Ng Huat Foundations Pte Ltd v Samwoh Resources Pte Ltd
[2006] SGHC 43

Case Number : OM 2/2005

Decision Date : 14 March 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Philip Jeyaretnam SC and Ajinderpal Singh (Rodyk & Davidson) for the applicant; Quentin Loh SC, Ronald Choo and Corrinne Chia (Rajah & Tann) for the respondent

Parties : Ng Huat Foundations Pte Ltd — Samwoh Resources Pte Ltd

Arbitration – Award – Whether appeal against award on question of law – Whether the appeal misconceived for being premised on facts not found by the arbitrator

14 March 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 On 5 May 2005, I gave Ng Huat Foundations Pte Ltd ("NHPL") leave to appeal on a question of law that arose in the arbitral proceedings between it and Samwoh Resources Pte Ltd ("Samwoh"). The arbitration took place in June and July 2004 before Mr Goh Joon Seng as the single arbitrator ("the Arbitrator") and the Arbitrator's award ("the Award") was issued on 16 December 2004.

2 The appeal proper was heard in November 2005. The following question of law now comes before me for determination:

> Whether a party to a joint-venture contract which has accepted the repudiatory breach of the other party is entitled to the entire benefit thereafter of assets of the joint venture including to retain for itself all profits from such assets earned after acceptance of the repudiatory breach.

Background

3 This account of the facts is taken, in large part, from the Award.

4 In late December 2000, the Defence Science & Technology Agency ("DSTA") acting on behalf of the Ministry of Defence ("Mindef") called for tenders for quarry-shaping works and disposal of rocks ("the project"). On 31 January 2001, following discussions between one Elvin Koh Oon Bin on behalf of Samwoh and one Tony Ng and his wife, Rosalind Lee, on behalf of NHPL, the parties entered into a document entitled "Prebid Joint Venture Agreement" ("the Prebid Agreement"). It was agreed thereby that they would form a joint venture for the purpose of tendering for the project and, if successful in the tender, executing it. *Vis-à-vis* Mindef, Samwoh was to be the sole contractor.

5 Samwoh duly submitted its tender. In February 2001, it was learnt that this tender was the most competitive. In anticipation of being awarded the project, in early March 2001, the parties discussed the formation of a joint-venture company. On 23 March 2001, DSTA indicated that the project would be awarded to Samwoh. Shortly thereafter, a company called Gali Batu Quarry (S) Pte Ltd ("Gali Batu") was incorporated to execute the project.

6 Despite ongoing discussions, the parties could not agree on the terms of the detailed joint-venture agreement for the operation of Gali Batu. By 31 May 2001, when Mindef formally awarded the project to Samwoh, the detailed agreement had still not been settled. To enable the joint venture to commence work on the project, the parties arrived at an interim agreement to each subscribe for 500,000 shares of $1 each in Gali Batu so that it would have $1m to fund the operations pending conclusion of the detailed agreement. The interim agreement was put into effect in July 2001 when the paid-up capital of Gali Batu was raised to $1m.

7 Subsequently, there were disputes between the parties over assertions that NHPL had failed to honour its obligations of equal contribution under the Prebid Agreement and the interim agreement. These went to arbitration at the instance of Samwoh who claimed a declaration that the joint venture between it and NHPL had been terminated due to the repudiatory breaches of NHPL and also that it was entitled to damages to be assessed by the Arbitrator.

8 The Arbitrator held that Samwoh (the claimant in the arbitration) had established that NHPL (the respondent in the arbitration) had breached the Prebid Agreement through its refusal or failure to bear its share of the financial and other obligations relating to the project. There were also numerous acts of bad faith and fraud perpetrated on Samwoh by NHPL through the actions of Rosalind Lee whom the Arbitrator held to be the directing mind of NHPL. The Arbitrator found the breaches to be fundamental and repudiatory. Samwoh accepted the repudiation on 7 March 2002 and the joint venture came to an end on that date. Consequently, Samwoh was entitled to the declaration applied for, namely, that the joint venture under the Prebid Agreement and operating through Gali Batu came to an end on 7 March 2002.

9 In paras 60 to 64 of the Award, the Arbitrator considered NHPL's claim to have an interest in the project on the ground that it was an asset of the joint venture. He noted that NHPL had relied on the *dicta* of Ferris J in the English decision of *The European Strategic Bureau Ltd v Technomark Consulting Services Ltd* (20 June 1995) (Chancery Division) (unreported) ("the *ESB* case"). The Arbitrator considered that *dicta* to be *obiter* and that it only addressed the "guilty venturer's" entitlement to his share in the profits of the joint venture but did not address that party's liability to the co-venturer in the event of ultimate loss. In the Arbitrator's opinion, if that *dicta* standing alone were to be followed, it would be better for any venturer to walk off the project leaving all the responsibility and risk to the co-venturer. The Arbitrator declined to apply the *dicta*. He held that NHPL did not have any interest in the profits earned from the project after the termination of the venture. It is that holding that NHPL seeks to challenge in this appeal.

The appeal

The arguments of the parties

10 The Arbitrator awarded damages to Samwoh for NHPL's breach. He also acknowledged that an account needed to be taken of the joint venture because NHPL was entitled to 50% of the profits. However, he imposed a cut-off date, namely, the date of termination, on the account. On appeal, it was NHPL's submission that there should not have been such a cut-off date since the benefit of the DSTA contract was an asset of the joint venture. It argued that the Arbitrator should have followed the *ESB* case.

11 The relevant passage of the judgment in the *ESB* case is as follows:

> I have to say, however, that I do not think the result would have been very different even if ESB

had been in breach of duty and Technomark had lawfully determined the joint venture. The way that I analyse the position is as follows. GDRU entered into a contract with Technomark for the performance by Technomark of certain services. GDRU was content that Technomark should make its own arrangements for the participation of ESB in the provision of these services, the only restriction being that the remuneration of ESB was to be the responsibility of Technomark. By entering into the joint venture with ESB Technomark made the benefit of the GDRU contract an asset of the joint venture. That asset had not been fully exploited when the joint venture came to an end. The grounds upon which the joint venture was brought to an end and the responsibility for its termination are immaterial to the ownership of the property of the venture. In the absence of the clearest possible stipulation to that effect, even the most extreme misconduct on the part of one venturer could not cause the benefit of the GDRU contract to cease to be the property of the joint venture or give the "innocent" venturer the right to confiscate the interest of the "guilty" venturer. After the determination of the joint venture its property has to be realised for the benefit of the co-venturers and distributed in accordance with their rights under the joint venture agreement. The obvious way of realising the asset consisting of the benefit of the GDRU assignment was to complete that assignment, which Technomark was able to do. Had the joint venture come to an end by reason of default on the part of ESB Technomark would probably have been entitled to claim a special allowance for the value of its services in bringing the GDRU assignment to fruition, although no claim to such an allowance was advanced in these proceedings. Subject to such allowance the fruits of the GDRU assignment would, in my judgment, be divisible between the co-venturers in accordance with their interests in the venture, in this case equal shares.

12 The argument put forward on behalf of NHPL was that the *ESB* case provided a definitive answer to the question of law raised in the appeal. Applying the proposition set out by Ferris J it was clear that:

(a) Samwoh, by entering into the Prebid Agreement with NHPL, had made the project an asset of the joint venture.

(b) In the absence of clear stipulations in the Prebid Agreement, even the most extreme misconduct on the part of NHPL could not cause the benefit of the project to cease to be the property of the joint venture or give Samwoh the right to confiscate NHPL's interests in the project.

(c) Following from the above, after determination of the joint venture, the joint venturers' property and assets, namely the project, had to be realised for the benefit of both co-venturers and distributed in accordance with their respective rights under the joint-venture agreement.

(d) Subject to the above principles, all Samwoh may be entitled to would be a special allowance for the value of its services in bringing the project to its conclusion.

13 NHPL argued that the Arbitrator's incorrect decision had resulted in a substantial windfall for Samwoh. If the joint venture had not been terminated, Samwoh would have received only 50% of the profits from the joint venture. For Samwoh to now receive 100% of such profits would be to over-compensate it and breach the principle that damages are only compensatory.

14 In response, Samwoh contended that the purported question of law raised by NHPL was premised on facts that were patently wrong and that had been rejected by the Arbitrator who had made contrary findings of fact. In Samwoh's opinion, the purported question of law was:

(a) in effect a collateral attack on the findings of fact made by the Arbitrator who had applied the correct principle of law to the facts as he found them; and

(b) an attempt to sidestep some very damning findings of fact made by the Arbitrator.

15 In Samwoh's view, the reliance placed by NHPL on the *ESB* case was misplaced because:

(a) the "rule" relied on by NHPL was *obiter dicta*;

(b) this case has never been subsequently approved or applied in subsequent cases;

(c) there was a concession by counsel that there was no difference between joint venturers and partners and this was clearly wrong; and

(d) on the contrary, there are clear and strong authorities stating that contracts of this nature do not constitute "assets" of a partnership, *a fortiori* in the case of a joint venture.

16 It is apparent from the foregoing brief account of the submissions that the parties took different positions on what had been found by the Arbitrator as a question of fact. In their submissions, they were referring to two different contracts: NHPL contended that the only contract that existed and that was the property of the joint venture was the DSTA contract. On the other hand, Samwoh's position was that the DSTA contract belonged to it alone and that the property of the joint venture was a subcontract between it and Gali Batu.

17 Samwoh submitted that NHPL had no legal basis to say that the DSTA contract became an asset of the joint venture on 31 May 2001 or at all. It further said that the Arbitrator acknowledged this fact.

18 The response of NHPL to the foregoing submission was that when the DSTA contract was awarded to Samwoh, Samwoh held that contract on behalf of the joint venture. It was precisely the asset that the joint venture had been formed to exploit. Article 1 of the Prebid Agreement stated that the parties agreed to form a joint venture solely for the purpose of participating in the tender for the project and, if successful in the said tender, in executing the works of the project. Under Art 2 of the Prebid Agreement, it was agreed that the joint venture was to do business in the name of Samwoh and, by Art 3, it was agreed that if the contract for the project was awarded, the parties would be jointly and severally liable to Samwoh for the execution of the project. Therefore it was anticipated at all times that Samwoh would be the contracting party with Mindef but that the DSTA contract would be held by it on behalf of the joint venture.

19 NHPL submitted that if the DSTA contract was not an asset of the joint venture at any time, then the Arbitrator would not have ordered an account of the profits earned from this asset prior to the termination of the joint venture.

20 In order to decide whether there is an issue of law, I must first establish what the Arbitrator held on the facts, as an arbitrator is the master of the facts in an arbitration and the court does not interfere with such factual holdings.

Do the Arbitrator's holdings allow for the question of law to be asked?

21 The assertion made by Samwoh was that the Arbitrator made the following findings of fact:

(a) The DSTA contact was awarded to Samwoh, not the joint venture (Award para 25).

(b) The parties agreed to enter into a joint venture and to fund that joint venture equally to carry out the contract; that joint venture was Gali Batu (Award paras 16, 40 and 45).

(c) There was no joint venture other than Gali Batu (Award paras 15, 16, 40 and 45).

(d) As the project was awarded to Samwoh, DSTA held and still holds Samwoh responsible for its proper execution.

(e) NHPL failed to honour its side of the bargain.

For the purposes of the present argument, I am not concerned with holding (e).

22 The Award is in various parts. The section headings of the Award are as follows: "The claim"; "The parties"; "The factual background"; "Respondent's failure to observe Article 2.1 of the Prebid Agreement" and "My findings". Under the heading "My findings", the Arbitrator made the following main findings:

(a) After considering the *ESB* case in some detail, he held that it did not apply to the situation before him (Award para 63).

(b) The project was a civil engineering works contract awarded by the government to Samwoh and, alongside it, there was a joint-venture agreement under the Prebid Agreement between Samwoh and NHPL to carry out the project as partners (Award para 64).

(c) NHPL had breached the Prebid Agreement through its refusal or failure to bear its share of the financial and other obligations for the project and had committed numerous acts of bad faith and fraud (Award para 65).

(d) NHPL's breaches were fundamental and repudiatory and Samwoh had accepted such repudiation on 7 March 2002 (Award para 65).

(e) The joint venture came to an end on 7 March 2002 (Award para 66).

23 The Arbitrator did not, in the section "My findings", make any finding on whether there was a subcontract between Samwoh and Gali Batu. I must therefore examine the preceding sections to determine whether they contain any findings on this issue or any indication of Arbitrator's stand on it.

24 First, under the heading "The factual background", the Arbitrator stated (at para 15) that on 27 March 2001, Gali Batu was incorporated to "be the corporate vehicle to execute the project". In para 16, he stated that to enable the joint venture to commence operations on the project, the parties arrived at an interim agreement to subscribe for certain shares in Gali Batu. This would give Gali Batu $1m to fund the operations pending the conclusion of the detailed agreement.

25 Second, in the section headed "Respondent's failure to observe Article 2.1 of the Prebid Agreement", three matters were considered. Under the subheading "Financial contribution", the Arbitrator stated that as the project was awarded to Samwoh, DSTA held Samwoh responsible for its proper execution and Samwoh had no choice but to fund the project in spite of the refusal or inability of NPHL to bear its share of the financial obligations for the operation of the project (see para 25). In the same subsection, the Arbitrator stated at para 30 that other than the injection of equipment into

Gali Batu, NPHL made no financial contribution to the project. The third part of this subsection is entitled "Respondent's disclaimer of all responsibility towards Gali Batu". Here, in para 39, the Arbitrator quoted *in extenso* a letter written by NHPL to Samwoh on 21 February 2002 in which it stated that Gali Batu was not a joint-venture company but a separate legal entity from NHPL and that the joint venture between NHPL and Samwoh had been referred to arbitration. In para 40, the Arbitrator commented as follows:

> The denial in the face of incontrovertible evidence shows the utter bad faith of the Respondent and its directing mind Rosalind Lee. The project was being executed by the parties through Gali Batu. If Gali Batu was not the joint venture vehicle then the Respondent had made no contribution at all towards execution of the project, …

In the next paragraph, the Arbitrator referred to an earlier letter dated 8 May 2001 from Rosalind Lee written on the letterhead of Gali Batu in which she had admitted that Gali Batu was the joint-venture company incorporated for the purpose of executing the project. Then in para 45, the Arbitrator stated that, by its various letters including the 21 February 2002 letter, NHPL had clearly repudiated the joint-venture agreement under the Prebid Agreement the terms of which were being carried out through Gali Batu. In para 49, the Arbitrator noted that although the Prebid Agreement was only entered into on 31 January 2001, Rosalind Lee who was in charge of the accounts of Gali Batu debited Gali Batu with effect from 1 January 2001 with the salaries of employees of related companies of NHPL who were subsequently employed by Gali Batu. Finally, in para 54, the Arbitrator held that by disclaiming its interest and denying having any obligation towards Gali Batu "which was the joint venture vehicle formed to carry out the sole project of the joint venture", NHPL had repudiated the joint- venture agreement.

26 Having studied the Award thoroughly, I have not been able to identify an express finding on the existence of a subcontract between Gali Batu and Samwoh. This is not the end of the matter, however. The next question is: Can such a finding be implied from the Award on the basis that certain holdings could not have been made but for such an understanding? The Arbitrator recognised that the DSTA contract was awarded to Samwoh but that did not mean that the DSTA contract belonged solely to Samwoh in the sense that Samwoh could exploit it alone since (as the Arbitrator also pointed out) it was the parties' intention all along that Samwoh would play the role of the main contractor with DSTA but that the actual work would be performed by the joint venture. This could only be effected by some form of novation or subcontract. It is also clear from the Award that the Arbitrator considered that the parties had decided to operate their joint venture through a corporate entity and, for that purpose, incorporated Gali Batu. He referred to Gali Batu as the joint-venture vehicle and treated it as holding the assets of the joint venture. The Arbitrator stated expressly that the joint venture was operating through Gali Batu. It would be Gali Batu that would do the work on the project and be entitled to receive from Samwoh the payments made to Samwoh by DSTA in respect of such work. He also recognised that NHPL had treated Gali Batu as being liable for the salaries of various persons needed to carry out the project even before the project had been awarded to Samwoh. The Arbitrator considered it a repudiation of the joint-venture agreement when NHPL subsequently declared that Gali Batu was not a joint-venture company. He could not have made such a declaration if he thought that Gali Batu was only an operator and not the form that the parties had decided to give to the joint venture.

27 When making the declaration that this joint venture came to an end on 7 March 2002 and ordering an account to be taken of it up to that date, the Arbitrator stated that the profits of the joint venture, subject to the claims, if any, of the liquidator of Gali Batu, were to be shared equally between the parties and that they were to bear the losses in like proportion. It seems to me that from this order and from the various remarks made by the Arbitrator in relation to Gali Batu and its role

and the way that it had been treated by the parties, that he considered that Gali Batu itself was the joint venture and that the benefit of the project had, presumably by way of a subcontract between Gali Batu and Samwoh, been injected into Gali Batu by the joint venturers. The incorporation of Gali Batu in anticipation of the award of the project to Samwoh was specifically mentioned by the Arbitrator and such mention denotes the significance the Arbitrator gave to the event.

28 Having considered the arguments carefully, I also agree with Samwoh's submission that the Arbitrator did not find that the DSTA contract itself was an asset of the joint venture. That was a contract between Samwoh and Mindef. In his mind, as he said, Samwoh was responsible for the proper execution of the DSTA contract and had no choice but to lend money to Gali Batu so that it could carry out the work of the joint venture and be the joint-venture vehicle.

29 I therefore accept the submission that the question of law posed by NHPL is misconceived because it is premised on facts that were not found by the Arbitrator and ignores the view of the facts that he took and the factual findings that he made. In the circumstances, this appeal fails and must be dismissed with costs. I have not found it necessary to go into detail on the issue of the validity of the *dicta* of Ferris J but my reading of the authorities submitted by the parties indicates that there is some basis in case law for this *dicta* and that it may be applicable, to some extent, in appropriate circumstances. However, I express no concluded opinion on the issue as it is not necessary for present purposes.