Vijayalakshmi Sivaprakasapillai v Mrinalini Ponnambalam and Others
[2009] SGHC 183

Case Number : Suit 444/2006, RA 99/2009

Decision Date : 13 August 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Ooi Oon Tat (Salem Ibrahim & Partners) for the plaintiff; Kelvin Tan (Gabriel Law Corporation) for the 1st to 3rd defendants

Parties : Vijayalakshmi Sivaprakasapillai — Mrinalini Ponnambalam; Gajendra Kumar Gangaser; Yogaluckshmy Ponnambalam (Personal Representative of Estate of Gaasinather Gangaser Ponnambalam, Deceased); Sheldon Investments Pte Ltd

Civil Procedure

13 August 2009

Lai Siu Chiu J:

1 This case involved a family dispute where Vijayalakshmi Sivaprakasapillai ("the plaintiff") sued her late brother's daughter and son ("the first and second defendants" respectively) as well as his widow ("the third defendant") and a family company Sheldon Investments Pte Ltd ("the Company") for oppression under s 216 of the Companies Act (Cap 50, 1994 Rev Ed).

2 The action was initially commenced as Originating Summons no. 1247 of 2002 ("the OS") and was subsequently converted to a writ of summons as Suit no. 444 of 2006 ("the Suit") pursuant to an order of court dated 13 July 2006 obtained by the plaintiff.

3 At the pre-trial conference on 5 March 2009, the court below made the following orders:

(a) parties were to exchange affidavits of evidence-in-chief ("AEICs") of all witnesses by 4pm of 18 March 2009;

(b) objections to the AEICs were to be taken by 25 March 2009;

(c) the case was to be set down by 23 March 2009;

(d) trial dates fixed between 2 to 8 April 2009 to remain; and

(e) unless the AEICs were filed by 18 March 2009, the plaintiff's claim would be dismissed with costs without further order or, the defence would be struck out with judgment to the plaintiff with costs without further order.

Order (a) above was made even though counsel for the plaintiff informed the court that he was not ready to file his client's AEICs. Counsel for the defendants had also informed the court he intended to apply for further discovery from the plaintiff.

4 By way of summons no. 1231 of 2009 ("the plaintiff's application") filed on 17 March 2009, the plaintiff applied for one week's extension to file and exchange the AEICs. The plaintiff's application was heard by the Assistant Registrar ("the AR") on 25 March 2009. The AR, noting that the plaintiff

was in breach of the "unless order" in [3(e)] above, dismissed the plaintiff's application as well as the plaintiff's claim and vacated the trial dates. The plaintiff's solicitors filed the plaintiff's AEIC as well as that of her husband on the following day.

5 The plaintiff appealed to a judge in chambers against the AR's decision by way of Registrar's Appeal No. 99 of 2009 ('the Appeal"). Her counsel also applied via summons no. 1690 of 2009 ("the appeal application") for leave to have his affidavit filed on 30 March 2009 ("the solicitor's affidavit") admitted and read at the hearing of the Appeal. I heard and allowed the appeal application as well as the Appeal but awarded costs to the defendants for both matters, which costs I directed should be borne by the plaintiff's solicitor personally with his undertaking not to recover them from the plaintiff.

6 The defendants are dissatisfied with my order restoring the plaintiff's claim and have filed a notice of appeal (in Civil Appeal No. 61 of 2009) against my decision.

The background

7 In the OS, the plaintiff claimed *inter alia* the following reliefs:

(a) that the affairs of the Company were being conducted or the powers of the directors were being exercised in a manner unfairly discriminative to the plaintiff or in disregard of her interests as a shareholder;

(b) an order that the first to third defendants (collectively "the three defendants") account for all sums taken by the third defendant from the Company being the purported share of loans taken by the late director Gaasinather Gangaser Ponnambalam ("the deceased") from the Company;

(c) an order that the Company pay the plaintiff sums owing to the plaintiff being the shortfall of sums due to her;

(d) an order that an investigative audit be conducted to determine the actual profits of the Company;

(e) in the alternative that the Company be wound-up under the provisions of the Companies Act.

8 The plaintiff who is a family physician (with her husband) has resided in the Untied States since 1978; her home is in Scarsdale, New York State. The first defendant resides in Kuala Lumpur, West Malaysia, and the second/third defendants live in Colombo, Sri Lanka.

9 The Company was incorporated in Singapore on 16 August 1983 by the plaintiff's mother and by the deceased who was the plaintiff's only brother/sibling. The Company's principal activity is that of a holding company and its issued share capital is $5,000 divided into 5,000 shares of $1.00 per share. One of its purposes was to receive the profits from a company incorporated in Malaysia known as Teluk Anson Agricultural Enterprises Sdn Bhd. The plaintiff's mother Rose Alagamany Ponnambalam ("RAP") passed away on 2 January 1999 while the deceased passed away on 5 January 2000.

10 The plaintiff was appointed a director of the Company in November 1983 and was a holder of one share therein. The deceased was appointed a director of the Company on or about 16 August 1983 and remained a director until his death. The first defendant was appointed a director of the

Company on 3 April 2001 and holds 1,249 shares while the second defendant was appointed a director on 30 May 2000 and similarly holds 1,249 shares. The third defendant was appointed an alternate director for the first defendant on 27 July 2001.

11 In her (amended) statement of claim filed in the Suit, the plaintiff alleged that the Company was built up by herself, RAP and the deceased. She alleged that on or about 16 August 1983, it was agreed that she and the deceased would share equally the profits of the Company while the deceased would manage the business of the Company. It was also agreed that the deceased would act in accordance with the wishes of RAP in managing the Company. It was further agreed that moneys advanced to the plaintiff would be the same as sums advanced to the deceased.

12 The plaintiff alleged that even after the demise of RAP, it was the shared assumption and common intention between herself and the deceased that he would manage the business carried out by the Company.

13 Until the death of the deceased, the shareholdings in the Company were allotted equally between the plaintiff and the deceased. In fact, RAP divested her shares in the Company before her death so that at all material times, the shareholdings of the plaintiff and the deceased were equal. After his demise, the shares of the deceased in the Company were redistributed in that the deceased's 50% share was redistributed to his family members viz to the first, second and third defendants.

14 However, since about the beginning of 1984, the deceased disregarded the wishes of RAP in the management of the business. This included withholding information from the plaintiff (including board resolutions and meetings he held with the Company's auditors in 1997 on the accounts and with the Company's secretary) as well as the Company's accounts for 1996.

15 The plaintiff alleged that the deceased established a pattern whereby all or important documents and/or correspondence of the Company including bank statements would be sent to his residence instead of to the Company's registered address. Subsequently, the deceased arranged for the documents and bank statements to be sent to the office of a Singapore law firm. He allowed the auditors of the Company to destroy the Company's documents.

16 The deceased failed to send out/cause to be sent out to the plaintiff notices of board meetings and shareholders' meetings or, sent these out late so that with such short or late notice, the attendance by the plaintiff was impracticable. When the plaintiff attended the meetings, the deceased made it clear by his conduct that he would have no regard for her views. The deceased discouraged the plaintiff and RAP (when she was alive) from attending the Company's meetings and rebuffed the plaintiff's offer to participate more in the management and day-to-day running of the Company.

17 The deceased failed to obtain specific approval from the board of directors for matters relating to the Company's auditors and to Hongkong Bank and he presented himself to the auditors and the said bank as the de facto owner of the Company.

18 The plaintiff alleged that since 1984, the deceased had mismanaged the Company and the three defendants had conducted its affairs in a manner oppressive to her or in disregard of her interests as a member and shareholder.

19 The plaintiff alleged that she, the deceased and RAP took loans from the Company but the resolutions passed by the Company did not tally with the amounts that had been withdrawn while the

figures in the annual reports for loans taken by her and the deceased were inaccurate. She disputed taking loans amounting to $2,943,435 as of 31 December 1990 as well as the figure of $3,737,053 shown in the annual report of 1990.

20 Further, in breach of the agreements in [11], the loans extended to the plaintiff and to the deceased from 1987 onwards did not reflect a 50/50 proportion. The total sums withdrawn by the deceased and his family were $2,987,643 while the sums withdrawn by the plaintiff totalled $2,331,800. There was a shortfall of $655,843 in the loans to her.

21 On 3 August 2001, the plaintiff convened a board meeting for the purpose of passing resolutions to accept the rectification of the accounts and consequent resolutions and for the purpose of claiming the outstanding amount owing to the plaintiff. However, the three defendants failed and/or refused to address the issues in respect of the accounts.

22 The plaintiff further alleged that her share in the Company had been carved up to increase the distribution to the three defendants.

23 In the common defence (Amendment No. 2) that they filed, the three defendants denied the plaintiff's many allegations and contended that all the main decisions for the Company were taken by RAP. They alleged that until her death, RAP made all the decisions. Thereafter, all decisions were taken jointly with or on behalf of the plaintiff by the deceased to whom the plaintiff had given a power of attorney. In addition to the deceased, the plaintiff had nominated proxies to act on her behalf in the affairs of the Company. Consequently, the plaintiff was bound by the actions of the deceased and those of her proxies. The plaintiff had also signed Notices of indebtedness that confirmed the true amount of her loans from the Company which she was seeking to dispute. She was therefore estopped from raising the issue.

24 The three defendants contended that the plaintiff had at various times participated actively in the management of the Company, she had attended meetings and had approved the audited accounts of the Company.

25 The three defendants denied there was any agreement that the loans taken by the plaintiff and the deceased from the Company should be equal. The history of the loan distribution showed the loans were never disbursed equally.

26 The three defendants contended that as a director, the plaintiff was entitled to copies of all board resolutions and audited accounts of the Company. In fact, the plaintiff's husband had visited the three defendants in Sri Lanka and had obtained copies of various documents from them.

27 The three defendants admitted that board resolutions that were passed by the Company did not tally with the amount of loans taken by the plaintiff but contended that this was known to the plaintiff.

28 The three defendants pointed out that notwithstanding her denial in [19] above, the plaintiff had signed confirmations of loans totalling $2,943,435 in the accounts of the Company as follows:

1985	$600,000.00
1986	$720,000.00
1988	$1,373,435.00

1990 $250,000.00

They gave a breakdown which showed that the loans taken by the plaintiff exceeded those taken by the deceased.

29 The three defendants contended that the plaintiff's claim was time-barred under ss 6(1), 23 and 24A of The Limitation Act (Cap 163, 1996 Rev Ed). This new defence was pleaded for the first time in Amendment No. 2 of the defence filed on 20 October 2008.

30 The plaintiff filed a reply that essentially denied the allegations and/or rebuttals pleaded in the defence. I should point out that both sides had drastically and extensively amended their respective pleadings by the date of the Appeal.

The arguments

31 Having set out the state of the pleadings, I now turn to the submissions presented by the defendants. Not unexpectedly, counsel for the defendants strenuously opposed the Appeal. He further submitted that the appeal application should be disallowed. He pointed out that the reasons set out in the appeal application for non-compliance with the "unless" order had been canvassed in the court below and had been rejected by the AR (see the AR's notes of arguments at page 3 lines 25–30). I noted however that the plaintiff's reasons for non-compliance with the "unless" order were not set out in an affidavit but were stated in the plaintiff's application itself.

32 In opposing the appeal application, counsel for the defendants relied on the decision of the Court of Appeal in *Lassiter Ann Masters v To Keng Lam @ Toh Jeanette* [2004] 2 SLR 392 ("*Lassiter*") which referred to the three conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 for the admission of new evidence; these were:

(a) it must be shown that the new evidence could not have been obtained with reasonable diligence at the trial;

(b) the new evidence must be such that, if given, it would probably have an important influence on the result of the case;

(c) the new evidence must be apparently credible though it need not be incontrovertible.

33 I turn next to the solicitor's affidavit. All that it sought to do was to set out briefly the plaintiff's dispute with the defendants and to explain why counsel for the plaintiff needed more time to prepare the AEIC in accordance with acceptable practice. He explained that the documents came up to 16 arch lever files not including correspondence files which numbered more than 15. Counsel deposed that he had to go through about two bags of documents comprising matters related to the Suit or to the parties' interest, namely proceedings in the United States and in Malaysia as well as documentation concerning the estate of RAP. Given the lack of time, the plaintiff's AEIC and that of her husband had to be truncated. Counsel pointed out that the plaintiff and her husband resided in New York and the time difference had to be taken into account.

34 Counsel added the plaintiff had a good case as she had engaged an accountant (Dr Choong Chow Siong) whose investigative audit (challenged by the defendants) confirmed that the deceased had taken more loans from the Company than the plaintiff during his lifetime. Counsel did not think the defendants would be prejudiced in the event the default judgment entered against the plaintiff was

set aside and an extension of time granted to her for the filing of the plaintiff's AEICs.

The decision

35 I overruled the defendants' objections to the appeal application and to the admission of the solicitor's affidavit for the Appeal. In my view, *Lassiter* case did not apply. In *Lassiter*, the appellate court dealt with the issue of whether the principles in *Ladd v Marshall* ([32] *supra*) applied to the admission of new evidence at an assessment of damages conducted by the Registrar and at a Registrar's Appeal before a judge.

36 The defendants' argument was a misreading of *Lassiter* and overlooked the principle that a Registrar's Appeal to a judge in chambers is dealt with by way of a rehearing of the application which lead to the order under appeal. The judge who hears a Registrar's Appeal treats the matter as though it comes before him for the first time (see *Evans v Bartlam* [1937] AC 473 followed by the Court of Appeal in *Chang Ah Lek & Ors v Lim Ah Koon* [1999] 1 SLR 82). As the Appeal was a rehearing before this court, it was within my discretion to allow the appeal application and to admit the solicitor's affidavit.

37 The court below had struck out the plaintiff's claim due to her failure to comply with an "unless" order, because her conduct was deemed to be contumelious. What prompted the court on 5 March 2009 to make the "unless" order was the fact that trial dates had twice been vacated previously. Counsel for the plaintiff did not deny he had been tardy in his compliance with the directions made then by the court at [3], which was one reason why this court penalised him personally in costs.

38 Counsel for the defendants relied on *Changhe International Investments Pte Ltd v Dexia BIL Asia Singapore Ltd* [2005] 3 SLR 344 ("*Changhe*") for his argument that the plaintiff had failed to give valid reasons to enable the court to exercise its discretion to grant her the extension of time she requested in the plaintiff's application. However, a closer perusal of the case would show why the Court of Appeal there affirmed the decision of the court below to strike out the statement of claim of the plaintiff/appellant.

39 In *Changhe*, the plaintiff's first action had been struck out for breach of an "unless" order. The plaintiff was unsuccessful in its application to set aside the dismissal of the first action. In support of the setting-aside application, it had filed an affidavit by its director ("Mr Boey") who claimed he had no personal knowledge of the transactions that gave rise to the first action as these had been handled by a Mr Yang, a Chinese national residing in China. Mr Boey maintained that the plaintiff's failure to comply with the "unless" order was due to a failure by its then solicitors to inform it of such an order.

40 Three years later, the plaintiff in *Changhe* started the second action against the same defendant. The plaintiff failed to file on time an affidavit to explain its conduct in the first action. The defendant successfully applied to strike out the plaintiff's statement of claim on the ground that it was an abuse of process. At the appeal, the plaintiff argued that its failure to comply with the "unless" order was not contumelious in that it was unintentional and it arose from extraneous circumstances over which it had no control.

41 The Court of Appeal held that in order to succeed in its appeal, the plaintiff must give a proper explanation to establish that its failure to comply with the peremptory order in the first action was not contumelious. Further, it had to show that no further disobedience of the court orders would occur. As the plaintiff did not adequately explain how what had happened was not its fault, the plaintiff's appeal was dismissed.

42 The facts in *Changhe* are a far cry from those in our case. Indeed, because of the new defence of time-bar raised by the defendants, the plaintiff would not be able to start a fresh action if the Suit was dismissed. I took that factor into consideration. Further, I saw no real prejudice to the defendants by allowing the appeal application and the Appeal. After all what was involved here was a family dispute. Counsel for the defendants (in his subsequent letter to this court) stated that the prejudice to his clients arose from the fact they had to provide time and make travel arrangements every time the Suit was set down for trial but vacated, causing them inconvenience. Inconvenience however is not to be equated with prejudice.

43 The Court of Appeal had held in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 ("*Syed Mohamed*") at [24] that there must be proportionality in respect of the sanction imposed on the defaulting party. The appellate court there followed Parker LJ's judgment in *Re Jokai Tea Holdings Ltd* [1993] 1 All ER 630 (at p 640) where he pointed out that there must be degrees of appropriate consequences even where the conduct of a party who has failed to comply with a penal order can properly be described as contumelious or contumacious or in deliberate disregard of the order.

44 According to *Syed Mohamed*, the court should see that the punishment fits the crime. It seemed to me to be disproportionate that the plaintiff should be punished for her late compliance (by a day) with the deadline for filing of AEICs by having her claim struck out.

45 In his subsequent request for further arguments (which I rejected), counsel for the defendants complained that he was not afforded an opportunity to reply to the solicitor's affidavit filed for the appeal application. Had he been granted leave to file the same, counsel would have set out the chronology of events for the Suit and the chronology would have shown that the plaintiff's conduct towards the court was contumelious – this not being the first time that the plaintiff had breached timelines set by the court and which resulted in two previous postponements of the trial.

46 As was pointed out previously (see [36]), counsel for the defendants overlooked the fact that the Appeal operated by way of a rehearing. He should have come to court prepared for the eventuality that the appeal application would be allowed. He should have had his own reply affidavit in readiness for filing and once the appeal application was granted, obtain the court's leave to refer to his reply affidavit in his arguments/submissions (which I would have granted) upon his undertaking to file the document after the hearing. Counsel failed to take these steps.

47 It is a known fact that courts are reluctant to strike out claims of litigants without their claims being tried on the merits. I held fast to this sentiment in regard to the plaintiff's claim.

Conclusion

48 As the opposing arguments presented by the defendants failed to outweigh the irreparable prejudice that would be suffered by the plaintiff if her claim was not restored, I granted the plaintiff's application and allowed the Appeal but compensated the defendants in costs for both applications.