Teng Fuh Holdings Pte Ltd v Collector of Land Revenue
[2007] SGCA 14

Case Number : CA 31/2006

Decision Date : 09 March 2007

Tribunal/Court : Court of Appeal

Coram : Kan Ting Chiu J; Judith Prakash J; Tan Lee Meng J

Counsel Name(s) : Tan Kay Kheng and Aw Charmian (Wong Partnership) for the appellant; Eric Chin (Attorney-General's Chambers) for the respondent

Parties : Teng Fuh Holdings Pte Ltd — Collector of Land Revenue

Administrative Law – Remedies – Certiorari and mandamus – Whether application for leave for order of certiorari and mandamus made out of time – When three-month period under O 53 r 1(6) of Rules of Court commencing – Whether sufficient grounds for leave for order of certiorari and mandamus to be granted under O 53 r 1(1) of Rules of Court existing – Order 53 r 1 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

9 March 2007 Judgment reserved.

Kan Ting Chiu J (delivering the judgment of the court):

Background

1 The appellant, Teng Fuh Holdings Pte Ltd, applied on 30 September 2005 for leave to apply for an order of *certiorari* (now known as a quashing order) and an order of *mandamus* (now known as a mandatory order) under O 53 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

2 The appellant wanted the quashing order to quash a declaration No 638 of 1983 dated 26 February 1983 made under s 5 of the Land Acquisition Act (Cap 152, 1985 Rev Ed) ("the Act") which stated that the appellant's land and property at Mukim 25 Lots 498, 348 and 350 ("the land") was to be acquired because it was needed for "a public purpose, viz: General Redevelopment".

3 The appellant wanted the mandatory order to be issued against the respondent, the Collector of Land Revenue, Singapore, to reconvey the land to it upon repayment of the compensation paid for the acquisition.

Basis for the application

4 The appellant argued that the orders should be made on grounds that the acquisition was made *ultra vires* and in bad faith because:

(a) the land had not been redeveloped, but had been left in the state it was in at the time of acquisition, leased back to the appellant, which has remained in occupation as licensee; and

(b) the land, which was zoned "Industrial" when it was acquired, was rezoned "Residential" under the 1993 Kallang Development Guide Plan.

The rules of court applicable

5 The appellant needed leave to apply for the orders because O 53 r 1(1) of the Rules of Court

in the then-prevailing form using the original names of the orders provided that:

> No application for an order of mandamus, prohibition or *certiorari* shall be made unless leave to make such an application has been granted in accordance with this Rule.

6 The appellant faced a difficulty right from the outset. It had to explain why it had not filed its application till 30 September 2005, more than 22½ years from the declaration of 26 February 1983.

7 Rule 1(6) of O 53 refers to the time in which such applications are to be made. Rule 1(6) states that:

> [L]eave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding or such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made; …

At the time of the acquisition, the period for application was six months. The period was reduced to three months in December 2004.

8 The appellant made a disingenuous argument that its application was not out of time. The appellant apparently did not know that the land was rezoned as "Residential" in the 1993 Kallang Development Guide Plan till 2004. In September 2004, the appellant came to know of the change in zoning. It obtained legal advice on the legality of the acquisition and it instructed its solicitors who wrote to the Ministry of Law on 7 September 2004 to appeal for the land to be returned to it. It did not hear from the Ministry till 13 July 2005, when it was informed that the request was rejected. The appellant argued that the time for application should run from 13 July 2005, and its application filed on 30 September 2005 was filed within time.

The decision below

9 The appellant's application came on for hearing before Andrew Phang Boon Leong J (as he then was) and his judgment is reported in [2006] 3 SLR 507. Phang J dismissed the application. On appeal before us, the parties essentially repeated the arguments made before him.

The issues

Was the period for application three months or six months?

10 Order 53 r 1(6) had been amended in December 2004 when the three-month period was put in place of the previously-prescribed six-month period. Did this rule apply retrospectively to the appellant's application? There were no transitional provisions or statements which addressed that. There is room for argument whether such an amendment on the time limit for action applied retrospectively to the appellant's application to quash the declaration of 26 February 1983. The issue to be addressed is whether the amendment affected the appellant's vested right of appeal, or whether it only related to the procedure by which the right was to be exercised.

11 *The Ydun* [1899] P 236, a decision of the English Court of Appeal, dealt with a similar situation. The plaintiff's vessel suffered damage on 13 September 1893. The plaintiff alleged that the damage was caused by the negligence of the defendant in the execution of its public duty, and issued a writ on 14 November 1898. In the intervening period, an act came into effect on 1 January

1894 which provided that such actions must be commenced within six months of the alleged negligence. The court had to decide whether the act applied to the action filed. The court ruled that it did, and that the action was filed out of time. A L Smith LJ held at 245:

> The rule applicable to cases of this sort is well stated by Wilde B. in *Wright v. Hale* [(1860) 6 H & N 227 at 232], namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. *But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.* [emphasis added]

12 In *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 MLJ 1, a decision of the Privy Council from Malaysia, the action-limitation change operated in the reverse and lengthened the time period. This was a claim for personal injuries arising from a traffic accident which occurred on 5 April 1972. At that time, the applicable limitation period was 12 months, but it was amended and extended to 36 months in June 1974. The plaintiff's action was filed in March 1975, after the original 12-month limitation had set in, but within the extended 36-month period. The issue before the court was whether the action was filed within time. Lord Brightman, delivering the judgment of the board, held at 2–3 that it was not:

> [T]here is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. *A statute is retrospective if it takes away or impairs a vested right acquired under existing laws*, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be *an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure*, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> *But these expressions "retrospective" and "procedural", though useful in a particular context, are equivocal and therefore can be misleading.* A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.
>
> [emphasis added]

and at 5:

> In their Lordships' view, *an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right*, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unvoidable. [emphasis added]

13 If the right to plead a time bar is a right that is preserved in the absence of a clear statement to the contrary, the right to commence action within a specified time should likewise be preserved in the same circumstances, and as the appellant here had the right to file its application within six months from the date the declaration was made, that right to apply should not be reduced to three months when the rule was amended in December 2004.

14 In this case, whether the period was three months or six months, the application was not made within time. If the construction to be given would determine whether the application was made within or out of time, we are inclined to the latter period because the appellant had the right to apply within six months when its land was acquired, and that right should not be removed except by a clear and unequivocal provision.

When does the period run?

15 In the hearing below, Phang J had found at [16]:

> [I]t is my view that *the three-month period under O 53 r 1(6) ought to run from the time the Ministry of Law responded to an inquiry by the plaintiff, and such an inquiry ought to have been sent to the Ministry at a time when a reasonable person in the plaintiff's position would have sent it*. [emphasis in original]

and at [20]:

> In my view, the plaintiff ought, *by 1993 at the latest*, to have made the necessary inquiry … *This was more than a decade ago*. If so, it is inconceivable that the Ministry of Law would have taken over a decade to respond had the plaintiff sent an inquiry to it at that time or shortly thereafter. And from the time the Ministry did in fact respond, the three-month period under O 53 r 1(6) would, in my view, have begun to run. [emphasis in original]

16 We are unable to agree with that construction or the appellant's construction. Rule 1(6) specifically requires that "the application for leave is made within three months after the date of the proceeding … or … where … the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made". The sub-rule refers to the proceeding intended to be quashed. In the present case, it would be the declaration of 26 February 1983 which had set in motion the acquisition of the land.

17 As we see it, the date must relate to the proceeding, and it should be the date on which the right to seek relief arises. In the situation where a declaration is issued for the acquisition of the appellant's land, the appellant's right to apply to quash the declaration arises on the date of the declaration and time must run from that date. Consequently, we found that time started to run on 26 February 1983.

18 However, the rule allows for some flexibility. It allows the time of filing to be extended where the delay is "accounted for to the satisfaction of the Judge to whom the application for leave is made." The onus is on the applicant to account for the delay.

Was the delay accounted for?

19 The appellant was an interested party in the acquisition of the land. It was the proprietor from which the land was acquired at the statutory rate, which was below the prevailing open market value.

20 After the acquisition, the appellant remained on the land, albeit as a licensee. It was therefore fully aware that the land was not redeveloped over the years following the acquisition.

21 The rezoning of the land under the 1993 Kallang Development Guide Plan was information in the public domain, accessible to everyone who wanted it. In this connection, it should be noted that

the appellant is actively engaged in property development through its related companies, and it should be aware that land usage zoning is liable to change when land usage needs and planning policies change.

22 The appellant's situation is therefore that when it complained that the land was not redeveloped, it had been fully aware of that from the time of acquisition in 1983. In respect to its complaint that the land was rezoned, that was information in the public domain since 1993, but the appellant apparently became aware of it only in September 2004. In any event, the fact that the land was not redeveloped since 1983 stood apart from the rezoning of the land in 1993.

23 In the circumstances, the appellant has not accounted for the delay because it had the interest, the knowledge and the means to have acquired the information to make its application long before it filed the same in September 2005.

The merits

24 Phang J went on to decide on the merits of the application. He started by identifying the standard of proof to be satisfied to obtain leave. He referred to *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR 609 ("*Colin Chan*'s case"), and concluded that there was a very low threshold for an applicant to meet.

25 He then focused his attention on s 5(3) of the Act which states that a declaration "shall be conclusive evidence that the land is needed for the purpose specified".

26 In the opening part of [36] of his judgment, he stated:

> However, does that mean that s 5(3) of the Act cannot be questioned in any court? This is not an implausible proposition, having regard to the nature and policy of the Act itself. However, *bad faith*, particularly in the *governmental* context, does not sit easily in any (and, especially, the modern-day) context. In my view, and viewing the matter from the particular perspective of land acquisition in the Singapore context, it is imperative that a *balance* be found in the tension between ensuring that the purposes of the Act and the ensuing public benefit are achieved on the one hand and ensuring that there is no abuse of power on the other. In this regard, it is important to note that the Act was promulgated not only for the public benefit but also because land is an extremely scarce and therefore valuable resource in the Singapore context. These are in fact inextricably related reasons. This being the case, it is clear why much more latitude and flexibility is given to governmental authorities. As a corollary, it is not the task of the courts to sit as makers of policy. This would in fact be the very antithesis of what the courts ought to do. But latitude and flexibility stops where abuse of power begins. Such abuse of power is most commonly equated with the concept of *bad faith*. At this point, the courts must – and will – step in. [emphasis in original]

He noted at [28] that the essence of the appellant's case was that there was bad faith on the part of the respondent manifested by the failure to redevelop the land for 22 years after acquiring it.

27 He addressed this in the concluding part of [36]:

> But, in the nature of both the concept itself, such abuse of power will not be assumed (let alone be found) at the slightest drop of a hat. It is a serious allegation. There must be proof. In proceedings such as these, there must be sufficient evidence, produced in its appropriate context, that establishes that a "prima facie case of reasonable suspicion" of bad faith exists.

and he went on to explain at [41]:

> However, it should be acknowledged that an allegation of bad faith is a *serious* one that, even in applications for leave (such as is the case here), ought to be treated accordingly. Indeed, in the Malaysian Privy Council decision of *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449, Lord Griffiths, delivering the judgment of the Board, emphasised (at 453) that "the burden … lay upon him who asserted bad faith to at least establish a *prima facie* case". The learned law lord proceeded to observe as follows (see *ibid*):
>
> > This is the correct approach. He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation.
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> [emphasis in original]

28 Phang J cited the judgment of the Indian Supreme Court in *Gulam Mustafa v The State of Maharashtra* AIR 1977 Supreme Court 448 where Krishna Iyer J held at 449 that:

> There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in the … declaration.

This statement was endorsed in another decision of the same court – *Mangal Oram v State of Orissa* AIR 1977 Supreme Court 1456.

29 We believe that the statement should be read to mean that a change of use of any acquired property is not inevitably a ground for avoiding the acquisition. The statement should not be taken to mean that a change of use can never lead to the conclusion that the acquisition was invalid. The reason for the change of use must also be considered. There may be good reasons for some changes, and invalid reasons for others.

30 Phang J cited another decision of the Indian Supreme Court, *State of Maharashtra v Mahadeo Deoman Rai* [1990] 2 SCR 533 for the statement at 538 that:

> A particular scheme may serve the public purpose at a given point of time but due to change of circumstances it may become essential to modify or substitute it by another scheme. The requirements of the community do not remain static; they indeed, go on varying with the evolving process of social life. Accordingly, there must be creative response from the public authority, and the public scheme must be varied to meet the changing needs of the public.

31 We find that it is implied in the statement that changes can only be made when they are justified. Indeed, the court in that case examined the circumstances surrounding the change of use before it dismissed the objections over a changed scheme.

32 It is noteworthy that in all three Indian Supreme Court cases cited, the challenges to the validity of the acquisitions were dismissed after the full facts were presented and full arguments were heard.

33 The appellant's case is essentially that the land was not acquired for the declared purpose. It contended that this was indicated by the fact that the land was not redeveloped for 22 years, and

was rezoned from "Industrial" to "Residential".

34 The respondent replied by filing an affidavit in opposition to the application. Sim Hwee Hong, a planner with the Urban Redevelopment Authority, made the affidavit which essentially exhibited the following documents affecting the land, *ie*:

(a) 2003 Master Plan Kallang Planning Area (Part) Location Plan;

(b) 1980 Certified Zoning Interpretation Plan;

(c) 1985 Master Plan Certified Interpretation Plan;

(d) 1998 Master Plan Certified Zoning Interpretation Plan; and

(e) 2003 Master Plan Certified Zoning Interpretation Plan.

He did not offer any explanation why the land was not redeveloped, or why it was rezoned in 1993.

35 In *Colin Chan*'s case ([24] *supra*), this court held at 616, [22] that in deciding whether to grant leave, the test to be applied was capable of two interpretations:

> One is that the court should quickly peruse the material put before it and consider whether such material discloses 'what might on further consideration turn out to be an arguable case'. The other is that the applicant had to make out a 'prima facie case of reasonable suspicion'. In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.

36 On the facts of the present case, the appellant's land was acquired in 1983 when it was declared to be needed for "a public purpose, viz: General Redevelopment". Nevertheless it was not redeveloped over the following 22 years. It is to be pointed out that the declaration for the acquisition of the appellant's land stated that it was needed for "a public purpose, viz: General Redevelopment" whereas the preceding declaration (No 637) made on another property on the same day stated that the land was needed for "a public purpose, viz: General Development". *Prima facie*, a distinction is made between general development and general redevelopment.

37 Can the respondent invoke s 5(3) of the Act, rely on the declaration as the sole and conclusive evidence on the issue, and decline to offer any explanation for the delay?

38 We are of the view that when the allegation of bad faith is founded on a very substantial period of inaction, an explanation should be given. Prolonged inaction, if not explained, could constitute an arguable case or a *prima facie* case of reasonable suspicion that the land was not needed for general redevelopment when it was acquired in 1983.

39 In *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449, referred to in [27] above, Lord Griffiths had held that in deciding whether the burden of proving bad faith was discharged, mere suspicion was not enough, and the court must consider all the evidence before it, including any explanation from the respondent, and if no explanation was given, the court could draw an inference from the lack of explanation.

40 In this case, no explanation was offered by the respondent. He could have done more. He could, for example, have explained the specific purpose the land was intended for at the time of acquisition and when that was intended to be implemented, and whether there were any subsequent

changes to those plans, and if so, what the current plans are. These are matters which are known only to the respondent, and he should, in view of the long period of non-development, disclose them in compliance with s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) which states that:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

41 The absence of any explanation supported the argument that there was an arguable case or a *prima facie* case of reasonable suspicion made out that the land was not needed for general redevelopment when it was acquired in 1983, sufficient for leave to be granted under O 53 r 1(1) of the Rules of Court.

Conclusion

42 We agree with Phang J that the appellant's application was made out of time and should be dismissed. However, we are of the view that if the application had been made in time, a reasonable argument could have been made for leave to be granted for the appellant to proceed with the action, which in turn would have merited serious consideration.

43 For the foregoing reasons, the appeal is dismissed with costs.