

Kader Mydeen s/o Muthu Ibrahim Samsudin v Gulab Bhojraj and Another
[2008] SGHC 175

Case Number : Suit 516/2007
Decision Date : 16 October 2008
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Surian Sidambaram and M Mahendran (Surian & Partners) for the plaintiff; Teo Keng Siang and K Ravendra (Teo Keng Siang & Partners) for the defendants
Parties : Kader Mydeen s/o Muthu Ibrahim Samsudin — Gulab Bhojraj; Mrs Kareshma Gulab Bhojraj Nee Sangeeta Jaikishin Jethani

Contract

16 October 2008

Woo Bih Li J:

Introduction

1 The plaintiff, Kader Mydeen s/o Muthu Ibrahim Samsudin ("Mydeen") commenced this action against the defendants, Gulab Bhojraj ("Sam") and Mrs Kareshma Gulab Bhojraj nee Sangeeta Jaikishin Jethani who is also Sam's wife, alleging that they were in breach of their contractual obligation to give him priority to purchase the property at 362 Tanjong Katong Road ("the Property") as they were supposed to do under the terms of a tenancy agreement of the property dated 28 December 2006. Instead, the Property was sold to a third party, Lau Kwai Lan ("LKL"). The defendants assert that Mydeen was asked whether he wanted to purchase the property but he declined. They also raised other defences but these were abandoned except for the defence that Mydeen did not have the financial means to acquire the Property.

Background

2 Mydeen said that he had been running a food stall at a hawker centre at Haig Road. Business was good and he was thinking of expanding his business. He discussed the idea with his wife who suggested that they purchase a property in Singapore as an investment and to use the rent they could save to service the monthly repayment of any loan they were to obtain. He agreed. This was in the middle of 2006.

3 Mydeen had come to know one Anthony Chea Kien Hong ("Tony") who had run a retail shop selling shoes opposite Haig Road Hawker Centre many years before.

4 Although Tony had given up his shop some years ago, he had started to patronise Mydeen's stall in the beginning of 2006. Tony told him he was a real estate agent and gave him his business card. When Mydeen decided to expand his business in mid 2006, he contacted Tony to ask him to look for suitable properties for him. Initially, Tony asked him to look at a coffee-shop at Bedok Reservoir vicinity but there was no positive outcome.

5 In late November 2006, Tony informed Mydeen about the Property. They went together to view it. The Property is quite a large two storey shophouse which is triangular in shape. It has a built-up

area of about 4,000 square feet. Tony promoted the location of the Property saying that it was near a Sikh temple, a Telecoms office building, a Singapore Post Office and a hostel for foreigners, among other things. I should add that in late November 2006, the Property was being renovated by Sam.

6 The above facts were not in issue. According to Mydeen, he subsequently reverted to Tony, after the first viewing, to ask if the owner was interested in selling the Property. Tony said that the owner was not considering selling the Property then but was prepared to give him a right of first refusal to purchase it provided he paid a higher rent than what other equivalent properties in the vicinity were fetching at the time.

7 Eventually, Mydeen agreed to rent the Property at \$12,000 a month which he claimed was higher than the market rent. It is undisputed that he signed a letter of intent dated 11 December 2006 ("LOI") to rent the Property at \$12,000 a month for a 24-month period with an option to renew for another 36 months.

8 Subsequently, he signed a tenancy agreement with Sam dated 28 December 2006. The Property was actually owned by Sam and his wife but nothing turns on the fact that she was not named as a party in the tenancy agreement. She accepts that she is bound by the terms of the tenancy agreement (see para 1 of the Defence and Counterclaim).

9 The tenancy agreement contained some variations from the LOI. The tenancy was to be for a period of 36 months (instead of 24) and the provision for renewal was for two years (instead of 36 months or three years).

10 Clause 1(f) (iii) of the tenancy agreement provided that the Property was to be sold subject to tenancy and included a right of first refusal to Mydeen. The last sentence of that provision stated, "However the tenant will be given the first priority to purchase at a mutually agreed price." This was the basis of Mydeen's claim.

11 Mydeen started operations at the Property as a 24-hour Muslim-Indian coffeeshop/restaurant on 16 February 2007. He had secured the necessary licence on 15 February 2007. He alleged that sometime in July 2007, someone told him that the Property had been sold to a third party but he had not been given the opportunity to purchase the Property. He consulted friends who advised him to consult lawyers.

12 Thereafter, Mydeen filed a Writ of Summons on 15 August 2007. He also lodged a caveat on the Property. This led to the defendants commencing an action in Originating Summons No 1189 of 2007 ("the OS") to seek an order to compel Mydeen to remove the caveat. The defendants (in this action) were the plaintiffs in the OS seeking the relief I mentioned. Apparently, Justice Tay Yong Kwang who heard the OS was of the view that the completion of the intended sale to the third party should not be hindered. He ordered Mydeen to remove the caveat and the defendants to make some provision to meet Mydeen's claim which would then remain as a claim for damages. Mydeen's primary relief for specific performance was therefore no longer applicable. I mention the OS not only as part of the background but because the affidavits filed by Sam and Tony for that OS have a material bearing on the outcome of the action before me as I shall elaborate later. Mydeen's claim before me was for interlocutory judgment with damages to be assessed.

13 The defendants themselves had exercised an option to purchase the Property on 8 September 2006. They were given possession early on 14 November 2006 and their purchase was completed on 12 December 2006. At trial, Sam described his business as that of a property investor and a financier to persons in Poland. It was he who was in contact with Tony and had spoken to Mydeen.

Apparently, his wife was not involved in the negotiations which led to the signing of the LOI and the tenancy agreement or the events thereafter.

14 I will now set out Sam's position as pleaded.

15 It was his position that the property was up for sale or rent. After the tenancy agreement was signed on or about 28 December 2006, his estate agent, Tony, had spoken to Mydeen on at least three occasions in early January 2007 to ask whether Mydeen was interested in purchasing the Property for \$1.8 million. On all occasions, Mydeen turned down the offers (see para 3(a) and (b) of the Defence and Counterclaim of 11 September 2007).

16 It was only after Mydeen had declined to purchase the Property that the Property was marketed through various real estate agents. Eventually, an agent, Alfred Tan ("Alfred") introduced LKL who was granted an option to purchase the Property at \$1.928 million on 12 January 2007. The option was exercised on 12 February 2007 and that sale was completed on 22 August 2007 (see para 3(d) and (e) of the Defence and Counterclaim).

The evidence and my conclusion

17 In evidence, Sam's position shifted in a number of ways. I need only deal with the most material one.

18 In para 11 of Sam's affidavit of evidence-in-chief ("AEIC"), he said that before the option was granted to LKL, Tony had told Mydeen that Sam was going to sell the Property for \$1.928 million. There was no response from Mydeen.

19 In para 11 and 12 of Tony's AEIC, he said that before the Property was sold for \$1.92 million, Sam had called him and instructed him to ask Mydeen once again whether he wanted to buy the Property and the offer was declined by Mydeen.

20 In para 7 of Alfred's AEIC, he referred to the option to purchase granted to LKL he but did not elaborate thereon.

21 In oral evidence, Sam, who was the first witness for the defendants, alleged that on 12 January 2007, he had been told by Alfred about a firm offer to buy the property at \$1.928 million. He told Alfred to wait while he asked Tony to check with Mydeen whether he wanted to buy the Property at that price. It was only after Mydeen had declined that Sam proceeded to sign the option in favour of LKL past midnight of 12 January 2007. Sam referred to a handwritten notation on the option to support his oral evidence. It said: "Subject to the vendor issuing by 5pm on 13-01-2007 the option money issued shall be return [*sic*] by 8pm 13-01-2007". Sam said this note had been inserted so that if Mydeen had decided to buy the Property, he would not sign the option and the cheque for the option fee (of \$19,280) which had apparently been received by Alfred, would be returned to LKL.

22 Alfred was the next witness for the defendants. He purported to corroborate Sam's oral evidence in so far as Sam had said he told Alfred on 12 January 2007 to hold on while Sam had a word with Tony. It was past midnight when Sam called back to say that it was alright for Alfred to hand him the cheque for the option fee and he would sign the option.

23 Tony was the fourth witness for the defendants. In cross-examination, he said that on 12 January 2007, Sam had informed him about the intended purchase at \$1.928 million. Tony tried to contact Mydeen but was not successful. Finally he went to see Mydeen and asked him to buy the

Property at \$2 million. When Mydeen said it was too expensive, Tony asked Mydeen to match the offer of \$1.928 million but Mydeen was not interested. Tony then informed Sam accordingly.

24 The point about the Property being offered to Mydeen for \$1.928 million was not pleaded. In any event, it was pursued at trial without objection from Mydeen's side. It then became important whether Tony had spoken to Mydeen on 12 January 2007 and asked him whether he wanted to bring the Property at \$1.928 million. It turned out that this assertion could not stand up to scrutiny.

25 As I mentioned, both Sam and Tony had earlier provided affidavits to support the OS to remove Mydeen's caveat. There was no mention in either of these two affidavits that Sam had asked Tony and Tony had in turn asked Mydeen on 12 January 2007 whether Mydeen wanted to purchase the Property at \$1.92 million. Worse still for the defendants, Tony's OS affidavit was not only silent on this important point. That affidavit in fact contradicted the version at trial.

26 Tony's OS affidavit stated at [7] that he had offered the property to Mydeen for \$1.8 million after the tenancy agreement was signed. It then stated, also at [7], "I believe the Property was sold at a price of \$1.928 million, a price higher than that offered to [Mydeen]. My conversation with [Mydeen] all took place in fact the week after the tenancy agreement was signed". The crux of the last sentence of [7] was reiterated in [8] of Tony's OS affidavit where he said, "he was offered the Property and made it very clear to me on less [*sic*] than three occasions in the first week of January 2007 that he did not have the means to buy the Property".

27 So, according to Tony's OS affidavit, the offers he had made to Mydeen were in the first week of January 2007, not on 12 January 2007. More importantly, Tony was saying that the \$1.928 million price tag was a price higher than that offered to Mydeen.

28 In yet another illustration of the lie to Tony's version at trial, I refer to a document he had signed. The document was addressed to Sam and was dated 2 August 2007, *ie*, before Tony's OS affidavit was executed on 14 August 2007. The document said that Tony had spoken to Mydeen about the sale of the Property on a few occasions at \$2 million. There was no mention in this document that Tony had offered the Property to Mydeen at \$1.928 million or at \$1.8 million. This document also said that Sam, "however have the right to sell the premises to any party". This sentence suggested that Mydeen did not even have a right of first refusal.

29 At trial, Tony was not able to give a satisfactory explanation for this document and his OS affidavit. Neither was Sam able to give a satisfactory explanation for Sam's own OS affidavit.

30 As for Alfred, he was not credible. In [8] of his AEIC, he had exhibited a log book which appeared (from the context of [8]) to be a record of prospective buyers he had brought to view the Property. Yet at trial, he said it was a record of calls of interest in response to advertisements of the Property. He tried to salvage the situation by saying two of the persons named therein had viewed the Property with him but yet no such names were identified when Mydeen had sought further and better particulars of the defence.

31 In any event, Alfred's evidence about the events on 12 January 2007 could not help the defendants in the light of what I noted about the evidence of Tony and Sam.

32 I had no hesitation in rejecting the contention that Mydeen was asked on 12 January 2007 whether he wanted to purchase the property at \$1.928 million.

33 Then, did Tony offer the property to Mydeen at \$1.8 million? I had concluded that Tony and

Sam had lied about the offer of \$1.928 million to Mydeen. Tony's credibility was so tainted that I had no hesitation in rejecting his allegation about any \$1.8 million offer especially when this allegation was also contradicted by the (2 August 2007) document he had issued to Sam which states that he had offered the Property to Mydeen at \$2 million. Also, there was no reason for Tony to repeatedly offer the Property at \$1.8 million on at least three occasions in one week if Mydeen had already declined on the first occasion and/or had said he had not enough money to purchase the Property.

34 It is true that before the tenancy agreement was signed, there was a banner which had been put up in front of the Property by Alfred and his colleague indicating it was for sale or rent. Mydeen's evidence was that he had asked Tony, before the tenancy agreement was signed, whether the Property was for sale or rent and he was told that it was for rent. He was not told it was for sale. Although Tony said in oral evidence that he had told Mydeen it was for sale or rent before the tenancy agreement was signed, Mydeen's evidence was inadvertently corroborated by Sam and by Tony too.

35 In oral evidence, Sam said that he had wanted to renovate the Property to enhance its value, put in a tenant and sell it off. In Tony's OS affidavit, he said at [7] that it was after the tenancy agreement was signed that Sam told him that he was keen on selling the Property "now that it was tenanted at a monthly rent of \$12,000". A similar allegation was made in [9] of Tony's AEIC.

36 I accepted Mydeen's evidence that he was told that the Property was for rent before the tenancy agreement was signed. That was why he asked for a right of first refusal to purchase the Property. That right was incorporated in the tenancy agreement. Even if he had been told that the Property was for sale before the tenancy agreement was signed, that would affect his credibility only but not his right of first refusal. In other words, any offer made to him before the tenancy agreement was signed did not count because the tenancy agreement still contained the right of first refusal.

37 I would mention one other point which Sam's counsel had spent some time on in respect of Mydeen's credibility or rather the lack thereof. The defendants had made a counterclaim for arrears of rent of \$9,000 on the basis that Sam had agreed to reduce the rent of \$12,000 per month by \$3,000 temporarily. According to Sam, the difference had to be made up by Mydeen in due course. As Sam was selling the Property and there had been a shortfall of \$3,000 for each of three months, *ie*, May, June and July 2007, the defendants were counter-claiming the \$9,000 shortfall as arrears of rent.

38 Mydeen disputed that the difference had to be made up. His version was that Sam had agreed to reduce the rent to \$9,000. Yet, Mydeen settled the counterclaim by paying the \$9,000 and interest. Accordingly, Sam's counsel sought to use the settlement to demonstrate Mydeen's lack of credibility. Mydeen's evidence on why he settled the counterclaim was confusing initially but eventually he said that it was because he still had not paid the rent for July 2007. The \$9,000 (and interest) was to pay the rent for July 2007 and not the shortfall for three months. However, he had apparently offered to settle the counterclaim without this qualification.

39 While Mydeen's evidence on this point was a bit shaky, there was, on the other hand, significant evidence against the defendants on the same point. On 23 July 2007, Mydeen had received a message ("SMS") on his mobile telephone that the landlord wanted him to pay rent from 23 July to 10 August 2007 (because LKL was scheduled to complete the purchase on 11 August 2007). The total Mydeen was to pay was said to be \$5,516. The breakdown for the figure of \$5,516 was spelt out on a piece of paper which was handwritten by Sam's younger son. It was based on rent at \$9,000 per month, (*ie*, 31 days) and not \$12,000 per month. Furthermore, there was no claim then in either the SMS or the piece of paper for the shortfall. There was no suggestion by Sam that his son had made a mistake. Furthermore, if the rent for July 2007 had already been paid, as Sam was suggesting, why

was there a demand for the July 2007 rent in a letter from Sam's solicitors dated 6 August 2007 claiming payment of rent for July 2007 which had been "long overdue"?

40 The counterclaim was no longer in issue before me and the issue was one of credibility only as I have said. I was of the view that Mydeen's version on this \$9,000 was the truthful one even though this meant that in Sam's version about the shortfall, Sam was saying that the July 2007 rent had been paid when it had not. It was not necessary for me to ascertain why Sam had taken this position. In any event, the evidence against Sam's position on the main issue, that is, whether the Property had been offered to Mydeen, whether for \$1.928 million or \$1.8 million, was overwhelming.

41 The defendants had also sought to show that Mydeen could not afford to purchase the Property. The primary reason for this contention was that two cheques issued by Mydeen for rent (after the option had been granted to LKL) were dishonoured. Also, Mydeen had asked for the rent to be reduced and his wife or a relative had allegedly mentioned that business at the Property was not good and she had to pawn her jewellery. On his part, Mydeen sought to explain why the cheques were dishonoured and it was disputed that Sam was told about the pawning of jewellery, although the request for a reduction of rent was not disputed. Mydeen also sought to show that he had some other assets like cash deposits and property in India.

42 I need not elaborate on Mydeen's explanation for the dishonoured cheques. Suffice it to say that I was not able to conclude that clearly he did not have the financial means to purchase the Property.

43 In the circumstances, I granted him interlocutory judgment with damages to be assessed and costs of the action so far. The question of his financial means could be raised again during the assessment of damages.

44 I would mention that it did cross my mind that it was not logical for Sam not to have offered the Property to Mydeen first when he received the offer of \$1.928 million from Alfred's client, LKL. One possibility was that Sam was not aware of the right of first refusal in the tenancy agreement but that was not his case. He said he was aware of it.

45 Another possibility was that he had forgotten about it and/or he had been too hasty to grant the option to LKL. Hence, he had to concoct the story about the delay in granting the option to LKL.

46 In any event, Mydeen's burden of proof was only to establish the breach. He did not have to establish the reason or motive for the breach.

47 Of course, another possibility was that Sam and Tony had been telling the truth about the offer of \$1.928 million or the offer of \$1.8 million to Mydeen. However, as I have said, the evidence against Sam and Tony was overwhelming for the reasons I have set out.

48 There is one other point I would like to mention. Mydeen's counsel sought to rely on clause 3(h) of the tenancy agreement to argue that in any event any oral offer to sell the Property to Mydeen was invalid as all notices under the agreement must be in writing. Clause 3(h) states:

Any notice served under or in any way in connection with this Agreement shall be sufficiently served on the Tenant if left at the said premises or delivered to the Tenant personally or sent to the Tenant at the said premises by registered post and shall be sufficiently served on the Landlord if delivered to the Landlord personally or sent to the abovementioned address by registered post. Any notice sent by registered post shall deemed to be given at the time when in

due course of post it would be delivered at the address to which it is sent.

49 I did not agree with this argument. In my view, clause 3(h) is a deeming provision and not a mandatory one. In other words, if, for example, Sam had sent Mydeen a written offer by registered post to the Property to sell the Property to him, that offer would have been validly made whether it actually came to Mydeen's attention or not. Clause 3(h) did not preclude an oral offer from being made.

50 In any event, Mydeen succeeded in his claim for the reasons I have stated.

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