Tan Boon Hai v Singapore Hainan Hwee Kuan
[2001] SGHC 63

Case Number : OS 1022/1999

Decision Date : 30 March 2001

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Yang Ing Loong and Christopher Tan (Allen & Gledhill) for the plaintiffs; Lee Chin Seon (CS Lee) for the second to the seventeenth and the twenty-first defendants

Parties : Tan Boon Hai — Singapore Hainan Hwee Kuan

Civil Procedure – Costs – Taxation – Review of registrar's decision by judge – Whether judge's discretion fettered on review – Whether judge not to interfere with taxing officer's decision on mere question of quantum except in exceptional circumstances

[Please note that this case has not been edited in accordance with the current Singapore Law Reports house style]

GP Selvam

1 I have before me an application for review of costs payable by the plaintiff, Mr Tan Boon Hai, to 17 of the 34 defendants in this originating summons.

2 The matter from which the application arose concerned election politics of a clan association. The association in question is Singapore Hainan Hwee Kuan. The plaintiff took out OS 1022/1999 on his own behalf and 32 other candidates who contested in the Association's annual general meeting held on 30 May 1999. In brief, the summons sought a declaration that the election of the successful candidates was ineffective on account of irregularities. Additionally, he further sought an order for a fresh election. He asked for an order to restrain the newly elected management committee from functioning as such. Finally, he sought an order to virtually freeze the funds of the Association.

3 The originating summons was filed on 5 July 1999. On 29 July 1999 there was an interim order in favour of the plaintiff. There was a partial freezing of the bank account. The interim order was made after a contested hearing.

4 The originating summons was heard for some nine days with cross-examination of witnesses. The case was given a further period of 15 hearing days but that did not materialise. It ended without a decision by the court as it was discontinued by the plaintiff. This resulted in him having to pay the costs of the action. The notice of discontinuance was filed with the consent of the defendants. The consent was on the basis that the plaintiff would pay the defendants 80% of the costs of the action. The costs were to be taxed on the standard basis if not agreed. The costs were not agreed. So there was a taxation of a bill submitted on behalf of the 17 defendants. The 17 defendants claimed a sum of $250,000 in Section I for work done. They were given $100,000. On review that amount was reduced to $70,000. The 17 defendants were dissatisfied with the award and applied for a review of the decision below. They said that even the amount of $100,000 was too low. They urged me to award something between $150,000 and $180,000.

Point of law

5 At the review before me, counsel for the plaintiff raised an important point of law. The point was that a judge must not interfere with the decision of the taxing officer on a mere question of quantum except in exceptional circumstances. In my view, that point no longer obtains, even though in 1992 it received the imprimatur of the Singapore Court of Appeal in *Diversey (Far East) v Chai Chung Ching Chester (No 2)* [1993] 1 SLR 542 and *Jeyaretnam JB v Lee Kuan Yew* [1993] 1 SLR 185. It has been overtaken by events. I shall now explain how.

The doctrine of fettered discretion (the old law)

6 First, a review of the old law. In 1875, Vice-Chancellor Sir R Malins, during arguments by counsel in *Smith v Buller* (1875) LR 19 Eq 473, remarked at p 474:

> Although the Court is reluctant to go into questions of detail, it will do so in a proper case, and even in a question of quantum will do so, where there has been a charge of a very exorbitant character.

The Vice-Chancellor was considering the taxation of the costs in a patent action.

7 The above statement, which I shall call the doctrine of fettered discretion, has been widely followed for more than a century. Some 60 years later, in 1939, Aitken J was guided by the statement of the Vice-Chancellor, see *Re Kana Moona Syed Abubakar deceased; Khatijah Nachiar v Sultan Allaudin* [1940] MLJ 4. On a review of getting-up fee allowed by the registrar, Aitken J said:

> I am not the Registrar, and the rule that a Judge must not interfere with the decision of a taxing officer on a mere question of quantum, unless very exceptional circumstances are present, is both settled and of long standing.

8 In 1973, Choor Singh J in *Starlite Ceramic Industry v Hiap Huat Pottery* [1972–1974] SLR 440 at 442; [1973] 1 MLJ 146 at 147 referred to the statement of Aitken J and said:

> Another general rule is that the court will not interfere with the discretion of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after considering all the circumstances and if no question of principle arises.

9 In none of the above cases did the court attempt to refer to the relevant rule which conferred the review power on the judge. In 1958, however, the English Court of Appeal did so in *Gorfin v Odhams Press* [1958] 1 All ER 578; [1958] 1 WLR 314. The relevant rule read that on review, "the Judge may thereupon make such order as the Judge may think just". Parker LJ, with whom Sellers LJ concurred, referred to the rule in question and said ([1958] 1 All ER 578 at 579; [1958] 1 WLR 314 at 316):

> Although the terms of R.S.C., Ord. 65, r. 27 (41), are very wide, and, in effect, treat the matter before the judge in chambers as a re-hearing, I think it is now clear in practice and on authority that the court will only interfere with the exercise of the master's discretion if it is clear that the master has gone wrong in principle. It is for this reason that matters of quantum only, where no principle is involved, are rarely, if ever, interfered with. In other matters, as indeed, the question whether two counsel or one counsel should be allowed, it is impossible to say that there is no principle involved; and, accordingly, if it can be shown that the master has erred in principle, then the court will exercise its own discretion in the matter.

10 Then came the decision of the Singapore Court of Appeal in *Diversey (Far East) v Chai Chung Ching Chester (No 2)* [1993] 1 SLR 542. In this case, two items awarded below were reduced by the judge-in-chambers. On further appeal, the awards made at the registrar's level were restored by the Court of Appeal. S Rajendran J, delivering the judgment of the Court of Appeal on 12 November 1992, reaffirmed the principle enunciated in *Re Kana Moona Syed Abubakar deceased* (supra). S Rajendran J said at p 551–552:

> *The principles applicable on review*
>
> We were unable to accept the submissions of counsel for the respondents relating to the principles applicable on review of the registrar's certificate by a judge in chambers. In our view, what is germane to the issue is a consideration of O 59 r 36(5), in particular the opening words:
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> > On an application under this Rule, the Judge may make such order as the circumstances require, and in particular may order the Registrar's certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.
>
> This was the successor to that part of O 65 r 27(41) of the Rules of the Supreme Court 1957, which sets out the power of the judge in the following terms:
>
> > … and the Judge may thereupon make such order as the Judge may think just …
>
> Looking at the two sub-rules, the wording may have changed but in substance, the rules provide for the same. The phrase 'as the circumstances require' confers on the judge a discretion. This discretion, however, is not unfettered and must be judicially exercised. The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error. The dicta of Aitken J in *Kana Moona Syed Abubakar* to the effect that a judge would be justified in interfering where the registrar's decision was 'an affront to reason and common sense' is, in our opinion, too harsh a standard to apply. What is required is a broad overview of the matter by the judge and if there is an error in principle or some other material error, he will be justified in interfering with the decision below. To suggest, as counsel for the respondents did, that the hearing before the judge is a rehearing, would not be in keeping with the wording of r 36 which speaks of 'review', not of 'rehearing' nor, for that matter, of 'appeal'.

11 Barely within a month of the Diversey decision, the Court of Appeal of a different composition, on 30 November 1992, independently set its seal on the fettered discretion doctrine. See *Jeyaretnam JB v Lee Kuan Yew* [1993] 1 SLR 185. LP Thean J said at p 189 :

> It is settled law that in regard both to the quantum and to the exercise of the discretion vested in a taxing officer, the court will only interfere if such discretion has been exercised on a wrong principle or the quantum allowed is obviously wrong.

LP Thean J cited in support *Malayan Trading Co v Lee Pak Yin* [1941] MLJ 207, *Chin Cham Sen v Foo Chee Sang* [1952] MLJ 99 and *Gorfin v Odhams Press* [1958] 1 WLR 314.

The doctrine of unfettered discretion (the new law)

12 Since then, the law on the matter underwent a sea of change. The present Rules of Court contain the following Rule, which was not applicable when the *Diversey* (supra) and *Jeyaretnam* (supra) decisions were made:

Order 59 r 36

(1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under Rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with Rule 35 (3) to state the reasons for his decision in respect of that item or part on the review.

(2) An application under this Rule for review of the Registrar's decision in respect of any item may be made at any time within 14 days of the review by the Registrar, or such longer time as the Registrar or the Court at any time may allow.

(3) An application under this Rule shall be made by summons and shall, except where the Judge thinks fit to adjourn into Court, be heard in Chambers.

(4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this Rule, and no ground of objection shall be raised which was not raised on the review by the Registrar but, except as aforesaid, *on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject-matter of the application*. [emphasis is added]

(5) On an application under this Rule, the Judge may make such order as the circumstances require, and in particular may order the Registrar's certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.

(6) In this Rule, 'Judge' means a Judge of the High Court or a District Judge in person.

13 The new rule came into effect on 1 February 1992. But because the taxation in both cases had taken place before 1992, they were governed by the old rule.

Statement of the new doctrine

14 The English Court of Appeal in *Madurasinghe v Penguin Electronics (a firm)* [1993] 3 All ER 20 at 23; [1993] 1 WLR 989 at 993 considering a similar rule said:

> The vital words are '*all such powers and discretion as are vested in the [district judge] in relation to the subject matter of the application*'. In my judgment, since the district judge and the judge have the same powers and discretion in relation to the subject matter of the application, the judge's discretion cannot be fettered by the manner in which the district judge exercised his discretion. It follows that I consider the judge was plainly wrong in believing himself to be bound by *Hart v Aga Khan Foundation* (UK) [1984] 2 All ER 439; [1984] 1 WLR 994 only to interfere if he thought that the registrar or district judge had not taken into account something he ought to have taken into account or had taken into account an irrelevant matter or that his opinion was clearly wrong. [Emphasis is added.]

Although not specifically mentioned, the decision clearly reflected and reinforced the new doctrine declared by of the House of Lords in *Evans v Bartlam* [1937] AC 473 which was cited to it.

15 Stated in simple words, the doctrine says that if there is an appeal to the judge-in- chambers

against a discretionary order of the registrar, the judge possessing the same discretionary power as the registrar has both the right and duty to hear the matter de novo, and take into account all circumstances of the case and apply his own discretion and make a completely fresh decision. "Review" means reconsider. In relation to the judge-in-chambers it means reconsider on appeal. In this context, it includes the power to revise, re-examine and reassess in order to correct or improve.

16 The exercise of the discretionary power of review conferred on a judge does not depend on whether the matter comes before the judge by way of an appeal, review or rehearing. What matters is that the judge hears it de novo. It gives the party claiming to be aggrieved a second bite at the cherry. To use the words of Lord Atkin in *Evans v Bartlam* (supra) at p 475, "Masters are not intended to be the final judges between the parties". At p 478, he added:

> where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time.

The signification to be extracted from this is that a Supreme Court judge's discretion is not to be subordinated to that of a registrar. Lord Roche said at p 475: "The hearing before the judge is a rehearing". In other words, it is a hearing de novo. Pace the Court of Appeal in the *Diversey* decision, this doctrine does not depend on the terminology of "review", "rehearing" or "appeal". In relation to the discretionary power of the judge, they signify the same principle.

17 This also means that the party seeking a review must present before the judge a serious case of some substance to warrant a review by the judge. Should the matter turn out to be frivolous, the applicant may be penalised in costs.

An analogue

18 In relation to the review of the registrar's award of damages in the assessment proceedings, it was erroneously held at one time that the judge, engaged in a rehearing or review of the award of damages made by the registrar, had no power to apply his own discretion and come to his own decision. The judge could only interfere when it was shown that the registrar was in error. It was so held in *Ng Siew Choo v Tan Kian Choon* [1990] SLR 331 and *Peh Diana v Tan Miang Lee* [1991] SLR 341. The Court of Appeal in *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82 following *Evans v Bartlam* (supra) held that to be wrong law and decided that the judge must exercise his own discretion de novo. The doctrine stated in *Evans v Bartlam* was held to be the dominant doctrine governing the exercise of discretion by the judge. The first two decisions which held otherwise were overruled on the point. The law was thus tuned to be in harmony with the *Evans v Bartlam* doctrine.

19 The power of review contained in O 59 r 36 is in harmony with the *Evans v Bartlam* doctrine, the *Penguin Electronics* case, and *Chang Ah Lek* case. It introduces uniformity. I therefore adopt and apply the essence of *Evans v Bartlam*, *Chang Ah Lek* and *Penguin Electronics* to the present case and hold that I must review and assess the quantum de novo. Armed with the unfettered discretion I now turn to the case before me.

20 In connection with this, there were certain significant features which bore upon the work done. First, the choice of putting the 34 defendants through the mill was made by the plaintiff. The defendants came from different educational backgrounds. Next as the plaintiff put it, the matter incurred "the benefit of the Hainanese community"'. In other words, it was not a run of the mill claim. In the event, what was in issue was reputation of the parties and partly high emotion. Indeed fraud

and theft of ballot papers became part of the case. The plaintiff himself retained an eminent senior counsel as his advocate and the senior counsel was assisted by a team of lawyers. In the circumstances, it was reasonable and proper for the 17 defendants to seek separate representation. This would necessarily involve consultation with all the 17 defendants. There would inevitably be some overlap and joint work. That does not mean there was no separate preparation for the 17 defendants.

21 The case was discontinued but only after some nine days of hearing and after a further period of 15 hearing days was allotted. A large mass of work had already been done before the discontinuance.

22 As to the amount, for a case which involves witnesses and has consumed some nine days, it would be reasonable and proper to start off with a base or benchmark of $10,000 per day and scale it up. It may, of course, be necessary to go below that figure in glaring cases where counsel comes to court and rely on the work done by another counsel. This was not such a glaring case. Having regard to the foregoing and having regard to the grounds of the decision of the assistant registrar, $100,000 would be the reasonable and appropriate award.

23 I further award $1,500 as the costs of the review by me and cancel the costs awarded to the plaintiff.

Orders accordingly.

Reported by Cheng Pei Feng