

Awyong Shi Peng v Lim Siu Lay
[2007] SGHC 16

Case Number : DC Suit 610/2006, RAS 83/2006
Decision Date : 30 January 2007
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Steven Lee Chung Yen (Hilborne & Co) for the plaintiff/respondent; Kevin Kwek (Legal Solutions LLC) for the defendant/appellant
Parties : Awyong Shi Peng — Lim Siu Lay

Civil Procedure – Default judgment – Court granting application to set aside default judgment but imposing condition that appellant furnish security – Whether court should exercise discretion to set aside condition – Applicable principles – Order 19 r 9 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

30 January 2007

Choo Han Teck J:

1 This was an appeal against the decision of the District Judge (“the DJ”) dismissing the appellant’s application to set aside a condition that the appellant furnishes security in the form of a Banker’s guarantee or pay into court the sum of \$100,000 which is the respondent’s claim amount (“the condition”). The appellant and respondent in this appeal were respectively the defendant and plaintiff in DC Suit No 610 of 2006 (“the main claim”). The respondent had entered judgment against the appellant in default of defence (“the default judgment”) on 20 March 2006. The appellant filed an application to set aside the default judgment on the ground that he had applied to strike out the respondent’s action and thought that by reason of that, the defence need not be filed in the meantime. The Deputy Registrar set aside the default judgment but imposed the condition. After hearing the parties, I allowed the appeal and the condition for setting aside the default judgment was rescinded.

2 The appellant is the brother-in-law of Mr Awyong Kah Lock (“AKL”) who is the father of the respondent. The respondent alleged that on or about 28 November 2001, the appellant had received a sum of \$100,000 from AKL, who directed the appellant to pay the said sum to the respondent when he turned 21 years old on 15 August 2003. The respondent relied on a memorandum dated 28 November 2001 (“the memorandum”) which was signed by the appellant, acknowledging that he had taken the said sum from AKL and that he unconditionally undertook to pay the said sum to the respondent on 15 August 2003. However, on 15 August 2003, the appellant refused to pay the said sum. He argued that he did not sign the memorandum and denied that he had received any money from AKL.

3 The respondent commenced the main suit against the appellant and the writ of summons was served on the appellant on 20 February 2006. On 15 March 2006, the appellant received a notice to file his defence within 48 hours. An application to strike out the writ of summons was filed instead, on the basis that the statement of claim disclosed no reasonable cause of action. The respondent proceeded to enter judgment in default of defence on 20 March 2006. When the appellant was served with the default judgment, Summons Entered No 4382 of 2006 was filed to set aside the default judgment. The Deputy Registrar ordered that the default judgment be set aside provided the condition imposed was fulfilled. That brings us to the present matter at hand.

4 In his affidavit, the appellant denied that he had signed the memorandum. He stated that he had a strained relationship with AKL as a result of previous disagreements when he was director and shareholder of AKL's company. Eventually he resigned and transferred his shareholding to AKL. Mr Kevin Kwek, counsel for the appellant, submitted that it was therefore unlikely that AKL would have transferred any money to him in late November 2001. In addition, he contended that even if such a transaction took place, it would be illegal as it was an arrangement by AKL to prevent the latter's assets from falling into the hands of the Official Assignee. According to the appellant, AKL owed, amongst other debts, \$1.5 million to the Inland Revenue Department in unpaid taxes and had absconded from Singapore with his wife at the end of 2001. As it stands now, AKL is an undischarged bankrupt and there is an outstanding warrant for his arrest.

5 The respondent refused to address the allegations made against his father as he felt that they were not relevant to the claim. He instead, produced a Report dated 5 July 2005 from the Health Sciences Authority ("the Report") regarding the authenticity of the appellant's signature on the memorandum. The Report found that the signature on the memorandum was in fact, the appellant's signature. The respondent submitted that the appellant was taking advantage of the absence of AKL in denying the respondent's claim to the \$100,000. It transpired from the affidavit of the respondent that his twin brother, Awyong Shi Hong had commenced an identical claim against the appellant also for a sum of \$100,000. According to Mr Steven Lee, counsel for the respondent, AKL had given the appellant another sum of \$100,000 which was to be paid to the respondent's twin brother on 15 August 2003 under a similar memorandum signed by the appellant also dated 28 November 2001. However, the twin did not commence any action until after the appellant had filed this appeal before me.

6 The respondent also challenged the bank statements submitted by the appellant, arguing that he did not submit all his bank statements. In particular, the appellant did not submit his bank statement from a Citibank Account in Hong Kong ("Citibank account"). The respondent knew about this account and had requested for the Citibank account statements from the appellant in May 2002. According to the statement, the Citibank account had HK\$1,000,021.62 in cash, which was approximately equivalent to \$200,000 Singapore Dollars. The respondent then alleged that the appellant had deposited the \$200,000 into the Citibank account as he was afraid that the Singapore government would query the source of his funds if he deposited such a large sum into his various Singapore bank accounts. The appellant however, contended that the Citibank account was opened in his name upon his sister's (i.e. the respondent's mother) request for assistance. The appellant met AKL in Hong Kong in October 2001 to open the account and it was AKL who deposited the money into the Citibank account through the appellant. The ATM card and cheque book issued by the bank were retained by AKL. According to the appellant, the account was closed in June 2002 and the remaining money in the account was withdrawn in cash and handed over to AKL.

7 Under Order 19 rule 9 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), the Court may, on such terms as it thinks just, set aside or vary any judgment entered pursuant to this Order. In general, the court may permit the judgment to be set aside subject to the defendant's compliance with reasonable conditions. A judgment entered in default of defence can be set aside, for example, subject to the provision of security by the defence (*TR Networks Ltd and Others v Elixir Health Holdings Pte Ltd and Others* [2005] SGHC 106). However, the court would avoid imposing terms which the defendant cannot possibly comply with as this would deprive him of his right to have the judgment set aside (see Jeffery Pinsler, *Singapore Court Practice 2006*, para 13/8/5 at p.191).

8 The discretionary power of the court to set aside a default judgment that has been entered into regularly, as was the case here, is unconditional. The overriding principle in the exercise of the court's discretionary power is to avoid the injustice which may result if judgment follows automatically

on default. In exercising its discretion to set aside the judgment, the court would look at whether the defendant had established a defence with a real prospect of success and which carried some degree of conviction (applying *Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep. 221 ("*The Saudi Eagle*"); followed in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 ("*Abdul Gaffer*"). However, where the defendant did not deliberately ignore the proceedings, the merits of the defence may not be scrutinized as strictly as propounded in *The Saudi Eagle* (see *Singapore Civil Procedure 2003*, para 13/8/3 at p.132). It was evident from the affidavit of the appellant that he did not deliberately ignore the proceedings. Rather, he filed an application, the grounds of which were not unreasonable, to strike out the action. It might not have been a correct move on his part, but that did not disentitle the appellant from having the default judgment set aside (see *Abdul Gaffer*).

9 At present, the merits of the case appear to be evenly balanced. It was not readily apparent from the affidavits filed which of the two parties was generally more truthful and reliable in respect of their claims. It was undeniable from the affidavits that there was substantial dispute of fact between the parties. While it was evident that there might be fraud involved, it is not clear which party was the perpetrator of the fraud. It seemed to me that the appellant may have a defence but that is not a matter for me to decide conclusively on at this juncture. It would be fair, therefore, that the appellant be given the opportunity to present his side of the story to the trial judge. The appellant may not have sufficient funds to satisfy the condition imposed. He had submitted that he was unable to furnish security of \$100,000 in the form of a Banker's Guarantee or payment into court. This would deprive the appellant of his right to defend himself against respondent's claim. In that sense, it would seem that judgment would have been passed against the appellant literally, by default. This matter was further complicated by the existence of the second claim. It would be unjustifiable if the present claim against the appellant succeeded (by default) and the second claim failed (if the appellant's defence succeeds). The interests of fairness would not be served in imposing payment into court as a condition for restoring the defence. For these reasons, the appeal was allowed, with costs in the cause.

Appellant's application to set aside the condition allowed.

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