Sinnadurai Thirumoorthy v Goh Seck Kang
[2002] SGHC 230

Case Number : Suit 681/2001/S

Decision Date : 02 October 2002

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Siaw Kheng Boon (Siaw Kheng Boon & Co) for the plaintiff; Goh Seck Kang (In Person)

Parties : Sinnadurai Thirumoorthy — Goh Seck Kang

Judgment

GROUNDS OF DECISION

This is a claim by the plaintiff against the defendant for certain sums of monies allegedly borrowed by the latter from the former.

Background

1. Mega Consortium Pte Ltd ("Mega") was incorporated in Singapore on 15 January 1992. The defendant was a director and shareholder of Mega. In June 1993, the company obtained approval from the Chinese authorities for a joint-venture with the government of Beijing Municipality (the municipal government), Daxing County, Xihongmen Town to construct housing units in Xihongmen Town (the project). The joint-venture was effected through a company called Beijing ZhongXing Real Estate Development Limited ("ZhongXing"), which was incorporated in the People's Republic of China. The project was divided into six (6) phases; the building costs for the first phase were fixed at RMB 2,100 per square metre for a built-in area of approximately 243,000 square metres and the municipal government undertook to purchase all the housing units after completion, at RMB 2,700 per square metre. Mega therefore stood to make an estimated gross profit of RMB 145m or about S$35m (at current exchange rates) from the entire project.

2. According to the plaintiff, the defendant approached him in 1998 to invest in the project; the plaintiff agreed. The plaintiff then negotiated with American Fidelity Trust (Fidelity) to secure a loan of US$60m for the project. On 27 April 1998, Mega (through the defendant) signed a Financial Services Agreement & Letter of Intent with Fidelity, pursuant to which the latter would endeavour to find an underwriter to provide the requisite funding of US$60m to the former. On 25 May 1998, the plaintiff purchased shares in Mega worth $250,000 and became a director as well. It was alleged by the defendant that the plaintiff would receive a commission of US$900,000 (based on 1.5% of US$6m) if the US$60m loan was successfully procured from Fidelity.

3. However, the proposed US$60m loan did not materialise. The defendant then invited a local company Heisei Kami Express (S) Pte Ltd ("Heisei") to invest in Mega. Mr Kawakami of Heisei agreed to invest S$1m into Mega, provided that he was satisfied with the environment and site conditions in Xihongmen Town. On 28 November 1998, Mega signed a Convertible Loan Stock Agreement (the "Agreement") with Heisei pursuant to which Mega would issue and Heisei would subscribe for, 300,000 convertible loan stock of S$1 each at par, for cash. The maturity date of the stock was 28 November 1999. It was agreed that the balance of $700,000 would be invested if Mr Kawakami was satisfied with the site conditions. Heisei subsequently decided not to invest the remaining $700,000 in Mega, after Mr Kawakami had visited the site.

4. Under the Agreement, the stock held by Heisei would bear interest from the date of issue at the rate of 10% per annum on the principal amount of the loan stock. Some events that would render the loan stock immediately convertible and the sum of $300,000 repayable to Heisei under the Agreement are as follows:

(a) if Mega defaulted in payment of interest owed on the principal loan;

(b) if Mega failed to perform or observe any of the provisions of the Agreement on its part to be performed or observed and failed to remedy such breach within 14 days of being notified in writing of such breach.

It was also a term of the Agreement that Mega would permit Heisei to exercise all its rights and remedies under the Agreement and would pay Heisei (on demand) all monies whatsoever which it may pay or become liable to pay (including legal costs on a full indemnity and solicitor and client basis) in connection with the exercise of any of its rights and remedies.

5. The then two (2) directors of Mega, namely Simon Lim and the defendant, guaranteed to pay on demand as principal debtors, the loan amount of $300,000 together with the interest. The interest on the $300,000 loan was to be paid in two (2) instalments (of $15,000 each) half-yearly, the first on 28 May 1999 while the second instalment would be payable with the principal sum, on 28 November 1999.

6. On 4 April 1998, Mega assigned the contract with the municipal government to Mitten International Pte Ltd ("Mitten"), which was a company incorporated in Singapore in 1998. Mega held an Extraordinary General Meeting on 7 May 1999 at which the assignment of the contract to Mitten was approved. The defendant was a shareholder and director of Mitten and, the plaintiff subsequently also became a director and shareholder. They both resigned as directors of Mega on 7 May 1999 but remained as shareholders. The plaintiff was re-appointed Mega's managing director on or about 14 September 1999.

7. On 16 August 1999, Heisei brought an action against Mega, the defendant and Simon Lim in Suit No. 1187 of 1999 (the Suit) for the sum of $330,000, as Mega had failed to pay the first interest instalment due on 28 May 1999. Subsequently, on 21 September 1999, Mega and Heisei entered into a Settlement Agreement (which was signed by the defendant on behalf of Mega) wherein it was agreed that Mega would pay Heisei the following (settlement) sums:

(i) $15,000 for interest due on 28 May 1999;

(ii) $315,000 for the principal debt and second interest instalment;

(iii) $1,851.90 being Heisei’s legal costs.

Heisei discontinued the Suit after it received the first interest payment of $15,000 and agreed legal costs, on 24 September 1999.

8. The plaintiff issued cheques in the sums of $1,851.90, $15,000 and $315,000; the first two (2) being made in favour of Heisei’s solicitors and the last cheque being in Heisei's favour, in payment of the above settlement sums.

The dispute

(i) the plaintiff's case

9. The plaintiff alleged that the defendant had approached him for help in making payment of Heisei's legal costs and the interest that was due to the company. He testified that on 27 August 1999, he lent the defendant a sum of $1,851.90 to pay Heisei's legal costs. This was evidenced by a DBS cheque dated 27 August 1999 for $1,851.90 drawn by the plaintiff on his personal account in favour of T M Hoon & Co (Heisei's solicitors) and a payment voucher dated 27 August 1999, which had been signed by the defendant and which reflected that $1,851.90 (together with two [2] other sums) had been paid to him.

10. The plaintiff also claimed to have lent the defendant $15,000 to pay the interest that was due, by issuing a cheque on his personal account in favour of T M Hoon & Co. The plaintiff produced the cheque stub as well as a copy of, the DBS cheque dated 24 September 1999, as evidence to support his claim but, did not produce any payment voucher signed by the defendant.

11. Mega subsequently failed to pay $315,000, in default of the terms of the Settlement Agreement. Correspondence was exchanged between T M Hoon & Co and Mega's solicitors (Chow Peng & Partners) in respect of Mega's default. This exchange culminated in a letter dated 1 December 1999 from T M Hoon & Co to Chow Peng & Partners demanding that the sum of $315,000 be paid by 5pm of 1 December 1999, failing which confirmation was sought from Chow Peng & Partners as to whether Mega (and the defendant) had given the firm instructions to accept service of process. According to the plaintiff, the defendant approached him again for a personal loan to pay off the sum of $315,000. The defendant agreed to do so and drew a Standard Chartered cheque on his personal account, dated 8 December 1999 in favour of Heisei. The cheque was forwarded to T M Hoon & Co with a covering letter bearing Mega's letterhead, which letter was carbon-copied to the defendant, Simon Lim and Chow Peng & Partners. A payment voucher dated 8 December 1999 was produced by the plaintiff as evidence to support this claim. The **Particulars** column of the payment voucher stated "*Payment of loan incurred by Steven Goh [the defendant] and Simon Lim".* However, neither Simon Lim nor the defendant signed the **Received By** or **Amounts Received** columns.

12. In his statement of claim (para 11), the plaintiff pleaded that the defendant requested him to lend the three (3) sums aforementioned to the defendant personally to pay Mega's debt. The plaintiff averred that the defendant had not repaid all or any of, the three sums despite written demands from the plaintiff's solicitors.

13. Counsel for the plaintiff in his concluding submissions argued that it was not strange or surprising for the plaintiff to have lent the defendant these sums. After all, the plaintiff had known the defendant since 1981 and the plaintiff had regarded the defendant as a good friend. Apart from friendship, the fact that there were business ties between the plaintiff and the defendant also explained why the plaintiff had assisted the defendant. At the time when the loans were made, the defendant was a director of ZhongXing and the plaintiff had attempted to form a Project Management Team and had made repeated offers to the defendant to be on the team. This indicated that the plaintiff needed the defendant for the project and therefore, it made sense for the plaintiff to assist the defendant personally. Counsel also drew the court's attention to the fact that the plaintiff had previously lent to the defendant (at the latter's request), various sums to help pay the defendant's housing and car loans. This allegation was not denied by the defendant.

14. Apart from the three settlement sums, the plaintiff further alleged that the defendant had requested him for loans on a number of occasions. He produced evidence of these loans in the form of

entries in his cheque stubs and or payment vouchers. The loans that the plaintiff had allegedly made to the defendant are as follows:

	Date	Amount (S$)
(1)	30 March 1999	10,000.00
(2)	30 March 1999	10,000.00
(3)	11 June 1999	15,000.00
(4)	15 July 1999	7,000.00
(5)	12 August 1999	13,000.00
(6)	25 August 1999	10,000.00
(7)	25 August 1999	8,000.00
(8)	21 September 1999	11,000.00
(9)	24 September 1999	1,149.00
(10)	24 September 1999	50,000.00
(11)	29 September 1999	5,000.00
(12)	8 October 1999	5,000.00
(13)	9 October 1999	2,000.00
(14)	27 October 1999	10,800.00
(15)	6 January 2000	1,111.30
(16)	15 March 2000	5,000.00
	Total owed	164,060.30

15. The plaintiff pointed out that the defendant had admitted in his affidavit (filed on 14 February 2001) in DC Suit No. 2887 of 2000 (wherein the defendant sued Mitten), that items 7 and 8 in para 13 of the plaintiff's statement of claim, were personal loans from the plaintiff. In respect of items 10, 11, 12, 13 and 14, the plaintiff explained that he had originally claimed these sums as loans made by Mitten to the defendant, by way of a counterclaim in that DC action but, the defendant had alleged in that same affidavit that, those items were personal loans given by the plaintiff not Mitten, to the defendant. The plaintiff was accordingly making these claims and informed the court that Mitten would amend its counterclaim in the DC action to remove those items of claim, if he succeeded here.

16. The company secretary Ng Kin Huat of Mega and Mitten testified that neither Mitten nor Mega repaid the plaintiff's loan of $315,000 or any part thereof, nor the interest and legal costs paid to Heisei. Ng Kin Huat (PW2) also confirmed that the plaintiff had acquired all his shares in Mega and Mitten by payment and not through the set-off of any loans made by him to the defendant, or conversion of any such loans into shares, or capitalisation of such loans.

(ii) the defendant's case

17. The defendant denied that he was indebted to the plaintiff for the three (3) settlement sums; he contended he had never requested the plaintiff to lend him any money to pay Heisei. According to the defendant, after Mitten was set up, he was the managing director and was in charge of its administration. On 22 May 1999, Mitten signed a Partnership Agreement with Chua Lim

Bin, executive-director of Chang Cheng Civil Engineering Pte Ltd ("Chang Cheng") to carry out the project. Under the Partnership Agreement, Chang Cheng was required to invest a total of $1.3m into Mitten for the project and Chang Cheng would be entitled to 50% of the shareholdings in Mitten and would have a 45% share of the profits. Mega was required to inject $2m into Mitten as paid-up capital for which Mega would be entitled to 50% shareholding in Mitten and 55% share of the profits. Both Mega and Chang Cheng would appoint two (2) directors each, to Mitten's board. In the Partnership Agreement, it was stated that Mitten would be responsible for the $300,000 loan from Heisei.

18. After Heisei had commenced Suit No. 1187 of 1999 against Mega, the company held a meeting of the board of directors on 14 September 1999. It was resolved during the meeting that the plaintiff was to be appointed as the managing director and that Tan Bin was to be appointed as the company's chairman. In respect of the loan of $300,000 from Heisei, the board further resolved that:

> (i) if Heisei decided to sue Simon Lim and the defendant, all the directors undertook to settle the loan in the proportion of their shareholdings or to sell 300,000 shares in Mega to any buyer; and
>
> (ii) the plaintiff, Tan Bin and the defendant would approach Mr Kawakami to request for deferred payment of the loan. It was agreed that the interest of $15,000 on the loan of $300,000 would have to be paid first. The interest and legal costs would be paid by the plaintiff as a loan to Mega.

I should point out that the above resolution was produced in court by the defendant (see AB 52-54) and was significantly missing from the two (2) bundles of documents of the plaintiff.

19. The defendant asserted that on 15 November 1999, the plaintiff had indicated to the defendant and Simon Lim that he was able to finance the project on better terms than Chang Cheng, if he was allowed to replace Chang Cheng as a partner in the project. The plaintiff's proposal was accepted by a majority of the board of directors. Consequently, the plaintiff called for a meeting of the board of directors of Mega on 23 November 1999 and, a resolution was passed to revoke the offer of 50% shareholding in Mitten at $1.3m to Chang Cheng; instead, those shares would be sold to the plaintiff. The plaintiff was accepted to take over the Partnership Agreement from Chang Cheng on the same terms and conditions initially offered to Chang Cheng. It was also resolved that the plaintiff would be appointed the executive chairman of Mitten. Like the earlier resolution dated 14 September 1999, this resolution of the board of directors was also missing from the plaintiff's documents produced to the court.

20. Soon after the plaintiff became Mitten's executive chairman, he expressed concern over the budget for the project. He indicated that the Standard Chartered Bank (the Bank) had approved a loan of $20m (the loan) for him to carry out the project and he wanted to have sole control of Mitten (including exclusive control over the bank account of Mitten). To that intent and purpose, the defendant said, he transferred all his 320,000 shares in Mega to the plaintiff so that, the latter could have the power to deal with the Bank on the loan. The defendant had agreed to transfer his remaining shares in Mega, as the plaintiff had undertaken to maintain the defendant’s 30% share in the project's anticipated profit, notwithstanding that the defendant was no longer a shareholder.

21. Prior to this transfer the defendant testified, he had already transferred 400,000 shares in

Mega to the plaintiff and, other shareholders of Mega had similarly transferred various lots of shares to the plaintiff. At the time when the plaintiff issued his personal cheque of $315,000 to settle Heisei's loan, the plaintiff already had control of the entire administration as well as the bank account, of Mitten.

22. The expenses incurred by the plaintiff since he replaced Chang Cheng in Mitten on 23 November 1999 until 31 January 2000 were $1,926,927.00, which included the sum of $330,000 paid to settle Heisei's loan. According to the defendant, the plaintiff instructed the company secretary of Mitten to convert the total amount of the defendant's expenses into shares to be issued to the plaintiff. In addition, the defendant claimed that on 3 February 2000, the plaintiff had admitted to having taken over Heisei's loan of $330,000.

23. In respect of the other sums of monies which the plaintiff allegedly lent to the defendant, the defendant denied that he owed the plaintiff the specified sums. The defendant raised the following defences against the claims set out in para 14 above:-

> (i) item 10 was made up of items 3, 6, 7, 8 and 9, as well as another sum of $4,851.90, and was therefore a double claim; there was never a loan made to him of $50,000 in one lump sum;
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> (ii) as at February 1999, the plaintiff had paid for the company's expenses amounting to $165,000. The plaintiff paid a further $90,000 up to September 1999, making a total of $255,000, which was inclusive of the total of $107,949 claimed in items 1 to 9 and 11 to 14. The total sum of $255,000 had been fully settled by the 400,000 shares in Mega which the defendant transferred to the plaintiff;
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> (iii) the defendant had no knowledge of the sum of $1,111.30 claimed in item 15;
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> (iv) as for item 16 ($5,000), that was cash given by Mitten to the defendant for his expenses in Beijing during his employment with Mitten and had already been deducted from the defendant's salary.

The decision

(i) The loans pleaded in para 13 of the statement of claim

24. In the course of trial, the plaintiff withdrew his claim for item 10 (an alleged loan of $50,000) as he conceded it was made up of items 6, 7, 8, 9 (after the defendant produced the plaintiff's own hand-written statement of account in exhibit **D3**). The plaintiff also withdrew his claim for $15,000 paid to T M Hoon & Co (for the interest on the loan from Heisei) and his claim for $4,851.90 (as it was omitted from his statement of claim). It was the defendant who pointed out to counsel when cross-examined (N/E 45), that the plaintiff had double-claimed on the same cheque (DBS no. 782429) for both items 3 ($15,000) and 10 ($50,000). Counsel for the plaintiff then made an feeble attempt to say that item 3 was for payment of the second interest instalment to Heisei. This explanation was promptly rebutted (N/E 54) by the defendant who pointed out that the plaintiff's Standard Chartered

Bank cheque no. 122983 for $315,000 issued to Heisei on 8 December 1999 (see PB82) included the second interest instalment. Apparently, the cheque number was not written on the payment voucher for item 10 when the defendant signed the same.

25. I believed the defendant when he testified he had repaid the loans by transferring a total of 400,000 shares in Mega to the plaintiff. These shares were transferred to the plaintiff on various dates – 5,000 shares were transferred on 28 October 1999, 195,000 shares on 23 November 1999, 50,000 shares in December 1999 and another 150,000 shares in January 2000. The plaintiff claimed that he had paid $100,000 to the defendant for the shares that were transferred to him, regardless of the number of shares that were transferred. In my view, this assertion was not substantiated by any evidence. The plaintiff had previously purchased shares in Mega (between November 1999 and June 2000) from other shareholders, including Tan Bin, Simon Lim and even from the defendant himself, at $1.00 per share; this was evidenced by the Payment Vouchers issued by the plaintiff. Therefore, there was no reason why and even less reason for the defendant to agree, that the plaintiff would pay only $100,000 for such a large number of shares.

26. At one stage during cross-examination by the defendant, the plaintiff alleged that the shares in Mega were *valueless* (N/E 57). The plaintiff's own conduct however, did not bear out that contention. According to the defendant, the plaintiff bought over the shares in Mega for $535,000 from seven other shareholders and the plaintiff invested $1.1m in Mega in December 1999. Subsequently, the plaintiff invested in the company $376,345.83 in January 2000, $331,678.65 in February 2000, $93,485.31 in March 2000 and $282,407.89 from April to June 2000. His investment in Mega in the first half of 2000 amounted to almost $2.2m. The plaintiff had therefore injected a total of $3.7m into Mega. The plaintiff did not challenge the defendant's assertion on the extent of his investment in Mega. If, indeed the shares were *valueless*, there was no reason for the plaintiff, who struck me as a shrewd businessman, to spend such a hefty sum purchasing worthless shares and investing in the company. In my opinion, he was prepared to do so because Mega (and himself by virtue of being the majority shareholder) had a sizeable share of the potential profits that could be generated from the project.

27. The defendant had testified that the plaintiff would return the original payment voucher to him whenever he settled a particular loan; the plaintiff would also return the defendant's post-dated cheques issued to secure the loans. The defendant was able to support his evidence by producing the original payment vouchers for the loans in items 1 and 2 (see exhibit **D2**), 4, 6, 7 and 8 (see collective exhibits in **D1**) set out in para 13 of the statement of claim. Counsel for the plaintiff had informed the court when queried (N/E 44), that the plaintiff did not have the original payment voucher dated 25 August 1999 for items 7 and 8 (for sums of $10,000 and $8,000) but could not offer any explanation. I believe the explanation was that given by the defendant – the loans had been discharged and hence the original payment voucher was returned to the defendant who could and did, produce the original in court.

28. The plaintiff was not a truthful witness. Not only did he not speak the truth, he deliberately withheld disclosing documents which would go to show that the defendant did not receive payment on certain payment vouchers. As an example, I refer to items 1 and 2 which original payment voucher in **D2** showed that, while the defendant signed the same, it was a staff of Simon Lim, one Lee Khong Poon, who had received the two (2) sums of $10,000 each. The plaintiff had relied on his own cheque stub, a self serving document, to support this claim.

29. In respect of item 16 in para 14 above, I am of the view that the sum of $5,000 was part of the $20,000 budget for the defendant's expenses and rental, when he was employed by Mitten as the project manager for Phase 1 of the project, with effect from 15 March 2000. This was apparent from

the letter of appointment dated 15 March 2000 setting out the terms and conditions of the defendant's employment and, the payment voucher issued on 15 March 2000 for the $5,000. The defendant's testimony (at N/E 50) which I believed was, that by January 2000, he was already an employee of the company; hence only those payments made to him before October 1999 were treated as personal loans to him and all those loans had been discharged by the transfer of his shares in the company to the plaintiff.

30. My conclusion on this issue is further supported by evidence showing that the plaintiff had paid the defendant sums totalling $70,167 on several occasions, namely, 25 November 1999, 10 December 1999, 24 January 2000 and 3 March 2000, for the shares which he had purchased from the latter. If the defendant had in fact owed the plaintiff a total sum of more than $100,000 on those respective dates, it was unlikely that the plaintiff would pay the defendant such substantial sums of monies on each of the occasions that he purchased shares from the defendant; logically, the plaintiff would want to set-off what the defendant owed him, against the consideration of $70,167.

(ii) sums paid to Heisei

31. As stated earlier (para 24), the plaintiff had withdrawn his claim for $15,000 paid to TM Hoon & Co, for the first interest instalment. On the evidence, the plaintiff's claims for $315,000 and $1,851.90 for the other two (2) payment made to Heisei cannot succeed either. I had earlier commented (para 18) on the plaintiff's failure to disclose the resolution passed by the board of directors of Mega on 14 September 1999. His payments of $15,000 and legal costs were not loans made to the defendant but, made on behalf of Mega. The payment voucher dated 8 December 1999 for $315,000 was not signed by the defendant. The plaintiff could write and did write, what he chose in the payment voucher but, it was Heisei not the defendant, who received the payment under the plaintiff's Standard Chartered Bank cheque no. 122983. The principal debtor on the loan from Heisei was Mega, not the defendant. Why should the defendant be the only director responsible for the payment and not the others?

32. On a balance of probabilities, I believe the defendant's testimony is more credible than the plaintiff's and more consistent with the documents produced in court. Accordingly, I dismiss the plaintiff's claim with costs to the defendant.

Sgd:

LAI SIU CHIU

JUDGE