Leong Wai Kay v Carrefour Singapore Pte Ltd
[2007] SGCA 26

Case Number : CA 66/2006

Decision Date : 30 April 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Kan Ting Chiu J; Andrew Phang Boon Leong JA

Counsel Name(s) : M Mahendran and Harvindarjit Singh Bath (Surian & Partners) for the appellant; Sadique Marican and Anand Kumar (Sadique Marican & Z M Amin) for the respondent

Parties : Leong Wai Kay — Carrefour Singapore Pte Ltd

Restitution – Prevention of Corruption Act – Employee of company obtaining bribes – Employee convicted of corruption under s 6(a) Prevention of Corruption Act and ordered to pay penalty equal to amount of bribes – Company commencing civil action under s 14(1) Prevention of Corruption Act to recover bribes – Whether recovery barred by penalties ordered under criminal proceedings – Sections 6(a), 14(1) Prevention of Corruption Act (Cap 241, 1993 Rev Ed)

30 April 2007

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 This was an appeal by an employee who had taken bribes from various suppliers of services to his employer, the respondent in this appeal. The only question before us was one of law, *viz*, whether, pursuant to s 14(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the Act"), the appellant, who had paid the penalty to the State under s 13(1) of the Act, remained liable to pay the same amount to the respondent as a civil debt. At the conclusion of the appeal, we dismissed the appeal. We now give our reasons for doing so.

Facts

2 The facts were undisputed and can be briefly stated. The appellant was employed as the facilities manager of the respondent between April 1998 and July 2003. In the course of his employment, he received bribes from several companies which provided services to the respondent in return for awarding service contracts to them.

3 The appellant was charged for offences punishable under s 6(*a*) of the Act. He pleaded guilty to ten charges of receiving bribes. He was convicted and 82 other charges were taken into consideration for the purposes of sentencing. The appellant was sentenced to a term of imprisonment and ordered, under s 13(1) of the Act, to pay a penalty of $292,800, being the amount of bribes received by him. The appellant duly paid the penalty.

4 The respondent then commenced proceedings under s 14(1) of the Act to recover as a civil debt the sum of $292,800, being the amount of gratification received by the appellant. The appellant admitted to having received $292,800 as gratification corruptly but argued that, having already disgorged all the moneys he had received, he had a full defence to the respondent's civil claim for the same amount.

Proceedings in the lower courts

5 The assistant registrar dismissed the respondent's application for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). On appeal, the judge allowed the appeal and entered final judgment for the respondent in the sum of $292,800 with costs. Her decision is reported at *Carrefour Singapore Pte Ltd v Leong Wai Kay* [2006] 4 SLR 412.

6 In finding for the respondent, the judge rejected the appellant's argument (described in [4] above) on the grounds that it was: (a) contrary to the clear language of s 14(1) of the Act; and (b) misconceived as criminal proceedings were separate and distinct from civil proceedings which were based on a cause of action given by s 14(1). The judge held that the respondent's right to recover the bribes from the appellant was unaffected by the conviction.

Sections 13 and 14 of the Act

7 We begin the discussion of our reasons by setting out the relevant provisions of the Act, which are ss 13 and 14:

> **When penalty to be imposed in addition to other punishment.**
>
> **13.**—(1) Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.
>
> (2) Where a person charged with two or more offences for the acceptance of gratification in contravention of this Act is convicted of one or some of those offences, and the other outstanding offences are taken into consideration by the court under section 178 of the Criminal Procedure Code for the purpose of passing sentence, the court may increase the penalty mentioned in subsection (1) by an amount not exceeding the total amount or value of the gratification specified in the charges for the offences so taken into consideration.
>
> **Principal may recover amount of secret gift.**
>
> **14.**—(1) Where any gratification has, in contravention of this Act, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of that amount or money value.
>
> (2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

8 A principal's right to recover a bribe or secret commission received by his agent originated in equity as early as 1829 in *Fawcett v Whitehouse* (1829) 1 Russ & M 132; 39 ER 51 where the court held that an agent who received any secret advantage from the other party to a transaction in which the agent was acting for his principal was bound to account for it to his principal. This was an equitable remedy, obtainable only in the Chancery Courts.

9 It was only until the later part of the 19th century, in the case of *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch D 339, that the common law courts came to recognise the principal's right to recover the bribe as an action for money had and received by the agent to the use of the principal. The principal's right was so well entrenched that it was statutorily recognised by s 14 of the Act, which was first enacted in 1937 as s 6 of the Prevention of Corruption Ordinance (No 41 of 1937) ("the 1937 Ordinance"). In *T Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 ("*Mahesan*"), Lord Diplock made the following observations (at 153) on s 30 of the Malaysian Prevention of Corruption Act 1961 (No 42 of 1961) ("the Malaysian Act"), which is *in pari materia* with s 14 of our Act:

> Subsection (1) which refers to *the principal's right to recover the amount of the gratification as a civil debt either "from the agent or from the person who gave the gratification to the agent" gives statutory recognition to the right of the principal at common law to recover the amount of the bribe from either the briber or the agent, as money had and received.* Subsection (2) in their Lordships' view does no more than to preserve the right of the principal to recover from the bribed agent as damages for fraud any loss, in excess of the amount of the bribe, he has actually sustained in consequence of entering into the transaction. In their Lordships' view, the Federal Court was right in its assumption that *these statutory provisions do not affect what had previously been the rights of the principal at common law.* [emphasis added]

10 Section 13(1) of the Act was not enacted in the 1937 Ordinance until 1961 when it was introduced for the first time under the Prevention of Corruption Ordinance (No 39 of 1960) ("the 1960 Ordinance") which also, *inter alia*, re-enacted s 6 of the 1937 Ordinance as s 14(1) of the 1960 Ordinance in the same terms. The object of s 13(1) was to prevent corrupt wrongdoers from keeping or benefiting from the spoils of their crimes: *Tan Kwang Joo v PP* [1989] SLR 496. It should be noted that the penalty under s 13(1) is recoverable as a fine. Under s 224(*b*)(iv) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed), if a fine is not paid, the court may order a prison sentence in lieu of the fine and such imprisonment shall be in excess of any other imprisonment to which the offender may already be sentenced. Therefore, it is clear that the penalty under s 13(1) was intended to enhance the punishment against offenders and act as a general deterrence against corrupt acts.

Civil recovery distinct from criminal proceedings

11 The appellant's main argument was based on the common law principle against double recovery. It was argued that since he had been made to disgorge the full value of the gratification by the court under s 13(1), he should not be made to disgorge the same amount again to the respondent in a civil action. It was argued that s 14 should be construed restrictively to apply only when there was no double recovery.

12 We rejected this argument. There is no question of double recovery of the bribe as far as the respondent is concerned. Section 14(1) is clear beyond any doubt. It provides that the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under the Act shall operate as a bar to proceedings for the recovery of that amount or money value.

13 Historically, the principal's right to recover as a civil debt bribes received by his agent was a common law right that was first recognised by s 6 of the 1937 Ordinance (now s 14 of the Act). When s 13(1) was introduced in 1960, the Legislature said nothing about its effect on the scope of s 14(1). It is an established principle of statutory interpretation that legislation is not presumed to take away existing rights except expressly or by necessary implication. In *In re Cuno* (1889) 43 Ch D

12, Bowen LJ said (at 17):

> [I]n the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature.

14 The present case is *a fortiori* for the reason that s 14(1) was part of the 1937 Ordinance before s 13(1) was enacted as part of the 1960 Ordinance. If the Legislature had intended that s 13 and/or s 14 should be subject to the principle against double disgorgement, it would have so provided. It did not, simply because it must have intended that the principle should not apply on the ground that its consequence, *ie*, that of double disgorgement, could act as a further deterrence against corruption. In our view, ss 13 and 14 were intended to operate independently of each other. The criminal proceedings under s 13 are distinct and separate from the civil recovery process under s 14.

15 This was substantially the conclusion reached by the Privy Council in the case of *Mahesan* ([9] *supra*). In that case, the appellant, Mahesan, was a director and employee of the respondent housing society. He received a bribe of RM122,000 from a housing agent, one Manickam, in respect of land sold by Manickam to the housing society. Manickam had originally purchased the land for RM456,000 but on-sold it to the housing society for RM944,000, thus making a gain of RM488,000. The housing society thus suffered a loss of RM488,000 as a result of Mahesan's fraudulent breach of duty in failing to inform his employers about the true price of the land.

16 Mahesan was charged with and convicted of two offences of corruption under the Malaysian Act. He was ordered, under s 13 of the Malaysian Act, to pay the housing society a penalty of RM122,000, being the amount of the bribe. Section 13 of the Malaysian Act is *in pari materia* with s 13 of our Act (except that under our provision the court has no power to order the corrupt agent to pay the penalty to the principal).

17 The housing society then commenced a civil action under two separate heads: (a) recovery under s 30 of the Malaysian Act of the amount of the bribe received by Mahesan, *ie*, RM122,000; and (b) damages for the loss sustained by the housing society in connection with the purchase of the land, *ie*, RM488,000. The High Court of Kuala Lumpur allowed *double recovery* and held that Mahesan was liable to pay the housing society both the penalty and the bribe received. On appeal, the Federal Court allowed *treble recovery,* holding that, in addition to the penalty imposed, Mahesan was liable under both heads of the civil claim.

18 The Privy Council overruled the Federal Court on allowing *treble recovery* and held (at 152) that under the common law as re-enacted in s 30 of the Malaysian Act, the principal had two distinct remedies against the agent, one for money had and received and the other for the tort of fraud. These remedies were in the alternative and the principal had to elect between them. Unsurprisingly, the housing society elected the larger claim for damages for the loss it had sustained as a result of Mahesan's wrongdoing.

19 More importantly, however, the Privy Council's decision in allowing the housing society to elect its remedy meant that the housing society was entitled to elect to recover the bribe received by Mahesan. Lord Diplock, who delivered the judgment of the Privy Council, was fully aware of the principle against double recovery, but nevertheless observed as follows (at 151):

> The order made in the criminal proceedings does not affect the rights of the principal against the agent in the civil proceedings. Section 30 of the Prevention of Corruption Act, 1961, so provides.

20 Further support may also be found in the later case of *Lee Mun Foong v Public Prosecutor* [1976] 2 MLJ 16. In that case, the Malaysian Federal Court approved the trial judge's finding that s 13 should operate independently of s 30 of the Malaysian Act. The trial judge had reasoned as follows (at 17):

> The intent behind section 13 would seem to be its operation independently of the provisions of section 30, and recovery by a principal under the latter section without considering the prior mandatory application of section 13 in the event of acceptance and irrespective of whether or not the gratification has been recovered would appear to be a more harmonious and sensible application and construction of the two sections and the Act as a whole.

In expressing approval with the trial judge's findings, Wan Suleiman FJ in the Federal Court held as follows (at 18):

> I agree with respect that the learned judge was again correct in holding that section 13 should operate independently of the provisions of section 30 which, as he puts it, is payment towards a civil debt. Section 30 is merely reaffirmation of a rule of law in the relation between agent and principal, a remedy which the principal would have even without the enactment of section 30.

21 The above was sufficient to dispose of the appeal. However, since counsel for the appellant placed great reliance on the decision of the District Court in *PP v Teng Cheow Hing* [2005] SGDC 38 in support of his appeal, it would be appropriate that we conclude these grounds of decision by stating that we agree with the following statement of the district judge at [25] of his grounds of decision:

> [I]t is clear that the purpose and object of section 13 [of the Act] is to eliminate the ability of offenders to benefit from their corrupt activities by disgorging the bribes from the culprit who accepted it. That will act [as] a strong deterrent to potential offenders.

However, that case was concerned with the scope of s 13(1) of the Act and had nothing to do with the scope of s 14(1) of the Act. In the circumstances, it is not necessary for us to consider whether the reasoning and rulings of the district judge in that case were correct and we do not propose to do so.

22 We accordingly dismissed the appeal with costs for the reasons we have given above.

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