SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd
[2000] SGCA 7

Case Number : CA 445/2000

Decision Date : 11 February 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Vinodh Coomaraswamy (Shook Lin & Bok) for the appellants; Howard Cashin and Lim Khoon (Lim Hua Yong & Co) for the respondents

Parties : SA Shee & Co (Pte) Ltd — Kaki Bukit Industrial Park Pte Ltd

Arbitration – Stay of court proceedings – Application for stay – Whether alleged agreements were "matters arising under or out of or in connection with" contract – Whether judge's approach in granting application correct – s7 Arbitration Act (Cap 10, 1985 Rev Ed)

Words and Phrases – "Matters arising under or out of or in connection with"

(delivering the grounds of judgment of the court): This was an appeal from the decision of the High Court in SIC 3257/99 in which it stayed the proceedings in Suit 658/99 pursuant to s 7 of the Arbitration Act (Cap 10) (the `Act`) upon the application of the defendants, who were the respondents in this appeal. At the conclusion of the hearing, we dismissed the appeal. We now give our reasons.

The facts

The respondents were the developer of a factory at Kaki Bukit Road 3 (the `project`). The appellants were a building contractor engaged by the respondents as the main contractor for the project pursuant to a building contract (the `contract`). The contract incorporated the Singapore Institute of Architects Conditions of Building Contract (the `SIA Conditions`). In the course of the works, the respondents failed to make payments under five interim certificates issued by the project architect. The appellants brought Suit 658/99 against the respondents to claim payment in respect of those five certificates, including interest and costs. The total amount outstanding under the five certificates was $5,469,137.04.

The respondents denied liability on two grounds. The first was that the respondents had paid $2m to the appellants` director, Chwee Meng Chong (`Chwee`) and the appellants had agreed that this sum would go towards reducing the amount owed by the respondents to the appellants under the interim certificates. Secondly, the appellants had agreed that the balance of $3,469,137.04 need not be paid until a sum of $9.46m was paid to the respondents by the appellants` associated company, How Hwa Investment Pte Ltd. The background to the alleged two agreements is as follows.

In 1994, one Ho Mun Fei (`Ho`) and Chng Heng Tiu (`Chng`) jointly tendered for the project site and when they succeeded, they incorporated the respondent company and assigned to it the tender award. Chng`s company, Chng Heng Tiu Pte Ltd and his associates (the `Chng group`), including Chwee, held 64% of the shares in the respondent company. Chwee himself held 5% of the shares in the respondent company. The other 36% was held by Ho and his brother (the `Ho group`).

The respondents commenced the development of the project. In late 1997, there arose a dispute between the two groups and the Ho group decided to acquire the Chng group`s 64% shareholding in the respondents through their company, Straits International Resources Pte Ltd (`SIR`). On 1

December 1997, an agreement was entered into between members of the Chng group as vendors and SIR as purchasers of the former`s shareholding in the respondents. The purchase price was payable in instalments. In February 1998, SIR stopped payment on these instalments because of a dispute in respect of the agreement of 1 December 1997.

In the meantime, on 8 March 1998, the contract was awarded by the respondents to the appellants. The link between the appellants and the respondents was in the person of Chwee, who besides being a 5% shareholder in the respondents, was also a majority shareholder and director of the appellants.

In October 1998, the Chng group and the Ho group decided to settle their dispute. It was agreed that firstly, SIR would proceed with the purchase of the shares of the Chng`s group in the respondents at a reduced price. Secondly, the Chng group would purchase certain units in the project from the respondents for which they would pay 50% of the price up front. Payment for 30% of the sale price was effected. But a cheque for $9.46m, being for the remaining 20%, issued by the Chng group to the respondents, was dishonoured due to a lack of funds. The Chng group then assured the Ho group that funds would be available subsequently. The respondents alleged that as a result thereof, there was an agreement that the appellants would not insist on payment under the interim certificates until the Chng group had paid the $9.46m due to the respondents. In return, the respondents would not sue on the dishonoured cheque. The appellants, however, denied that they had agreed not to receive payment under the interim certificates until the Chng group had paid the $9.46m to the respondents. I shall hereinafter refer to this point as `the collateral agreement question`.

As regards the $2m allegedly paid to Chwee, $1m was allegedly paid to him by one Darwin Liman, an Indonesian businessman (on behalf of Ho Kok Cheong, the project manager of the respondents), in order to secure the discharge from bankruptcy of Ho Kok Cheong under a scheme of arrangement. That object having failed, Chwee did not return the money. However, Chwee said he had returned the same. As for the other $1m, the respondents claimed that it was a deposit for the sale of shares in the respondents by the Chng group to SIR. This deposit was not yet returned to SIR and was under the control of Chwee as part of the Chng group. The respondents claimed that there was an agreement that the two sums of $1m in Chwee`s control would be used for the payment of the sums owing from the respondents to the appellants under the interim certificates for the project. Again, the appellants denied the existence of this agreement. In any event, the appellants said the two sums, if any, concerned Chwee in his personal capacity and did not concern the appellants. This point involving the two sums will be hereinafter referred to as the `$2m question`.

Notices to terminate

On 11 February 1999, the appellants sent a letter to the respondents giving them notice under cl 33(1)(b) of the SIA Conditions on the ground that the respondents had defaulted in making progress payments as certified by the architect. Clause 33(1)(b) provides:

> *(1) The Contractor shall be entitled by a written Notice of Termination given to the Employer to terminate his employment under the Contract on any of the following grounds:*
>
> *...*
>
> *(b) If the Employer does not pay the Contractor the amount due on any certificates within the Period for Honouring Certificates named in the Appendix hereto (unless and to the extent that under the terms of the Contract the*

Certificate has been superseded or corrected by a later Certificate or the Employer may be expressly empowered either not to pay, or to make deductions from, the sums shown as due in the certificate) and if such default is continued for 14 days after receipt by registered post or recorded delivery of a prior written notice from the Contractor stating that, failing payment within such further period of 14 days, Notice of Termination will be given under this Condition.

However, just two days later, and without waiting for the 14-day grace period laid down in cl 33(1)(b) to expire, by a letter dated 13 February 1999, the appellants, referring to the letter of 11 February 1999 and invoking cl 33(1)(b), gave the respondents the notice of termination of the contract.

On 22 February 1999, both parties held a meeting and agreed on a `mutual termination` of the contract. Under the termination agreement, the architect and quantity surveyor would measure and certify the value of work done up to 22 February 1999 and the value of materials on site. The respondents would then pay the appellants such certified sum plus the outstanding sums under the interim certificates by 31 March 1999 and the appellants would vacate the site on that date.

On 24 February 1999, the respondents wrote to the appellants pointing out that the notice of termination of 13 February 1999 was invalid. But they went on to point out that the matter had been superseded by the termination agreement of 22 February 1999.

However, disputes soon surfaced when the appellants claimed for loss of additional profit `due to further fall in material since award of contract.` Quite inexplicably, the parties also started to argue if the termination notice of 13 February 1999 was valid. As a result, the appellants continued to remain on the site after 31 March 1999 and what amount was due from the respondents to the appellants could not be resolved. On 8 April 1999, the respondents rescinded the termination agreement and reserved their right to claim damages. The respondents also gave the appellants notice to vacate the site by 15 April 1999. The appellants did not comply with the respondents` notice to vacate. By their letter dated 22 April 1999, the respondents accepted the appellants` repudiation of the contract and reserved their right to claim damages. Eventually, the respondents recovered possession of the site by way of OS 627/99.

The litigation

On 21 April 1999, the respondents gave notice of arbitration to the appellants` solicitors pursuant to cl 37(1) of the SIA Conditions. On 3 May 1999, the appellants took out the writ of summons in Suit 658/99. On 19 May 1999, the respondents took out SIC 3257/99 to stay the proceedings pursuant to s 7 of the Act. On 28 May 1999, the appellants took out SIC 3480/99 for summary judgment on its claim. Both SIC applications were fixed for hearing before the learned Judicial Commissioner Lee Seiu Kin (the judge) on 21 June 1999.

The decision below

The learned judge below ordered that all proceedings in Suit 658/99 be stayed pending arbitration. In view of his order staying the proceedings, he did not make an order on the appellants` application for

summary judgment.

The grounds on which the judge allowed the respondents` application for a stay of proceedings were as follows:

(a) in view of the complex inter-relationships between the parties, there were triable issues in respect of the alleged $2m question and the collateral agreement question;

(b) such triable issues would have entitled the respondents to unconditional leave to defend in the appellants` application for summary judgment;

(c) the triable issues were matters arising `in connection with` the contract pursuant to cl 37(1) and therefore, those issues fell within the reference to arbitration;

(d) the respondents had satisfied s 7(1) of the Act in that a dispute between the parties had been validly referred to arbitration and the issue was one which was within the jurisdiction of the arbitrator; and

(e) the appellants had failed to show that, under s 7(2) of the Act, there was a sufficient reason for not referring the matter to arbitration.

The appeal

The appellants put forward three main grounds of appeal, namely:

(i) that the judge below had adopted an incorrect approach by first determining that there were triable issues raised in this case; instead, he should have proceeded on the assumption that there were triable issues raised by the affidavits;

(ii) that the triable issues as found by the judge were wholly extraneous to the contract and thus did not come within cl 37(1) and no question of any stay arose;

(iii) that the appellants` right to payment under the interim certificates was not a triable issue as the law clearly allowed the appellants` claim under the interim certificates.

Whether the judge had adopted the correct approach

While the learned judge recognised that under cl 31(11), in the absence of fraud or improper pressure or interference by either party, the court should give full effect to the interim certificates, he ruled that as the respondents had shown that there were triable issues, the appellants were not entitled to summary judgment. Unconditional leave to defend should be given. He also held that the triable issues raised by the respondents fell within the reference to arbitration. Thus, he ordered a stay in accordance with s 7 of the Act.

The appellants contended that the judge had misdirected himself and adopted the wrong approach in first determining whether there were triable issues and followed by determining whether those issues formed part of the reference to arbitration. They submitted that the court should first have heard the respondents` application for a stay of proceedings based on the assumption that the questions to be determined in the suit were triable.

We were unable to see how the judge could be considered to have erred in taking the approach he did. It was the same approach taken by LP Thean J (as he then was) in **Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd** [1989] SLR 610 [1989] 3 MLJ 216 , where after the writ was issued by the plaintiffs, the defendants took out an application for stay pending arbitration and at about the same time, the plaintiffs applied for summary judgment. There, both applications were fixed to be heard together as in the present case. The assistant registrar dismissed the plaintiffs` application for summary judgment and allowed the defendants` application for stay. On appeal, LP Thean J granted the plaintiffs` application for summary judgment in part and stayed the balance of the plaintiffs` claim for arbitration. It was clear from his judgment that the hearing of the application for summary judgment was heard first followed by the application for stay. The same approach also appears to have been taken by FA Chua J in the earlier case **Woh Hup (Pte) Ltd & Anor v Turner (East Asia) Pte Ltd** [1986] SLR 152 [1987] 1 MLJ 443 .

In any event, we were unable to appreciate what real difference it made to the stay application whether the judge first determined there were triable issues or assumed there were triable issues. Whichever approach could not have altered the determination of the stay application. If there were no triable issues, then there would be no dispute which required reference to arbitration. There would be no question of a stay. A stay would only come into question whenever there were triable issues or disputes within the meaning of cl 37(1), necessitating a reference to arbitration.

Whether the triable issues raised fell within cl 37(1)

Clause 37(1) of the SIA Conditions states:

> *Any dispute between the Employer and the Contractor as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract, or tort, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties...*

Section 7(1) of the Act provides:

> *If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.*

The judge below found that the appellants` purported termination of the contract on 13 February 1999 under cl 33(1)(b) of the SIA Conditions arose out of the respondents` failure to pay on the interim certificates. Whether the appellants were entitled to invoke cl 33(1)(b) would depend on whether the respondents were justified in not paying the appellants on those interim certificates. The judge therefore found that the two issues, namely, the $2m question and the collateral agreement question, would be matters arising `in connection with` the contract which had been referred to arbitration.

However, the appellants contended that the issues found by the judge to be triable dealt with alleged transactions and agreements to which the appellants were not a party and that the agreements were completely unrelated to the obligations of the parties under the contract. The appellants also pointed out that the respondents had not disputed any of the sums due and owing under the interim certificates or that the work done by the appellants was completed to the contractual standard. The appellants` entitlement to the sums owing under the interim certificates was therefore only disputed by the respondents on extraneous grounds arising outside the contract and the issues did not fall within the ambit of cl 37(1) and thus, s 7(1) of the Act would not apply.

The appellants further contended that under the SIA Conditions, any sum certified by the architect on an interim certificate constituted a debt due and payable by the employer to the contractor. The contractor`s right to such payment was subject only to any deduction or set-off as provided expressly in the contract and any counterclaim the employer might have against the contractor had to be separately litigated. Under cl 31(1) and the Appendix of the SIA Conditions, the respondents were to pay the appellants the sum due under an interim certificate within 21 days of receipt by the respondents of the original interim certificate issued by the project architect and the tax invoice from the appellants. Each interim certificate was given temporary finality. This was the effect of cl 31(11) of the SIA Conditions which provided:

> *No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect (other than a Cost of Termination Certificate or a Termination Delay Certificate under clause 32(8) of these Conditions), whether for payment or otherwise, until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall (save as aforesaid and subject to sub-clause (4) of this condition) be binding on the Employer and the Contractor in relation to any matter which, under the terms of the Contract, the Architect has a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has as a fact ruled, in his certificates or otherwise ...*

The appellants also relied on letters written by the respondents to them to show that the two alleged agreements were collateral and did not arise `in connection with` the contract. The letter from the respondents` solicitors to the appellants` solicitors dated 21 April 1999 stated:

> *...*
>
> *We are further instructed that disputes have now arisen between our respective clients, arising from your clients` purported termination of their employment under your clients` notice of termination dated 13 February 1999, which termination our clients maintain was unlawful and in breach of cl 33(1)(b) of the conditions of contract.*
>
> *Pursuant to cl 37(1) of the Conditions of Contract, we are instructed by our clients to give your clients notice to refer the said dispute to arbitration.*

...

The appellants pointed out that from this letter, it was clear that the respondents envisaged only disputes arising from the termination of the contract being referred for arbitration and not such triable issues in respect of the alleged agreements as identified by the judge below. Moreover, in the minutes of the meeting of 22 February 1999 at which the parties agreed on the `mutual termination` of the contract, there was no mention of any agreement that the appellants would not insist on payment under the interim certificates until the respondents had received payment of the $9.46m.

Furthermore, in a letter dated 22 March 1999 from the respondents to the appellants, it was stated:

...

As mentioned earlier, we cannot agree that your termination of the contract was made under cl 33(1)(b). As such there is no basis for your claim for additional profits.

...

Quite apart from the above, you are also aware that your related company, M/s How Hwa Investment Pte Ltd has issued a cheque of $9,460,000 dated 23 October 1998 to us which was dishonoured upon presentation...

The appellants placed particular reliance on the words `Quite apart from the above` to submit that the respondents themselves treated the alleged agreement as a collateral matter apart from the contract itself. Thus, such a collateral matter could not be a matter `arising under or out of or in connection with` the contract.

It is trite law that the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on firstly, what the dispute is and secondly, what disputes the arbitration clause covers: **Heyman v Darwins Ltd** [1942] AC 356 at 360 per Viscount Simon LC. In the present case, it was clear that in order to come within cl 37(1) the issues in dispute must have arisen under or out of or be reasonably connected with the contract between the parties: **Coop International Pte Ltd v Ebel SA** [1998] 3 SLR 670 at 681.

In the light of the appellants` arguments, we agreed that the $2m question and the collateral agreement question were matters collateral to the contract itself. While it is true that both the questions could affect the appellants` right to payment under the interim certificates, they were really separate issues and not `matters arising under or out of or in connection with the contract`. They were truly matters outside the contract. To this extent, we were unable to agree with the judge below.

Whether the respondents could rely on cll 32(10) and 32(8)(a) to withhold payment on the interim certificates

However, this did not conclude the matter. There was another issue which related to the termination

of the contract and the question that arose from that was whether the respondents could rely on cl 32(10) of the SIA Conditions to withhold making payment on the interim certificates. It would be recalled that on 11 February 1999, the appellants gave the respondents a notice under cl 33(1)(b) and just two days later, on 13 February 1999, they gave the respondents the notice of termination under cl 33(1)(b). The respondents disputed the validity of the appellants` termination of the contract under cl 33(1)(b) on two bases. First, the appellants were not entitled to give their notice of 11 February 1999 as the respondents were justified in not paying the appellants under the interim certificates in view of the two alleged agreements. Second, and more importantly, the notice of termination was invalid as the appellants did not allow 14 days to elapse following the first notice of 11 February 1999.

As the appellants had persisted in their stand that they had validly given the notice to terminate, the respondents had, on 22 April 1999, written to the appellants, accepting the appellants` repudiation of the contract and rescinding the same. The respondents contended that upon electing to treat the contract as repudiated by the appellants, they did not have to pay the appellants on the interim certificates. For this contention, they relied on cll 32(10) and 32(8)(a) of the SIA Conditions, which read:

32(10)	In the event of the Employer being entitled and selecting to treat the Contract as repudiated by the Contractor under the general law and deciding to complete the Works by other contractors, the powers, remedies and damages conferred by sub-clause (8) of this Condition shall be exercisable and recoverable by the Employer in the same way as if a valid Notice of Termination had been given.
32(8)(a)	No further sum shall be certified as due to the Contractor until the issue by the Architect of the Completion Cost Certificate hereinafter mentioned in this sub-clause nor shall the Employer be bound to pay any sums previously certified if not already paid.

The respondents contended that besides the aforesaid two questions ([para] 7 and 8 above), other triable issues were: (i) whether the appellants had wrongfully terminated the contract under cl 33(1)(b) and (ii) whether as a result, the respondents were entitled to treat the contract as repudiated by the appellants and rely on cll 32(10) and 32(8)(a) to withhold payment on the interim certificates. Such issues would clearly fall within cl 37(1) and should be referred to arbitration. We agreed with this submission.

It is true that under cl 31(11), as construed in **Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd** [1989] SLR 610 [1989] 3 MLJ 216 , the existence of a cross-claim by the employer is no ground to refuse payment on an interim certificate. As stated by Warren LH Khoo J in **Aoki Corp v Lippoland (Singapore) Pte Ltd** [1995] 2 SLR 609 at 619:

> *... Progress payments are the lifeline of a building contractor`s business. The object of giving interim certificates temporary finality is to enable the contractor to be paid during the progress of the works so as to minimize cash flow problems.*

However, the position here was different. While cl 31(11) provided that summary judgment could be obtained on the basis of an interim certificate, it was subject to the exception `in the absence of express provision`. Clause 32(8)(a) appeared to be one such `express provision`. Furthermore, the rationale for giving temporary finality to an interim certificate could no longer hold good when the contract had come to an end. The contractor would not be carrying out any more work. So the need to minimize `cash flow problems` for the project no longer existed.

The appellants also argued that the words `any sums previously certified if not already paid` in cl 32(8)(a) should mean only sums which were already certified but not yet due from the employer and should not include sums which had already fallen due because the period for honouring the interim certificates had expired. If this argument were correct, it would mean that under cl 32(8)(a), the employer would in effect be able to withhold payment on only one interim certificate at any one time. We could not accept this argument. First, the wording of cl 32(8)(a) is clear. The contention of the appellants would require us to read words into it. Second, if an employer should withhold payment which had fallen due under any interim certificates, and if such withholding was wrongful, it would be open to the contractor to pursue his remedy by summary judgment or other means. In this instance, no steps had been taken by the appellants to enforce payment until now. As we saw it, once cll 32(10) and 32(8)(a) were set in motion, quite clearly, these provisions should be given effect to.

Whether stay should be granted

Section 7(2) of the Act provides:

> *The court or a judge thereof, if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.*

It is settled law that once a dispute falls within an arbitration clause and is being referred to arbitration, the burden is on the party resisting a stay to show that there is a sufficient reason for not referring the matter in dispute to arbitration. In this instance, no reasons, other than those points discussed above and which we did not accept, had been advanced by the appellants to show why the parties` choice of forum should not be given effect to. Accordingly, we held that there ought to be a stay.

Conclusion

In the premises, the appeal was dismissed with costs and theusual consequential orders.

Outcome:

Appeal dismissed.