Ong Jane Rebecca v Lim Lie Hoa
[2002] SGHC 254

Case Number : OS No 939 of 1991, RA No 600087 of 2002

Decision Date : 29 October 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Chandra Mohan and Ong Pang Yann (Rajah & Tann) for the appellant; Arul Chandran (C Arul & Partners) for the respondent

Parties : —

Civil Procedure – Production of documents – Issue of subpoena requiring attendance of accountant to produce documents – Accountant no longer having possession of documents required – Whether subpoena should be set aside

Civil Procedure – Witnesses – Issue of subpoena requiring attendance of accountant as witness at inquiry – Accountant no longer in charge of matter – Whether subpoena should be set aside

(Inquiry pursuant to Judgment dated 16 July 1996)

Citation: **OS No 939 of 1991; RA No 600087 of 2002**

Jurisdiction: **Singapore**

Date: **2002:10:29**
2002:10:28

Court: **High Court**

Coram: **Choo Han Teck, JC**

Counsel:
Chandra Mohan and Ong Pang Yann *(Rajah & Tann)* for the Appellant/Mr Tay Swee Sze

Arul Chandran *(C. Arul & Partners)* for the Respondent/Second Defendant

HEADNOTES

Civil Procedure

– Subpoenas served on a person to attend as a witness in an inquiry – Whether the subpoenas should be set aside

Facts

This was an appeal by Mr Tay Swee Sze who was served with a *subpoena ad testificandum* as well as a *subpoena duces tecum*, both of which were issued at the instance of the second defendant in Originating Summons No. 939 of 1991. Mr Tay applied to set aside the subpoenas, but his application was refused by the assistant registrar. Mr Tay then appealed against that decision.

Mr Tay was a partner in the firm of Arthur Anderson in 1996 when the first and second defendants in OS 939 of 1991 were ordered by the judge to produce an account of all the assets of the Estate of Ong Seng King. The first defendant appointed Arthur Anderson on 8 November 1996 with instructions to review all

documents and records belonging to the Estate and to prepare a report to assist her to comply with the order of court.

Counsel for Mr Tay conceded that Mr Tay was then the partner-in-charge of that matter at the material time, but argued that the firm's file and all the responsibilities relating to the file was transferred to another partner, Mr Tam Chee Chong, who had since taken the matter with him to his new firm, Deloitte & Touche. Counsel said that no relevant documents are currently in Arthur Anderson. Counsel also argued that the subpoena was not necessary and immaterial to the matter at hand. He submitted that Arthur Anderson had never been engaged by the second defendant to act in the matter. The second defendant was merely riding "piggyback" on the first defendant's affidavits for the purposes of complying with the order of court. Counsel asserted that the Writ of Subpoena must be utilised for the production of relevant evidence and that the court has jurisdiction to set aside the subpoena because the intention of the party issuing the subpoena was not to obtain relevant evidence, but rather, on the basis of an improper motive.

Held, dismissing the appeal:

The subpoena should not be used frivolously or in a scandalous manner, that is, to cause to be issued indiscriminately without any basis or reason so as to embarrass or inconvenience the person subpoenaed. Such occasions have been extremely rare. A person who has been served with a subpoena ought not to take out a separate application to put the issuing party to justify the issuance of the subpoena except in the clearest cases. (See [6])

In the present case, Mr Tay was the partner-in-charge of the file at Arthur Anderson at the material time from November 1996 to June 2000. The file was then handed over to Mr Tam. On this fact alone, the second defendant was justified in calling Mr Tay to testify at the inquiry. The affidavit of Mr Tay, which was filed confirming this fact, and his previous affidavits producing copies of the accounts of the estate justify his attendance in court. In the end, his oral evidence may not be of much benefit to any party, but the same can be said of many a witness. The ultimate value of the witness is not the gauge to determine whether he ought to be subpoenaed. (See [7])

The subpoenas were therefore not unreasonably issued. It is open to Mr Tay to testify, when called, that he has no further or other documents in his possession, and cross-examined on his testimony. These are all matters rightfully in the domain of the judge at the substantive hearing. (See [7])

A third party cannot be compelled to give discovery of any document in his possession merely because it may be relevant to an issue in the case, but he is amenable to the process of the *subpoena duces tecum* provided it is limited to evidence that is both material and admissible. The material sought in this case are clearly material and appears to be admissible. These concern the documents relating to the assets and accounts of the estate of Ong Seng King, which is the subject of the inquiry.(See [8]).

Case(s) referred to

Macmillan Inc. v Bishopgate Investment Management PLC (No. 1)

[1993] 4 All ER 998 (refd)

Judgment

GROUNDS OF DECISION

1. This was an appeal by Mr Tay Swee Sze who was served with a subpoena to attend as a witness in the Inquiry presently held before the assistant registrar Mr Phang Hsiao Chung. Mr Tay, through his counsel, applied to set aside the subpoena but his application was refused by Mr Phang; and it was against that refusal that Mr Tay appealed before me. The subpoena was issued at the instance of the second defendant in this Originating Summons, No. 939 of 1991.

2. Mr Tay was a partner in the firm of Arthur Anderson in 1996 when the first and second defendants in this Originating Summons were ordered by the judge to produce an account of all the assets of the Estate of Ong Seng King. The first defendant appointed Arthur Anderson on 8 November 1996 with instructions to review all documents and records belonging to the Estate and to prepare a report to assist her to comply with the order of court.

3. In the appeal before me, Mr Chandra Mohan appeared on behalf of Mr Tay. He conceded that Mr Tay was then the partner-in-charge of this matter at Arthur Anderson at the material time. However, he argued that the firm's file was transferred to another partner, Mr Tam Chee Chong who had since taken the matter with him to his new firm Deloitte & Touch. Mr Mohan said that no relevant documents, including documents perused or considered in preparing reports, work sheets, notes and memoranda relating to this file are currently in Arthur Anderson. Counsel submitted that in addition to transferring the file to Mr Tam Chee Chong, all the responsibilities relating to the supervision of the file and the conduct of work relating to it had also been transferred to Mr Tam.

4. Counsel argued that the subpoena issued by the second defendant against Mr Tay was "not necessary and immaterial to the matter at hand". He submitted that Arthur Anderson had never been engaged by the second defendant to act in the matter of the estate of Ong Seng King. It was asserted that the second defendant was merely riding "piggyback" on the first defendant's affidavits for the purposes of complying with the order of court that was directed at both defendants (at that time the third and fourth defendants had not been joined).

5. Mr Mohan said that the Writ of Subpoena must be utilised for the production of relevant evidence and that the court has jurisdiction to set aside the subpoena because the intention of the party issuing the subpoena was not to obtain relevant evidence, but rather, on the basis of an improper motive. Counsel relied on the English case of *Macmillan Inc. v Bishopsgate Investment Management PLC* (No. 1) [1993] 4 AER 998 in support. The test propounded by the English court for ordering a non-party witness to produce a document in litigation is to see whether the order could be "necessary for disposing of the cause or matter or for saving costs". Mr Mohan deprecated the use of the subpoena for the purpose of "fishing for evidence".

6. The subpoena should obviously not be used frivolously or in a scandalous manner, that is to say, to cause to be issued indiscriminately without any basis or reason so as to embarrass or inconvenience the person subpoenaed. Such occasions have been extremely rare, in my experience. On the present facts I see no need to make any further qualifications or rules judicially by way of guidelines in the use of the subpoena. In my view, persons who have been served with a subpoena

ought not to take a separate application to put the issuing party to justify the issuance of the subpoena except in the clearest cases.

7. In the present case, Mr Tay was the partner-in-charge of the file at Arthur Anderson at the material time from November 1996 to June 2000. The file was then handed over to Mr Tam. On this fact alone, the second defendant was justified in calling Mr Tay to testify at the inquiry. There is one the face of the record, namely the affidavit of Mr Tay, filed confirming this fact, and his previous affidavits producing copies of the accounts of the said estate, to justify his attendance in court. In the end, his oral evidence may not to be of much benefit to any party, but the same can be said of many a witness. The ultimate value of the witness is not the gauge to determine whether he ought to be subpoenaed. The *Macmillan* case concerned the *subpoena duces tecum*. The witness there was already in court and in the midst of cross-examination when the subpoena was issued against him for the production of certain transcripts of a private inquiry. In the present case, Mr Tay was issued with a *subpoena ad testificandum* as well as a *subpoena duces tecum*. In the circumstances outlined above, the subpoenas were not unreasonably issued. It is open to Mr Tay to testify, when called, that he has no further or other documents in his possession, and cross-examined on his testimony. These are all matters rightfully in the domain of the judge at the substantive hearing.

8. As Millet J said in *Macmillan*'s case (*ibid.*, page 1002), a third party cannot be compelled to give discovery of any document in his possession merely because it may be relevant to an issue in the case, but he is amenable to the process of the *subpoena duces tecum* provided it is limited to evidence that is both material and admissible. The material sought (if Mr Tay still has them) are clearly material and appears to be admissible. These concern the documents relating to the assets and accounts of the estate of Ong Seng King, which is the subject matter of the present inquiry before Mr Phang.

9. For the reasons above, the appeal was dismissed.

Sgd:

Choo Han Teck

Judicial Commissioner