to how he was injured. There being ample evidence as to how the accident occurred, the issue of *res ipsa loquitur* does not arise: see *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR 116.

23 After considering all the circumstances of the case, there is clearly an "appreciable degree of certainty that there will be a judgment for costs" in favour of Mr Yong and that Mr Zheng should furnish security for costs for his claim against Mr Yong. The fact that a plaintiff is impecunious does not preclude the court from ordering that security for costs be furnished in a case when it is just that such an order be made. Mr Zheng should not be permitted to litigate on an unlikely claim and leave the defendant with a paper judgment for costs. The sum ordered by AR Alam, namely $10,000, was arrived at after careful consideration of Mr Zheng's circumstances. I saw no reason to vary his order.

24 For the reasons stated, Mr Zheng's appeal was dismissed with costs.