

Beng Tiong Trading, Import And Export (1988) Pte Ltd v Maria Janda Achmad Bin Abdullah
Wachdin Basharahil Alias Maria and Others
[2003] SGHC 67

Case Number : Suit 1255/1996, RA 600092/2002
Decision Date : 26 March 2003
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Stanley Wong (Jing Quee Chin Joo) for the plaintiff; T P B Menon (Wee Swee Teow & Co) for 6th and 13th defendants; Norain Abu Bakar (KC Abu Bakar & Partners) for 14th defendant; Peter Chua (Peter Chua & Partners) for fourth defendant
Parties : Beng Tiong Trading, Import And Export (1988) Pte Ltd — Maria Janda Achmad Bin Abdullah Wachdin Basharahil Alias Maria; Abd Rahim Bin Awad Bin Achmad Abdullah Wachdin Basharahil Alias Abd Rahim Awad Wachdin; Abd Rachman Bin Ali Bin Achmad Abdullah Wachdin Basharahil Alias Abd Rachman Ali Wachdin; Salim Bin Hasan Bin Achman Abdullah Wachdin Basharahil Alias Salim Hasan W; Ishak Bin Saad Bin Achmad Abdullah Wachdin Basharahil Alias Ishak Wachdin Be; Quresh Bin Muchsin Bin Achmad Abdullah Wachdin Basharahil Alias Quraishj Wahidin S.H Alias Quresh Muchsin Wachdin; Abubakar Bin Achmad Bin Abdullah Wachdin Basharahil Alias Abubakar Wahdin; Abd Azis Bin Achmad Bin Abdullah Wachdin basharahil Alias Abd Aziz Wahidin; Wachin Bin Achmad Bin Abdullah Wachdin Basharahil Alias Dr H. Wachdin Achman; Harith Bin Achman Bin Abdullah Wachdin Basharahil Alias Harits Ahmad Wahdin; Abd malik Muhammad Wachdin Alias H Abdul Malik Dr; Futum Binti Achmad Bin Abdullah Wachdin Basharahil Alias Futum; The Public Trustee of Singapore; Jak Alhadad & Co Pte Ltd

Civil Procedure – Interim orders – Whether earlier interlocutory order should be set aside because of subsequent judgment from higher court

Civil Procedure – Interim orders – Whether earlier interlocutory order should be set aside on application by party to be joined as co-defendant

Civil Procedure – Parties – Joinder – Party failed to obey earlier direction of court to file application within time stated – Whether leave should be granted for party to be joined as defendant to existing suit

Introduction

1 This appeal arises from an application made by JAK Alhadad & Co Pte Ltd ("JAK") to be joined as 14th defendant in this action commenced by Beng Tiong Trading Import & Export (1988) Pte Ltd ("Beng Tiong") against 12 beneficiaries of the estate of Shaik Ahmad Bin Abdullah Wahdain Basharahil ("the Testator"), with the Public Trustee being named as the 13th defendant. However JAK's application also included a prayer that an Order of Court dated 19 July 1999 ("the 1999 Order") be set aside.

2 The Testator died on 15 July 1995 in Madura, Indonesia, leaving a large number of properties in Singapore. He made a Will in Singapore on 3 September 1938.

3 Probate to the Will of the Testator was originally granted to Shaik Sayeed bin Ahmad Wahdain Basharahil, one of the Executors and Trustees named in the Will. Subsequently the Public Trustee was appointed trustee of the Will by an Order of Court dated 11 October 1976 in Originating Summons No. 80 of 1976 as the Court was satisfied that the original trustee was permanently residing out of the jurisdiction and was unfit to act as such trustee. By this order, 61 immovable properties belonging to

the estate of the Testator became vested in the Public Trustee. Since then 32 of those properties have been compulsorily acquired by the State leaving only 29 immovable properties vested in the Public Trustee.

4 On 11 July 1996, Beng Tiong commenced the present action ("Beng Tiong's action") to claim the rights and interests of 12 beneficiaries in the immovable properties identified in a Consent to Sale dated 12 August 1993 ("the Consent"). The Consent had an annexure which was a draft agreement. About three years later, on 19 July 1999, Beng Tiong obtained the 1999 Order before an Assistant Registrar. The 1999 Order was obtained after arguments had been presented by Counsel for Beng Tiong and Counsel for the Public Trustee. It states, inter alia:

1.0 The Plaintiffs are hereby declared entitled to the rights, interests, benefits and entitlements of the 1st, 2nd, 3rd, 5th, 6th, 9th, 10th and 12th Defendants in the immovable properties identified in the Contract dated 12 August 1993.

2.0 The 13th Defendant, as trustee of the estate of the Testator, do take such steps as are necessary in cognisance of the declaration above, including but not limited to execution of the Deed of Assent at the proper time of distribution, to vest the 1st, 2nd, 3rd, 5th, 6th, 9th, 10th and 12th Defendants' interest in the immovable properties identified in the Contract in the Plaintiffs. No transfer of the interest in the immovable properties as identified in the Contract dated 12 August 1993 is to be made save if the consideration stated in the Contract is paid to the 13th Defendant as trustee of the estate.

3.0 That the parties do have liberty to apply.

4.0 There be no order on prayer 4 of the application.

5.0 The 1st, 2nd, 3rd, 5th, 6th, 9th, 10th and 12th Defendants do pay the Plaintiffs costs fixed at \$1,500.00.

AND UPON HEARING Solicitors for the Plaintiffs and for the 4th Defendant IT IS ORDERED THAT:

[the other orders are not material for present purposes.]

5 Subsequently, the Public Trustee, as the first applicant, and Quraish Wahidin ("Quraish"), as the second applicant, applied for various reliefs in OS 1030/2000. Quraish was the attorney of six persons claiming to be some of the beneficiaries under the will of the Testator. In that application, the applicants sought, inter alia, an order that the Public Trustee be empowered to sell the properties described in the schedule thereto free from encumbrances including:

(a) the equitable interests of the beneficiaries under the will of the Testator,

(b) the interest claimed by various caveators against the properties.

6 The application for sale was objected to by the fifth respondent ("Musa") and the sixth respondent ("Salim"). They claimed to represent another group of beneficiaries. They also claimed that the persons whom Quraish represented were not beneficiaries under the will of the Testator. Musa and Salim claimed that those whom they represented constituted all the beneficiaries.

7 Musa and Salim then filed OS 600626/2001 as plaintiffs and named the Public Trustee and Quraish as

defendants. In that application, they sought a determination of the true and lawful beneficiaries of the estate of the Testator and their respective shares and properties.

8 At a hearing of OS 1030/2000 on 1 September 2000, Beng Tiong appeared as an interested party. JAK was the fourth Respondent in this OS.

9 On 28 September 2001, after hearing parties, Judicial Commissioner Lee Seiu Kin ordered that:

(a) the Public Trustee be empowered to take steps in preparation for the sale of the Properties provided that no sale was to be made without the prior approval of the court,

(b) an inquiry be conducted to ascertain the persons entitled to the Properties,

(c) OS 600626 of 2001 be consolidated with OS 1030 of 2000 and that any inquiry be held on a date to be fixed.

He also gave consequential directions.

10 On the same day, Beng Tiong was given leave to be joined as the seventh Respondent in OS 1030/2000 in view of the 1999 Order that Beng Tiong had obtained.

11 The inquiry ordered by Lee JC was conducted on 3 July 2002 after which he made a determination of the beneficiaries. After hearing the parties as to costs, he made the following declarations and orders (Lee JC's 2002 Order):

1. The Beneficiaries of the estate of the Testator under Muslim law are the fourteen (14) persons set out in the 2nd Applicant's 3rd Affidavit affirmed on the 21st September 2001 and filed herein on the 24th September 2001 namely

(i) Maria (only surviving widow)

(ii) Said

(iii) Umar

(iv) Awad

(v) Ali

(vi) Hassan

(vii) As'ad

(viii) Mushin

(ix) Salum

(x) Abu Bakar

(xi) Abdul Aziz

(xii) Fetum

(xiii) Wachdin

(xiv) Harith

2. (i) That the 1st Applicant as the current trustee of the Will of the abovenamed Testator be empowered to sell the properties described in the Schedule hereto by public tender, public auction or private treaty at a price not less than the reserved price of \$17,970,000-00 on such terms and conditions as the 1st Applicant may in his absolute discretion determine freed from all encumbrances including:

(a) the equitable interests of the beneficiaries under the Will of the Testator; and

(b) the interest claimed by the Caveators against the properties set out in the Schedule hereto,

and as from the date of this Order all the claims of the beneficiaries and the Caveators who have lodged Caveats against the properties set out in the Schedule hereto shall be deemed to be cancelled or withdrawn.

(ii) If the 1st Applicant is unable to sell the Testator's properties within six (6) months from the date hereof the parties are at liberty to apply.

3. The 1st Applicant as such trustee aforesaid be empowered to execute such assurances or transfers of the properties in favour of the purchasers or their nominees thereof and to receive the purchase price and to give good and valid discharges for the same.

4. The 1st Applicant shall not make any payment of the proceeds of sale to the beneficiaries without the leave of the Court.

5. The costs of the 1st and 2nd Applicants and the 5th and 6th Respondents are to be taxed on an indemnity basis and to be paid out of the proceeds of sale of the Testator's properties. There be no order as to the costs of the 1st to 4th and 7th Respondents.

6. All parties are to have liberty to apply.

THE SCHEDULE ABOVE REFERRED TO

[Details of the properties were stated.]

12 JAK claimed to have locus standi to make its present application in Beng Tiong's action on the basis of two documents:

(a) An agreement dated 5 November 1994 between JAK and one Abdurrachman who signed in his capacity as the attorney of the heirs and heiresses of the testator.

(b) A series of assignments made on 12 February 1996 between the representatives of those who claimed through 6 original beneficiaries and a former director of JAK, one Syed Jafaralsadg Bin Abdul Kadir Alhadad.

13 The application was heard on 13 November 2002 by an Assistant Registrar who ordered, inter alia, that:

- (a) JAK be granted leave to be joined as the 14th Defendant in the action,
- (b) the 1999 Order be set aside.

That order also required Beng Tiong to pay costs to various parties. Beng Tiong was appealing against that order.

Submission for Beng Tiong

14 Mr Stanley Wong, Counsel for Beng Tiong, made submissions on the lack of merit about JAK's claim and the merits of Beng Tiong's claim.

15 He also submitted that JAK had been guilty of inordinate delay for the following reasons:

- (a) Beng Tiong had lodged caveats on the Properties on 28 September 1993, before the agreement or assignments which JAK was relying on.
- (b) On 14 September 1999, Beng Tiong had lodged a memorandum with the Registry of Deeds regarding the 1999 Order.
- (c) JAK was a Respondent in OS 1030/2000 and when Beng Tiong appeared in that action and eventually obtained leave to be added as a Respondent, JAK must have been aware of Beng Tiong's claim.
- (d) On 2 May 2002, in OS 1030/2000, Lee JC had directed JAK to file any application to set aside the 1999 Order within two weeks but JAK did not do so until about one and a half years later. No explanation for the delay was given. Its conduct bordered on the contumacious. However, he accepted that no prejudice had been caused to Beng Tiong by JAK's delay.

16 Mr Wong also submitted that none of the beneficiaries who had signed the Consent was disputing its validity. Furthermore, before the 1999 Order was made, the Public Trustee was represented by Counsel (although it was a different one from Mr T P B Menon who was currently appearing for the Public Trustee) and that Counsel had made submissions against the claim of Beng Tiong.

17 However, Mr Wong admitted that Beng Tiong did not serve its application, upon which it obtained the 1999 Order, on JAK which had also filed caveats, or on other caveators, even though Beng Tiong was aware of the caveators before the 1999 Order was made. He said that there were too many caveators and he claimed that he had disclosed to the Assistant Registrar who made the 1999 Order the existence of the other caveats. However, he was not directed to serve Beng Tiong's application on anyone else. Unfortunately, the notes of arguments leading to the 1999 Order did not reflect the disclosure made by Mr Wong.

Submission for the Public Trustee (Thirteenth Defendant) and Quresh Bin Muchsia Bin Achmad Abdullah Wachdin Basharahil Alias Quraishj Wahidin S.H. Quresh Muchsin Wachdin ('Quresh') (Sixth defendant)

18 As I have mentioned, Mr T P B Menon was the current Counsel for the Public Trustee who is the

Thirteenth Defendant in Beng Tiong's action. Mr Menon also acted for Quresh who is the Sixth Defendant in the same action. Mr Menon said that various persons claiming to be beneficiaries had purportedly sold their interests in the estate of the Testator to various parties.

19 Mr Menon submitted that the Consent was invalid for various reasons. I need only deal with his main reason which is that the Court of Appeal had decided that the Consent had been fatally impinged in *Lee Siong Kee v Beng Tiong Trading Import and Export (1988) Pte Ltd* [2000] 4 SLR 559. This demonstrated that the 1999 Order was wrongly made.

20 Secondly, he submitted that Lee JC's 2002 Order had impliedly over-ruled the 1999 Order since the Public Trustee could now sell the Properties free from all encumbrances. He submitted that Lee JC's 2002 Order was contrary to the 1999 Order and Beng Tiong had not appealed against Lee JC's 2002 Order even though it had objected to the application for an order empowering the Public Trustee to sell the Properties.

21 Thirdly, Mr Menon submitted that the Writ in Beng Tiong's Action was only served on six out of the 12 Defendants and not on Quresh. Furthermore, it was only served on a village headman. Also the affidavit in support of the service did not set out all the facts and, also, the 1999 Order was obtained without disclosure of all the relevant facts.

22 Fourthly, Mr Menon submitted that the Public Trustee had, pursuant to Lee JC's 2002 Order put up the Properties for sale by public tender on 27 November 2002 and yet Beng Tiong had not taken any step to stop the Public Trustee from proceeding with the tender.

23 Accordingly, Mr Menon submitted that the court was not precluded whether by issue estoppel or res judicata from setting aside the 1999 Order. Mr Menon said that there were special circumstances why the court should reopen the matter and set aside the 1999 Order in view of the decision of the Court of Appeal in the case of *Lee Siong Kee*. Mr Menon cited *Property & Revisionary Ltd v Templar* [1977] 1 WLR 1223 and *Arnold v National Westminster Bank* [1991] 3 All ER 41 to support his argument.

Submission for JAK

24 Ms Norain Abu Bakar, Counsel for JAK, accepted that there was delay on the part of JAK in proceeding with its application to be added as a party in Beng Tiong's action and to set aside the 1999 Order. However she submitted that as Lee JC's direction to JAK (to do so within two weeks of his order) was not an "unless" order, JAK was not precluded from making its application late.

25 Ms Tan, the co-counsel for JAK, also accepted that the order of the Assistant Registrar allowing JAK's application to be joined as a 14th defendant in Beng Tiong's action and to set aside the 1999 Order was not a determination of the merits of Beng Tiong's claim.

Reply Submission for Beng Tiong

26 Mr Wong submitted in his reply that the case of *Lee Siong Kee* was on different facts. There, the plaintiff was suing Beng Tiong for his remuneration under an agency agreement. He did not agree that the Court of Appeal had thrown out all Beng Tiong's rights under the Consent.

27 Mr Wong also informed me that while Beng Tiong was not trying to stop the Public Trustee from selling the properties which were before Lee JC, Beng Tiong's position was that it was still entitled to the proceeds of sale and, for this reason, to rely on the 1999 Order.

My Decision

28 As there was no prejudice to Beng Tiong arising from JAK's delay and Lee JC's order was not an "unless" order, I was of the view that JAK should not yet be shut out from pursuing its claim just because of its failure to comply with the two week dead-line from Lee JC.

29 However, I was of the view that the 1999 Order should not be set aside until there was a final order to the contrary. Before it was set aside, the 1999 Order itself was a final order as between Beng Tiong and the first, second, third, fifth, sixth, ninth, tenth, twelfth and thirteenth defendants. As I have said, the Public Trustee is the 13th defendant in Beng Tiong's action. If the 1999 Order was set aside on the application of JAK to be added as a defendant, then, it would mean that the Public Trustee could re-argue its case against Beng Tiong, without more, even though JAK had not yet established its claim on the merits.

30 Accordingly, I was of the view that the Public Trustee could not simply ride on JAK's application to be added as a defendant. It seemed to me that even if the decision of the Court of Appeal in the *Lee Siong Kee* case meant that the 1999 Order was wrongly made, this did not mean that the 1999 order was automatically set aside or ceased to have effect. The Public Trustee would still have to make his own application to set aside the 1999 order.

31 As regards the *Templar* case, the landlords there had commenced proceedings in connection with a rent review clause. The High Court made a determination of the rent review clause against them. Subsequently, they attempted to set aside the earlier order made by the High Court in the light of a subsequent decision of the House Lords in another case which involved a similar rent review clause. However, their attempt was made in the context of their application for leave to appeal out of time. Here, before me, the Public Trustee had not made any application to appeal out of time.

32 As for the *Arnold* case, there was also a dispute regarding a rent review provision. The dispute arose on the first rent review date and the court made a determination on the construction of the provision which was favourable to the landlords. Shortly before the second review date, the lessees sought a rectification of the lease and a determination again on the true construction of the provision on the ground that subsequent cases had shown the judge's earlier determination to be wrong. The landlords applied to strike out the lessees' claim on the ground of issue estoppel but their application was dismissed. An important consideration was the fact that the lessees' claim was not in respect of rent as at the first rent review date but as at the second review date. The landlords were relying on issue estoppel and not cause of action estoppel. In any event, my point is that the lessees there did make a separate claim or application rather than assume that the first decision had ceased to apply to the next rent review date in the light of subsequent decisions in other cases.

33 Accordingly, it was not necessary for me to decide whether the Court of Appeal's decision in the *Lee Siong Kee* case necessarily meant that the 1999 Order was wrong or whether the 1999 Order should be set aside. Likewise, if the Sixth defendant was to take the position that the Writ in Beng Tiong's action had not been properly served on him, then it was for him, and not JAK, to apply to set aside the 1999 Order vis-à-vis himself.

34 As JAK wanted to challenge Beng Tiong's entitlement to sale proceeds, then it should challenge Beng Tiong's claim before the Public Trustee is persuaded or compelled to pay Beng Tiong part thereof by virtue of the 1999 Order. JAK was doing that but, as I have said, a final order had already been made under the 1999 Order as regards Beng Tiong and the first, second, third, fifth, sixth, ninth, tenth, twelfth and thirteenth defendants. It seemed to me that it was too late for JAK to apply to be joined as a party in Beng Tiong's action. What it should do instead was to file a fresh action and name

Beng Tiong as one of the defendants. It would be for JAK's solicitors to consider what the appropriate reliefs should be and who else should be named as defendants in the fresh action. For example, should the beneficiaries, as determined by Lee JC, or some of them, be made defendants in JAK's action, since JAK would presumably want whatever order it manages to obtain successfully to be binding on those beneficiaries through whom it claims? Should the Public Trustee be named as a defendant if JAK seeks, *inter alia*, an order for payment of the sale proceeds from the Public Trustee? Should the other caveators be included as defendants as well, even though there may be many of them, otherwise, JAK may find itself in the same situation as Beng Tiong i.e even if JAK is successful and the Public Trustee pays the sale proceeds, or part thereof, to JAK, JAK is still at risk of facing a claim by one or more of the other caveators. Whether that claim will be successful or not is another matter.

35 Even if the 1999 Order had not been made, it would not be sufficient for JAK to be merely joined as a defendant in Beng Tiong's action because it must not only contest Beng Tiong's claim but seek an order declaring its own rights. If JAK were to be made a defendant in Beng Tiong's action, it would still have to make a counterclaim naming not only Beng Tiong but at least the beneficiaries through whom JAK claims as defendants to its counterclaim. That would make matters in Beng Tiong's action very untidy.

36 As for the question whether Lee JC's 2002 Order had impliedly over-ruled the 1999 Order, I was of the view that it did so only to a limited extent, that is, the second paragraph of the 1999 Order or part of the said second paragraph would no longer apply (see paras 11 and 4 above for Lee JC's 2002 Order and the 1999 Order). I was also of the view that Lee JC's 2002 Order was not intended to and did not affect Beng Tiong's entitlement as stated in paragraph 1 of the 1999 Order as that was not an issue to be decided by him.

37 Accordingly, on 24 March 2003, I allowed the appeal of Beng Tiong on terms:

- (a) the Order of the Assistant Registrar dated 13 November 2002 was set aside,
- (b) JAK was at liberty to file a fresh action by 14 April 2003 vis-à-vis Beng Tiong and any other party as JAK thought fit failing which JAK was precluded from pursuing its claim,
- (c) liberty was granted to JAK and the Public Trustee to apply to set aside the Order dated 19 July 1999 if the outcome of JAK's fresh action warranted such an application.

38 If the Public Trustee still considers that it is necessary to set aside the second paragraph of the 1999 Order or part thereof or the entire order, then it is up to him to seek such a prayer as when he decides to make an application.

39 Indeed, by 24 March 2003, the Public Trustee had applied for an extension of time to appeal against only the second paragraph of the 1999 Order. Mr Wong did not contest that application as it was confined to the said second paragraph although he was of the view that the said second paragraph need not be entirely deleted. Accordingly, I allowed the application for extension of time to appeal and this order of mine was also made on 24 March 2003 in respect of the Public Trustee's application .

40 There is one other observation I wish to make. Counsel for the Public Trustee should re-consider whether it is appropriate for him to act for Quresh or any of the other beneficiaries vis-à-vis any claimant of a beneficiary's interest.