Citiraya Technology Sdn Bhd (in liquidation) v Centillion Environment & Recycling Ltd [2008] SGHC 183

Case Number : Suit 36/2008

Decision Date : 22 October 2008

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Sadique Marican, Anand Kumar and Krishnamorthy (Frontier Law Corporation) for the plaintiff; Thio Shen Yi SC, Lee Huay Yen Adeline and Leow Yuan An Clara Vivien (TSMP Law Corporation) for the defendant

Parties : Citiraya Technology Sdn Bhd (in liquidation) — Centillion Environment & Recycling Ltd

Contract – Total Failure of Consideration

22 October 2008 Judgment reserved.

Choo Han Teck J:

1 The plaintiff sued the defendant for the return of $2,000,000 paid under a contract entitled "Sale and Purchase Agreement" ("the agreement") dated 18 November 2002. Under that agreement the plaintiff agreed to purchase what was described in the contract as "the Electronic Recycling and Precious Metals Recovery and Refinery facilities"("the facilities"). The facilities were set out in Schedule 1 in the agreement and comprised, among other things, an incinerator. The total purchase price was stated to be $20,000,000 but with the qualification that the prices of the individual items were "budgetary and firm equipment prices will be submitted upon final confirmation of design and specification by [the plaintiff]. The parties had contracted to the terms of payment with a payment schedule that was set out in cl 3 of the agreement. That clause is vital and it provided as follows:

> 3. Payment Terms and Payment Schedule
>
> By telegraphic remittance directly to [the defendant]:
>
> | | |
> |---|---|
> | Upon acceptance of this proposal | 10% of the total contract sum |
> | Upon delivery of machinery | 30% of the respective contract sum |
> | Upon completion of installation | 30% of the respective contract sum |
> | Upon commissioning | 20% of the respective contract sum |
> | Upon completion of warranty period | 10% of the total contract sum |

The $2,000,000 claimed by the plaintiff in this action was the 10% payment referred to above. It was not disputed that the rest of the contract was not fulfilled by either side although the defendant's case was that substantial work had been done in respect of the machinery that was part of the subject facilities.

2 The plaintiff claimed that it was entitled to a refund of the $2,000,000 because that sum was paid as a deposit which must be returned if the defendant was in breach. Secondly, Mr Sadique,

counsel for the plaintiff also submitted that not having done anything after signing the agreement and taking the plaintiff's money, the contracted must be deemed frustrated. Counsel emphasized that it was no defence to say that there was partial work if the agreement was the delivery of a thing. The consideration being to deliver, the failure to deliver was a total failure of consideration.

3 Mr Thio, counsel for the defendant submitted that the agreement was not a sale and purchase of a single article. He submitted that it was an agreement covering a massive complex of buildings and equipment for recycling waste products. He emphasized that the agreement provided that the facilities were "for use only at the designated site at No. 1, TTC 32, Taman Technology Cheng, 75250, Melaka, Malaysia". The defendant had been working with professional consultants appointed by the plaintiff as well as the state of Malacca's Department of Environment. The latter eventually notified the defendant that the incinerator was not acceptable because of complaints by the public, and it had to be replaced by a hammer mill instead. Mr Thio submitted that the defendant had produced sufficient evidence to show that it had paid a subcontractor $1,655,000 to work on the facilities. The plaintiff disputed this and put the defendant to proof. The matter would have been put beyond doubt had EPS testified, but the defendant was not obliged to prove all available evidence. It had produced internal accounting records that were not contradicted or shown to be unreliable, and much of the work done by the subcontractor had been admitted by the plaintiff in any event. I am of the view that work had proceeded as the defendant claimed.

4 The issues before me were straightforward. As regards the plaintiff's first ground, namely, whether the $2,000,000 was paid only as a deposit, I am of the view that the contract clause was unequivocal in its description. There was no mention of the word "deposit". The payment terms show the payment as a staged payment. $2,000,000 was required to be paid when the contract was signed. That was done. That left the plaintiff with only the claim based on a total failure of consideration. Although the agreement was named a "sale and purchase" agreement, it was apparent from the agreement that it included production, building, installation, and many ancillary services such as negotiating with the state authorities for the requisite licenses. In such a case, it would not be reasonable to hold that the purchaser was entitled to a refund of monies paid if the milestones in the staged payment had accrued. In such contracts, the parties would have anticipated various work to be done or consideration given before setting a milestone for payment. The first stage would usually, as in this case, have involved preparatory work and the staged payments were meant to have all that taken into account. It would be the parties' agreement with each other that when each stage is reached, payment will be made as scheduled. If the plaintiff had suffered damage or loss, it must prove its entitlement to a remedy in law on grounds (if there were any) other than a "total failure of consideration".

5 Mr Sadique further submitted that the work claimed by the defendant was in fact work done in connection with the "Malacca Project" which was separate and distinct from the agreement. The defendant does not deny that the agreement was a separate agreement from the primary project known as the "Malacca Project". However, the agreement was a separate agreement from the agreement governing the main project. The parties referred to that as the "Overarching Agreement". The agreement and Overarching Agreement appear to me to be connected, but the defendant's case and the evidence indicated that work under the agreement was distinct and pursuant only to the agreement even though it would benefit and contribute to the eventual completion of the Malacca Project. The plaintiff failed to persuade me otherwise.

6 I am of the view that there was no total failure of consideration in this case. That being the case, the plaintiff had exhausted its grounds of claim as pleaded and the action is therefore dismissed with costs.