Jagbir Singh s/o Baldhiraj Singh v Lim Keh Thye and Another
[2009] SGHC 166

Case Number : Suit 372/2005, RA 281/2008

Decision Date : 15 July 2009

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Subir Singh Panoo (Sim Mong Teck & Partners) for the plaintiff; Teo Weng Kie (Tan Kok Quan Partnership) for the defendants

Parties : Jagbir Singh s/o Baldhiraj Singh — Lim Keh Thye; The Society for the Physically Disabled L.K.A The Society for Aid to the Paralysed

Civil Procedure – Deemed discontinuance – Party filed notice of change of solicitors – Whether party had taken step or proceeding in the action

Civil Procedure – Deemed discontinuance – Party tendered payment of costs to other party as ordered – Whether party had taken step or proceeding in the action

15 July 2009 Judgment reserved.

Kan Ting Chiu J:

1 This appeal touches on the operation of O 21 r 2(6) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) which states that:

> Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

2 Specifically, it touches on the question whether a notice of change of solicitors is a step or proceeding under the rule.

3 The salient facts of the case to the appeal can be stated very briefly. The plaintiff, who was involved in a road accident, filed a claim against the defendants on 30 May 2005. Subsequently, interlocutory judgment was entered against the defendants on 7 August 2006 with damages to be assessed. On 16 May 2008, an application was filed by the solicitors for the defendants for a declaration that the action be deemed discontinued pursuant to O 21 r 2(6). (I shall comment on this later in my judgment.)

4 In the intervening period, the damages had not been assessed, but there were two developments which the plaintiff contended were steps or proceedings under r 2(6):

(i) On 5 July 2007, a notice of change of solicitors was filed on behalf of the defendants, and

(ii) On 18 July 2007, the plaintiff tendered payment of $600 to the defendants for costs they were ordered to pay on 22 January 2007.

5 The application was dismissed by an Assistant Registrar who found that the notice of change of solicitors was a step and proceeding under r 2(6), but at the same time, she also ruled that the

payment of costs was not a step or proceeding. This matter came before me on the defendants' appeal against the dismissal of the application.

6 In the course of the arguments before the Assistant Registrar and before me, two quite recent decisions on exactly the same point were referred to. In *Chellaiya Chandra v Cheng Song Thiam* (Suit No.600011 of 2001), V K Rajah J ruled on 4 February 2005 that a notice of change of solicitors is a step or proceeding under r 2(6). However, in *James Lee Chong Hwa v Phang Yen Hoong* (MC Suit No. 3546/2002), Lai Siu Chiu J, who heard the matter on an appeal from the Subordinate Courts, ruled on 30 March 2005 that a notice of change of solicitors is not a step or proceeding under the rule. Regrettably, no grounds of decision were delivered in either case.

7 There is an earlier Singapore decision on the effect of a notice of change of solicitors. This is *Gian Singh & Co Ltd v Super Services* [1965] 1 MLJ 256 ("*Gian Singh*"), which dealt with the Rules of Court 1934, specifically Order LXI r 5(1) thereof, that:

> In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed.

8 Rule 5(1) differs from the present r 2(6) in that under the old rules, a party in proceedings which has been dormant for a year or more can reactivate the proceedings by issuing one month's notice of its intention to proceed. In the scheme of the current rules, an action is deemed to be discontinued when no step or proceeding which appears from the records maintained by the court is taken for a year.

9 In *Gian Singh*, the plaintiffs had sued the defendants in December 1962. The defendants entered appearance in the same month and a notice of appointment of solicitors was filed in the following month, but no defence was filed. In May 1964, a notice of change of solicitors was filed, but still no defence was filed. In September 1964, the plaintiffs entered judgment in default of defence without first issuing a notice of intention to proceed.

10 The defendants applied to set aside the judgment on the ground that there was a non-compliance with r 5(1), but the judgment was not set aside. Winslow J held at p 259 that:

> It is true that [the plaintiffs' solicitor] did not serve a formal notice giving one month's notice of intention to proceed …

and that:

> [i]t seems to me therefore, that although there has been a technical non-compliance with the provisions of Order LXI, r.5 …

implying that the notice of change of solicitors filed was not a proceeding as no notice of intention to proceed was required if the notice of change of solicitors was a proceeding. However, the learned judge went on to state that:

> … I think that the filing in court of *the change of solicitors* for the defendants in the cause in May, 1964 *was a step or proceeding* in the proceedings towards judgment and is itself a proceeding within the meaning of the expression as used in Order LXI, r.5. It gave notice both to the court and to the plaintiffs' solicitors that the defendants intended to defend the action by solicitors. [emphasis added]

and

> If it is not such a proceeding it is difficult to say what else it can be in the light of the authorities I have cited above. If it was not intended to be a formal step in the action they need not have filed it. Why did they file it and give notice thereof? If they had not filed it, the plaintiffs would have had to give them one month's notice of intention to proceed. As they had, in fact, filed it, can they be heard to say that the plaintiffs should have given them a month's notice of their intention to proceed when they were all along aware of this intention?

Then he went back to the position that the plaintiff should have issued a notice of intention to proceed at pp 259–260 and ruled that:

> In my opinion the equities of the situation lie with the plaintiffs though the defendants may be technically correct but, as they have contributed to the creation of a situation like this to the plaintiffs' detriment, I cannot see any merit in their insistence on a technical one month's notice of intention on the plaintiffs' part to proceed with the action when they themselves seem to have taken an active part to keep the action alive by filing a formal notice of change of solicitors thereby evidencing their readiness and willingness to defend the action. This act on their part is tantamount to waiver. Even if it is not, I am of the opinion that technical non-compliance with Order LXI, r.5 is an irregularity (if any) which does not render the final judgment a nullity. It is an irregularity which does not necessarily render the judgment void unless I so direct, under Order LXIII, r.1 and, for the reasons I have stated, I do not feel disposed to do so.

11 What was the status of the notice of change of solicitors? On the one hand, by holding that there was a non-compliance, the judge did not regard the notice of change of solicitors as a proceeding. On the other hand, he also ruled the notice of change of solicitors was a proceeding. The case has been cited as authority that a notice of change of solicitors is a proceeding in *The "Melati"* [2003] 4 SLR 575 and in G P Selvam, Singapore Civil Procedure 2007 (Sweet & Maxwell Asia) without reference to the discordant rulings.

12 The policy consideration behind the rule for deemed discontinuance is quite clear; it is a case-management measure to ensure that actions filed in court are proceeded with diligently, and that those that are not will be deemed to be discontinued, even if the parties have not settled or abandoned the action. Deemed discontinuance can occur even when the parties are attending to the dispute. This is so because deemed discontinuance will set in when no step or proceeding is taken in an action, cause or matter *that appears from records maintained by the Court*. Activities such as exchanges of correspondence or meetings between parties are not to be taken into consideration as they do not appear in records maintained by the courts. Such matters may be relied upon in applications under r 2(6B) where:

> The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent as it may think fit.

and applications for reinstatement under r 2(8):

> Where an action, a cause or a matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter, and allow it to proceed on such terms as it thinks just.

13 Some reported cases touching upon r 2(6) and deemed discontinuance were cited in the submissions. They included the decision of the Court of Appeal in *Tan Kim Seng v Ibrahim Victor*

Adam [2004] 1 SLR 181 ("*Tan Kim Seng*") and *Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43. However, neither case considered the effect of a notice of change of solicitors. The former case determined that r 2(6) applies to proceedings even after an interlocutory judgment is entered (but not after a final enforceable judgment is obtained), and the latter case dealt with a party's right to commence a fresh action after an action has been deemed discontinued. While these are important decisions on the operation of r 2(6), they do not offer guidance on the effect of a notice of change of solicitors.

14 In seeking to have the Assistant Registrar's decision over-turned, the defendants submitted that:

> 18. What is a "step or proceeding" under Order 21 r2 (6)? The Singapore Civil Procedure 2007 states that "*a proceeding is essentially any formal and significant step taken before judgment. It should refer to the last interlocutory proceeding taken by a party, i.e. an act done while the matter is still in controversy, before judgment is obtained …"* This passage was cited by the Court of Appeal with approval in [*Tan Kim Seng*] at para 21. [emphasis in original]
>
> 19. It is submitted that a step or proceeding that is taken by the Respondent or any party has to be a step towards bringing the case to a conclusion. This is why time and time again, the courts refer to a step that is BOTH "formal" AND "significant". If it is not one with the intent and/or objective of bringing the case to a conclusion, it is not a significant step or proceeding for the purposes of O 21 r 2(6). The mere filing of a Notice of Change of Solicitors by the Appellants-Defendants does not qualify as a step in bringing the matter to a close. It merely served to inform the Respondents solicitors of the fact that there has been a change of solicitor's firms and that if their client is in fact pursuing, they should then deal with the new solicitors. This cannot be regarded as a formal and significant step.

15 A careful reading of *Tan Kim Seng* will show that the Court of Appeal did not approve the quoted passage from Singapore Civil Procedure 2007, and had merely stated that the court below had relied on it.

16 Another decision of the Court of Appeal, *The "Melati"* [2004] 4 SLR 7, is more helpful. In this case, the Court considered an argument that the filing of a statement of claim could not be a step under r 2(6) because the filing of a statement of claim, without it being served, did not move a case forward. The Court rejected the argument. It stated in its judgment that:

> 22 Counsel for the defendants argued that the "filing" of a statement of claim could not be a "step" within the meaning of O 21 r 2(6). This was because a filing of the statement of claim *per se*, without service on the other party, would not move the case forward. And if "filing" alone sufficed to constitute a "step", then the plaintiff could simply file without serving it on the defendant, thus buying himself another 12 months to procrastinate. Thus, the object of O 21 r 2(6) could all too easily be circumvented.
>
> 23 On the other hand, there is the judgment of Prakash J in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429, where she appears to have held that it was the "filing" and not the "service" which ought to be reckoned with. This was because the "service" of a writ (or in the present case, of a statement of claim) would not be "recorded in the court's record" and O 21 r 2(6) expressly provided that the "step" for the purposes of the rule should appear from the "records maintained by the Court".
>
> 24 While we appreciate the force of the argument of the defendants, we cannot ignore the

explicit words of O 21 r 2(6) that the "step" must be one which appears from the records maintained by the court. Thus, we endorse the views expressed by Prakash J in *Moguntia-Est Epices*.

17 The Court's pronouncement made it clear that an entry in the court's records was a step or proceeding even if it did not on its own bring the action forward. While the filing of the writ marked the commencement of the action, the action can only proceed after the writ was served.

18 Is the notice of change of solicitors the defendants filed a step or proceeding under r 2(6)? It was a step in the action the defendants had to take because O 64 of the Rules of Court required the defendants to file the notice of change of solicitors. There is no reason to exclude the filing of a notice of change of solicitors from the open category of *any* step or proceeding.

19 I will now refer to the plaintiff's alternative argument that he had taken a step or proceeding when he paid to the defendants the costs that he was ordered to pay.

20 This argument was founded on the premise that an act done in pursuance of an order made in an interlocutory application should also qualify as a step or proceeding on which *Barclay Davit Co., Ltd. v. Taylor & Sons* [1946] 2 All ER 41 ("*Barclay Davit*") was cited as authority.

21 *Barclay Davit* was concerned with the operation of O 26 r 1 of the English Rules of Court that:

> The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and there-upon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn … Save as in this Rule otherwise provided, it shall not be competent for the plaintiff [to discontinue his action].

22 The material facts of the case are set out in the headnote to the report, that:

> In an action by the plaintiffs alleging the infringement of their letters patent, the defence was delivered on May 30, 1945. On an interlocutory application by the plaintiffs under R.S.C., Ord. 53A, r. 21A, an order was made by the master on Nov. 6, 1945, and, pursuant to that order, on Feb. 4, 1946, the plaintiffs delivered a written statement signed by counsel. On Feb. 12, 1946, the plaintiffs served notice of discontinuance. Under R.S.C. Ord. 26, r. 1, a notice of discontinuance delivered by the plaintiff after receipt of the defendant's defence is valid only if delivered before the plaintiff has taken "any other proceeding in the action (save any interlocutory application). It was contended by the defendants that the service of the written statement was a "proceeding in the action" within the meaning of R.S.C., Ord. 26, r. 1, and that the notice of discontinuance was, therefore, invalid. On behalf of the plaintiffs, it was contended that compliance with an order was not in itself a separate proceeding in the action and that, although the delivery of the written statement together with the order under which it was delivered constituted a "proceeding," such proceeding was protected from the operation and scope of R.S.C., Ord. 26, r. 1, because it was made on an interlocutory application:—

and the decision of Romer J is summarised in holding (i) of the report that:

> An act which had some degree of formality and significance and which was done by the plaintiff in furtherance of the action was a "proceeding" within the meaning of R.S.C., Ord. 26, r. 1. The

fact that the act was done in pursuance of an order made on an interlocutory application was immaterial where the order was made on the application of the plaintiff and there was no penalty for failure to comply with its provisions; the exemption from the operation of R.S.C., Ord. 26, r. 1, given to interlocutory applications and orders made under them did not include everything done as a result of such an order.

23 The defendants referred to Lim Hui Min's article *Automatic Discontinuance Under Order 21 Rule 2 – First Dormant, Then Dead* … (2001) 13 S.Ac.L.J 150 where the writer discussed *Barclay Davit* and proposed at p 166 that:

> Order 21 Rule 2(6) states that the "step or proceeding" must appear "from records maintained by the Court". This may mean that compliance with a court order may only count as a "step or proceeding" if the court order involves the filing of documents in court. It is submitted, however, that this view ensnarls the automatic discontinuance provision in an unnecessary and technical distinction. It is submitted that compliance with *all* orders of court, no matter what their nature, should generate a fresh "trigger date" – i.e. the date of compliance with the court order. The court order itself would appear in the court records, thus satisfying the condition that the step or proceeding must appear from "*records maintained by the Court*". This is in keeping with the overriding objective of the court to ensure that the action continues to progress. [emphasis in original]

24 The Assistant Registrar rejected this alternative argument and I agree with her. *Barclay Davit* dealt with a materially different rule from r 2(6). The rule under consideration in *Barclay Davit*, ie O 26 r 1, was concerned with any "proceeding in the action" without reference to the records maintained by the courts.

25 Rule 2(6) refers to any step or proceeding that *appears from the records maintained by the Court*. Those words should not be extended to include steps or proceedings which are not in the court records, and are taken pursuant to matters appearing in the records. That was not what the drafters of the rules had intended by the language that they used. The Court of Appeal in *The "Melati"* had made it clear that "we cannot ignore the explicit words of O 21 r 2(6) that the "step" must be one which appears from the records maintained by the court" (see [16] hereof), and had ruled that the service of a writ was not a step or proceeding because it did not appear in the records of the court.

26 Notwithstanding the clear rules in O 21, the parties to an action may take different positions on whether an action has been deemed discontinued, and whether it is necessary to file an application under r 6(8) or to file a fresh action to pursue the matter. In such circumstances, a ruling of the court is sought.

27 The proper party to apply for a ruling is a party to the action. In this case, as it was the defendants who wanted a ruling, they should make the application. The defendants' solicitors can file the application on their behalf, but the application should be made in the name of the defendants, and the solicitors should not make the application in their own name, as they had done. This issue was not raised before the Assistant Registrar or on appeal before me, and I refer to this issue to draw attention to the mistake that had been made and not as a ground for dismissing the appeal because the error could have been corrected if it was brought up.

28 The appeal is dismissed with costs on the basis that the notice of change of solicitors was a step or proceeding under r 2(6).