ITC Global Holdings Pte Ltd (under judicial management) v ITC Limited and Others [2007] SGHC 127

Case Number : Suit 1344/2002, SUM 5593/2006, 1775/2007

Decision Date : 13 August 2007

Tribunal/Court : High Court

Coram : Brenda Chua AR

Counsel Name(s) : Paul Ng, Mark Cheng and Christopher Eng (Rajah & Tann) for the plaintiff; K Shanmugam SC and Colin Chow (Allen & Gledhill LLP) for the first defendant; Imran Hamid Khwaja and Lalitha Rajah (Tan Rajah & Cheah) for the thirteenth defendant

Parties : ITC Global Holdings Pte Ltd (under judicial management) — ITC Limited; Yogesh Chander Deveshwar; K Vaidyanath; N Lakshminarayanan; Revati Prasad Aggarwal; Gopala Krishna Parvatha Reddi; Rariyankandath Krishnan Kutty; Narayanaswami Sitaraman; Krishnan Lal Chugh; Biswadev Mitter; Feroze Rustom Vevaina; Ashutosh Garg; Sriram Khattar; Suresh Chitalia; Devang Chitalia

13 August 2007 Judgment reserved.

Assistant Registrar Brenda Chua:

Introduction

1 As Cotton LJ aptly cautioned in *Re Busfield, Whaley v Busfield* (1886) 32 Ch D 123: "Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over [their] subjects wherever they may be, such jurisdiction is valid, but, apart from statute, a Court has no power to exercise jurisdiction over any one beyond its limits": at 131. Indeed, our courts have always respected the parameters and boundaries drawn by courts in other jurisdictions. This stems from the principle of international sovereignty and the doctrine of comity of nations.

2 Courts must engage in a cautious and scrupulous exercise when considering if service effected on a foreign jurisdiction is proper and in accordance with the laws of our country and the foreign country. The mechanism of service out of jurisdiction exists as a favour by other courts to execute service of a writ where proceedings have been commenced in Singapore. It is a reciprocal act and when other courts approach our courts for assistance in effecting service, we will return the favour. Since we are borrowing the services of foreign courts, it is an implicit and unspoken rule that our courts have to ensure that the laws of the foreign country in relation to service of foreign summonses are strictly adhered to.

3 The present proceedings raise squarely two important issues as to the interpretation of a foreign statute in order to determine whether service out of jurisdiction was in fact proper and the circumstances in which, if at all, the court has the discretion to cure an irregular service out of jurisdiction.

Facts

4 The case before the court involves the plaintiff and the first defendant in Summons No 5593 of 2006 and the plaintiff and the thirteenth defendant in Summons No 1775 of 2007. The first and

thirteenth defendants are applying to set aside the plaintiff's service of the writ of summons on them on the basis that the plaintiff has not complied with the requirements of service of foreign summonses in India.

5 By way of background, the plaintiff is a company incorporated in Singapore. The first defendant is the sole shareholder of the plaintiff and is a company incorporated in India. The thirteenth defendant was, at the material time, an employee of the plaintiff. The plaintiff is claiming against the fifteen defendants on two grounds – one, a claim for US$9.1m for alleged advances or loans from the plaintiff to one Chitalia Group (owned or controlled by the fourteenth and fifteenth defendants as stated in the thirteenth defendant's affidavit filed on 23 April 2007 at [17]) in which the plaintiff is alleging that the defendants used the Chitalia Group as a sham to fraudulently create apparent profits for the first defendant and; two, a claim for US$9m for Columbo rice transactions which were purchased by the plaintiff from the Chitalia Group on which the plaintiff is claiming on an indemnity which was provided by the first defendant to the plaintiff.

6 On 6 November 2006, the first defendant was allegedly served with a writ at its registered office at Virginia House, 37 Jawaharial Nehru Road, Kolkata 700071, West Bengal, India by "a person claiming to be from the Calcutta High Court": see the first defendant's affidavit filed on 8 December 2006 at [9]. The person allegedly served the writ on an office assistant at the first defendant's mailing room. The plaintiff alleged that proper service has been effected as required under Indian law. On the other hand, the first defendant argued that service did not conform to Indian law and ought to be set aside.

7 On 19 March 2007, the thirteenth defendant was allegedly served with a writ at his house by "someone claiming to be a process server from the Tis Hazari Courts in New Delhi": see the thirteenth defendant's affidavit filed on 23 April 2007 at [30]. Again, the plaintiff alleged that proper service has been effected as required under Indian law. On the other hand, the thirteenth defendant argued that service did not conform to Indian law and ought to be set aside.

8 This is a convenient juncture to mention at the outset that the plaintiff has previously attempted service of writ on the first to fourth defendants and the sixth defendant. In Summons No 4404 of 2003 and Summons No 6259 of 2003, Assistant Registrar Low Siew Ling ("AR Low") dismissed both summonses and set aside service of the writs as they were not served through the proper judicial channels, i.e. through Indian courts.

The law

9 On the local front, O 11 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is the governing provision on leave to serve out of jurisdiction. Apart from satisfying the requirements under O 11 r 2, the plaintiff has to ensure that it has complied with the requirements under O 11 r 4(2) which is the applicable provision in this case as "there does not subsist a Civil Procedure Convention" between Singapore and India. Order 11 r 4(2) reads:

> Service of originating process abroad through foreign governments, judicial authorities and Singapore consuls or by other method of service (O. 11, r. 4)
>
> 4. — (2) Where in accordance with these Rules an originating process is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the originating process may be served —

(a) through the government of that country, where that government is willing to effect service;

(b) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country; or

(c) by a method of service authorised by the law of that country for service of any originating process issued by that country.

10 I noted that the parties' arguments were premised, in particular, on O 11 r 4(2)(c). It was the evidence of the Indian law expert of the thirteenth defendant, Ciccu Mukhopadhaya ("Ciccu") that O 11 rr 4(2)(a) and (b) were not applicable in India and this was not rebutted by the plaintiff (see Ciccu's affidavit filed on 24 May 2007 at [20]):

"Indian law does not recognise service of a summons relating to civil procedure by the Indian Government or through consular authorities of any country as is contemplated by Rule 4(2)(a) and (b) of the Singapore Court Rules."

11 On the Indian front, it was not in dispute that the relevant provision in the Code of Civil Procedure, 1908 (Act V of 1908) ("Indian CPC") was s 29 which states:

29. Service of foreign summonses. Summonses and other processes issued by –

(a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or

(b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or

(c) any other Civil or Revenue Court outside India to which the Central Government has, by modification in the Official Gazette, declared the provisions of this section to apply,

may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts.

Whether service on the first defendant was proper

12 Counsel for the first defendant, Mr K Shanmugam, referred the court to Order V r 22 of the Indian CPC which stipulates:

22. Service within presidency-towns, of summons issued by courts outside. Where a summons issued by any Court established beyond the limits of towns of Calcutta, Madras [and Bombay] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

13 As I have stated earlier, the first defendant's office is situated at Kolkata. Mr Shanmugam contended that Order V r 22 required the writ to be served though the Court of Small Causes at Kolkata, not through the Calcutta High Court: see the affidavit of the first defendant's Indian law expert, Marezban Padam Bharucha ("Bharucha"), filed on 26 April 2007 at [9]. Further, Mr Shanmugam argued that this point which was raised in Barucha's affidavit has not been responded to by the plaintiff's Indian expert, Shreyas Patel ("Patel") since it was filed, and he pointed out that Patel has filed further affidavits rebutting other points raised by Bharucha, yet nothing was said with respect to

Order V r 22.

14 In rebuttal, counsel for the plaintiff, Mr Paul Ng, submitted that the parties should wait for the endorsement of service from the Indian courts in order to affirm who exactly effected the service on the first defendant. Mr Ng also mentioned that he was taking no position as to the accuracy of the evidence submitted by the first defendant's officers. When queried by the court as to how then was the plaintiff going to prove to the court that the service was proper and which evidence the plaintiff was relying on, Mr Ng realised that he was taking an incongruous position and stated that he was taking the first defendant's officer's evidence at face value and on that basis, he submitted that the writ was properly served in accordance with Indian law.

15 In this regard, Mr Shanmugam pointed out that the only evidence which pertained to the first defendant's affidavit filed on 8 December 2006 at [9] that the writ was allegedly served on "a person claiming to be from the Calcutta High Court" remained unchallenged by the plaintiffs who had ample notice of this statement yet remained silent on this point. He asserted that the plaintiff had come to court ready to prove their case; they could not now argue that they did not have the endorsement.

16 More significantly, when the court asked Mr Ng whether he had any evidence to show that Order V r 22 has been complied with, he answered in the negative. This explicit concession effectively disposed of any hurdles for the first defendant. Accordingly, I found that the service of the amended writ on the first defendant was improper.

Whether service on the thirteenth defendant was proper

17 The arguments raised by the parties on the purported service on the thirteenth defendant were more complicated than the arguments on the purported service on the first defendant. As the affidavit of the thirteenth defendant's Indian law expert, Ciccu did not provide an opinion on Order V r 22, counsel for the thirteenth defendant, Mr Imran Hamid Khwaja ("Mr Hamid") took the position that insofar as Mr Shanmugam's arguments were concerned, he agreed that the plaintiff has not provided sufficient evidence to prove that it has complied with the Indian laws relating to service.

18 The key words of s 29 of the Indian CPC were: "served as if they were summonses issued by such Courts." It was Mr Hamid's contention that s 29 of the Indian CPC stipulated that a foreign summons should be served in a *similar* manner as if it was a summons issued by an Indian court. Order V of the Indian CPC sets out the procedure to be followed for the "issue and service of summons". Mr Hamid referred the court to Order V r 10 of the Indian CPC which I now set out for the sake of convenience:

> **ORDER V – ISSUE AND SERVICE OF SUMMONS**
>
> **10. Mode of Service.** Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

19 Relying on *Soumitri Taria v The Branch Manager, State Bank of India and Others* ("*Soumitri*") (1999) (II) Orissa Law Reports 326, Mr Hamid quoted the relevant portions of the case:

> "6…The provisions of Order 5, Rule 10, CPC is *mandatory* and there is no question of dispensing with the provisions while judging the sufficiency of notice/summons on the other side. Rule 10 of Order 5, CPC prescribes that service of summons *shall* be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal

of the Court."

[emphasis added]

20 Mr Hamid continued by citing a Calcutta High Court case in *B K Gooyee v Commissioner of Income Tax* AIR 1966 Calcutta 438 ("*Gooyee*") which concerned the words "signed by the judge" in Order V r 10. The court held:

> "14…the signature must not only exist before the sending out of the summons but also at the time when it reaches the hands of the defendant….for the signature of the officer together with the seal of the Court…is the hall mark of genuineness or proof or guarantee that was issued by the Judge of the Court."

21 It was the thirteenth defendant's case that the fact that the Indian jurisdiction was embracing a foreign document must mean that the Indian seed of court had to be imprinted on it. The only rationale way of reading the provision, as Mr Hamid pointed out, was that legitimacy was borne out of the fact that the writ must be given the seal of acceptance by the Indian courts.

22 Mr Hamid submitted that if Order V r 10 was not interpreted to require a signature of an *Indian* judge and the seal of an *Indian* court, any person could claim to be acting on the jurisdiction of the Singapore court and the service would be deemed properly effected. It could not be the case. There must be effective policing of the system. Mr Hamid contended that as a matter of common sense, the foreign summons had to be "rooted" through proper channels in order to adopt the strength of the local jurisdiction. He also mentioned that service was the basis of a country's jurisdiction and this was a fundamental point. In this regard, Mr Hamid pointed out to the court that the plaintiff has not rebutted this reasoning.

23 On the other hand, it was the plaintiff's argument that Mr Hamid was challenging the *form* of the writ, not the manner or method of the service. Since service was a non-issue, Mr Ng urged the court to look at the form of the writ and adopt Patel's position that the requirement under Indian law was for the writ to contain a signature of a *Singapore* judicial officer and the seal of a *Singapore* court. The plaintiff adopted the position that s 29 of the Indian CPC did not expressly state that insofar as foreign summonses are concerned, it had to bear the signature of an Indian judicial officer and the seal of an Indian court. Mr Ng contended that the wording of s 29 of the Indian CPC presupposed that there was a distinction to be drawn between a summons issued by foreign courts and a summons issued by Indian courts. Otherwise, the words "as if" would be redundant. In addition, this was buttressed by Patel's evidence that "Rule 10 of Order V of the CPC only applies to summons issued directly by an Indian court" and "the Writ clearly bears the signature of the person authorised by the Singapore Court as well as the seal of the Singapore Court": see Patel's affidavit filed on 22 June 2007 at [18].

24 By way of rebuttal to the cases cited by the thirteenth defendant, Mr Ng argued that *Soumitri* was a case which involved the issuance of an Indian writ and therefore did not stand for the proposition that the same principle must apply to summons issued by foreign courts. As for *Gooyee*, Mr Ng submitted that it involved the issuance of an income tax notice which did not bear the signature of the income tax officer and thus, the genuineness of the document was in question. He alerted the court that in the present case, the genuineness of the document was not an issue because the writ clearly bore the signature of a Singapore judge and the seal of the Singapore court.

25 Mr Ng's point was that insofar as service of Singapore court documents were concerned, they were perfectly valid, since they bore the signature of a judicial authority and clearly contained the

seal of the Singapore court. He contended that the court should, instead, determine whether Order V r 9 (method of service) was complied (and he submitted that it has been), not whether Order V r 10 was satisfied. Order V r 9 reads:

> **ORDER V – ISSUE AND SERVICE OF SUMMONS**
>
> **9. Delivery of summons by Court**
>
> (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or *sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court*.
>
> [emphasis added]

26 To illustrate that Order V r 9 was satisfied, Mr Ng relied on a letter dated 24 March 2007 which was signed by one Vinod Yadav, an Administrative Civil Judge, Delhi to show that the writ was served by an Indian court, in accordance with Indian law (bearing in mind that the underlying ground for the setting aside of the plaintiff's previous attempt on service on some of the defendants was that it did not serve the writ through the proper judicial channels in accordance with Indian law, i.e. through the Indian courts). A gloss on Patel's affidavit would show that (see Patel's affidavit filed on 22 June 2007 at [22]):

> "[t]he letter addressed by the Administrative Civil Judge…clearly establishes the fact that the Writ was *served by an Indian court* and not by the Indian Government or consular authorities. On this basis alone, I am of the view that the 13th Defendant's contention that he was not validly served with the Writ in accordance with the requirements of Indian law should fail."
>
> [emphasis added]

27 At this juncture, it was the thirteenth defendant's position that "[t]he person who left these documents did not provide, nor [was he] aware of any, evidence or proof of his identity or the fact that he was in fact a process server authorised to act for the judicial authorities of India in effecting service": see the thirteenth defendant's affidavit filed on 23 April 2007 at [31]. Mr Hamid pointed out that there was no affidavit of service prepared by the plaintiff to substantiate the fact that *at the time of service*, the person was a process server of the Tis Hazari court. In fact, the process server attested on a process report dated 21 March 2007 that he was a process server of the Tis Hazari court. One would recall that the thirteenth defendant was allegedly served on 19 March 2007 and Mr Hamid asserted that the plaintiff has not rebutted this point. The onus was on the plaintiff to prove that the process server was authorised by the Indian courts at the point of service; a report which post dated the date of service on the thirteenth defendant is irrelevant.

My decision

28 As a starting point, the pivotal provision in determining whether proper service was effected on the thirteenth defendant is Order V r 10 of the Indian CPC. To my mind, there is no iota of doubt that the term "shall" in Order V r 10 meant that this provision must be strictly adhered to, and the signature of the judge coupled with the seal of the court embodied the authority of the court. This begs the question: *Which court* did Order V r 10 refer to? The determinative issue is whether "the judge" and "the Court" under Order V r 10 read with s 29(c) of the Indian CPC refers to the foreign

court or the Indian court. Cases proffered from both sides offered me no real solution.

29 Parties were centring their arguments on the correct interpretation of "served as if they were summonses issued by such Courts" in s 29 of the Indian CPC. It is noteworthy that s 28(2) of the Indian CPC contains the words "proceed as if it had been issued by such court" which I now set out:

> **28. Service of summons where defendant resides in another State.** (1) A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.
>
> (2) The Court to which such summons is sent shall, upon receipt thereof, *proceed as if it had been issued by such court* and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto…
>
> [emphasis added]

30 Sir John Woodroffe & Ammer Ali's Code of Civil Procedure, A Commentary on Act V of 1908, Law Publishers (India) Pvt Limited: 1988, offers some guidance on the meaning of "as if issued by such court" under s 28 of the Indian CPC (at 470 and 471):

> **2. As if issued by such court.** The duty of the serving court under this section is to *proceed*, on receipt of the summons, *as if it had issued it*, and then return it with the record (if any) framed under the section to the Court from which it originally issued. *It then devolves upon the latter court, when the defendant does not appear to determine upon the sufficiency of the service before proceeding to try the suit*. But it is not necessarily the duty of the transmitting court in every case, to satisfy itself that the law as to service has been strictly followed.
>
> [emphasis added]

31 It must be accentuated that s 28 of the Indian CPC uses the terms "*proceed* as if it had been issued" and from the above-mentioned commentary, it seems that it is the role of the court from which the summons was originally issued to determine "the sufficiency of the service before proceeding to try the suit." This, to me, means that the terms "proceed as if it had been issued" do not allow the laws as to service to be contravened. In other words, there is no waiver of the requirements of the laws as to service. With this in mind, I add that s 29 of the Indian CPC adopts the phrase "*served* as if they were summons issued by such Courts". For ease of comparison, I set out once again s 29 of the Indian CPC:

> **29. Service of foreign summonses.** Summonses and other processes issued by –
>
> (a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or
>
> (b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or
>
> (c) any other Civil or Revenue Court outside India to which the Central Government has, by modification in the Official Gazette, declared the provisions of this section to apply,
>
> may be sent to the Courts in the territories to which this Code extends, and *served as if they were summonses issued by such Courts*.

[emphasis added]

32 In my view, the difference in the *effect* of the word "served" in s 29 of the Indian CPC and the word "proceed" in s 28 of the Indian CPC is marginal. When a summons is issued, the next natural step to take is to serve the summons. As such, to *proceed* has the same effect as to *serve*. Based on the above-mentioned commentary's interpretation on the meaning of "as if issued by such court", I hold that the court where the summons originated – in this case, the Singapore courts – still has "to determine upon the sufficiency of the service before proceeding to try the suit", which means that the requirements on the Indian laws of service must nonetheless be adhered to. Moreover, s 29 does not say "served as if *served* by such courts"; it bears constant reminding that it stipulates "served as if *issued* by such courts". The foreign summons is only deemed to be *issued* by the Indian courts; it is not deemed to be *served* by the Indian courts. In my view, service still has to meet the requirements of the Indian laws.

33 Further and more significantly, I reiterate that the exact words used in s 29 of the CPC were "*issued by*" and "served as if they were summonses *issued*". At this juncture, I would like to examine Order V which heading states "Issue and Service of Summons". The heading does not read "Issue or Service"; it states "Issue *and* Service". I find that the distinction between *issue* and *service* must not be glossed over so readily and ought to be accorded due weight. To my mind, there is a clear dichotomy drawn between how a summons is issued and how a summons is served. This difference could not be simply negated or ignored. In this regard, I hold the view that s 29 of the Indian CPC only deems the *issuance* of a foreign summons to be as if the Indian court had issued it – it does not deem the *service* of a foreign summons to be as if the Indian court had served it. More specifically, I find that Order V can be broken down into the 'issue' aspect and the 'service' aspect. A perusal of the rules in Order V would reveal that rules 1 to 8 concerns the issue of summons, while rules 9 to 30 involves the service of summons. Sir John Woodroffe & Ammer Ali's Code of Civil Procedure, A Commentary on Act V of 1908 sets out the rules of Order V and I quote the salient parts (at 1502 and 1510):

> **Order V – ISSUE AND SERVICE OF SUMMONS**
>
> **1. Summons.** (1) Where a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim…
>
> …
>
> Service of Summons
>
> **9. Delivery or transmission of summons for services.** …

34 It must be underscored that in the above-mentioned commentary, the learned authors made a plain distinction between issue and service, and I highlight to the reader that a sub-heading entitled "Service of Summons" was added before the learned authors examined Order V r 9. It follows from this reasoning that the words "issued by…served as if they were summonses issued by such Courts" under s 29(c) of the Indian CPC seems to connote that the serving court has to proceed as though or in the same manner as it had issued the summons *and* it was axiomatic that the serving court had to effect service in accordance with its own law. Order V r 10 unequivocally reads "Mode of *service*" and s 29 of the Indian CPC is not a deeming provision to the extent that the Singapore writ of summons would be regarded as *served* by the Indian courts; the Singapore writ was only regarded to be issued by an Indian court. Thus I also hold that the signature of a judge and the seal of a court pursuant to Order V r 10 should be interpreted to read that of an Indian judge and an Indian court. In my view,

such localization of a foreign summons was crucial and accordingly, the plaintiff has not complied with the strict requirements of Order V r 10 (mode of service).

35 Mr Ng was right to point out that the High Court of Orissa case of *Soumitri* involved the setting aside of a summons which was issued in India and the High Court of Calcutta case of *Gooyee* involved the issuance of an income tax notice. Both cases did not relate a foreign summons but the common thread underlying both cases was the courts' observations on Order V r 10. In light of my finding that Order V r 10 meant the signature of an Indian judge and the seal of an Indian court, by parity of reasoning, the principles in *Soumitri* applied insofar as the requirements of Order V r 10 were compulsory, and the principles in *Gooyee* applied inasmuch as the signature and the seal were the hallmarks of genuineness of the document.

36 As I held earlier, the signature of the judge and the seal of the court should belong to the Indian courts. This finding was buttressed by sound policy reasons. Mr Hamid's arguments were persuasive and I quote from a statement from him which, in my view, nips the matter in the bud: "A naked writ from Singapore has no impact in a country. It must be adopted by the jurisdiction. Indian law gives them the rule that adopts that." The summons should be accompanied by the order of court from the High Court of Singapore which bears the signature of the assistant registrar – this would indicate that the Singapore courts have granted the plaintiff leave to serve out of jurisdiction. When the summons reaches the Indian courts, which is the proper judicial channel for service of foreign summons, the Indian courts must be apprised of the fact that the summons has been approved by the Singapore courts for service out of jurisdiction. By way of logic and reasoning, the summons has to be approved by the Indian courts; it cannot simply slip pass the Indian courts without any mark of authorisation. This mark embodies the principle of legitimacy of the Indian courts. The Indian courts have to show that they have authorised service and the requirements of Order V r 10 of the Indian CPC must be strictly complied with, which was not the case here. Since I found that Order V r 10 was not satisfied, there is no necessity to venture into a discussion of Order V r 9.

Whether the improper service on the first and thirteenth defendants can be cured

37 Before I commence to discuss this issue proper, I would like to state at the outset that both the first and thirteenth defendant embraced the same position on this point. Order 11 r 3(2) of the Rules read:

> **Service of originating process abroad: Alternative modes (O. 11, r. 3)**
>
> 3. —(2) Nothing in this Rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

38 The pith and marrow of the first defendant's case was that it was expressly stated in O 11 r 3(2) of the Rules that the court had *no* jurisdiction to authorise any act which is contrary to the law of the country in which service was to be effected. When one country was seeking to effect service in a foreign jurisdiction, it was mutual courtesy to comply with the rules of the foreign jurisdiction. It was not the role or in the power of the Singapore court to decide whether one can disregard the rules of another country.

39 This was an opportune moment to set out O 2 r 1(1) of the Rules:

> **Non-compliance with Rules (O. 2, r. 1)**

1. —(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the *failure shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order therein.

40 In the alternative, Mr Shanmugam asserted that even if the court had jurisdiction to cure the irregularity by virtue of O 2 r 1, the court's discretion could only be exercised in extraordinary circumstances. In this aspect, the plaintiff has no vestige of evidence, by way of an affidavit or otherwise, providing reasons why the court should exercise its discretion in this case. He argued that if the irregular service was curable by O 2 r 1, any writ which was not served in accordance with the foreign laws would be curable and the purpose of O 11 was rendered nugatory.

41 In *Afro Continental Nigeria Ltd v Meridian Shipping Co SA (The "Vrontados")*, there was a time bar to the plaintiffs' claim for breach of contract. As time was running out fast, the plaintiffs applied *ex parte* to serve the writs by way of substituted service. The defendants applied to set aside the writ and service. The trial judge, Parker J, held that "all three of the directors of the defendant were residing in this country and all three could have been served without the slightest difficulty and since there was not anything impracticable about serving the directors", substituted service was not allowed and the service of the writs were consequently set aside. On appeal, the Court of Appeal approved Parker J's decision and held that "[s]ubstituted service ought only be ordered when it was impracticable for the plaintiff to effect personal service".

42 I hold the view that *The "Vrontados"* is distinguishable on the basis that the defendants were residing in England and the application was for substituted service in the same jurisdiction, not service out of jurisdiction. I appreciated the analogy Mr Shanmugam tried to show insofar as the court took a strict approach on setting aside the service of the writ in *The "Vrontados"* even though this led to the plaintiffs' claim being time barred, which was a serious consequence.

43 Mr Shanmugam and Mr Hamid both submitted that *Ong & Co Pte Ltd v YL Chow Carl* [1987] SLR 304 (*"Chow Carl")* supported their position. The facts involved the service of the notice of the writ by means of a court process server employed by a firm in Kuala Lumpur which was not an authorized method of service. Chan Sek Keong JC (as he then was) set aside the service of the writ and appropriately observed:

6 …The service of a writ is an exercise in judicial power. The judicial power of a state can only be exercised within the territorial limits of the state over which the courts have jurisdiction…

7 In other words, the judicial power of one state cannot be extended or exercised in another independent state except with the consent of that state. The reason is that it encroaches upon the sovereign rights of the other state…

44 In a nutshell, the first defendant adopted the position that from the express wording of O 11 r 3(2) of the Rules, the court had no jurisdiction to cure the irregularity present here. In the alternative, even if the court had jurisdiction and discretion to cure the irregularity, there must be cogent reasons of an extremely high threshold to do so. In this aspect, the plaintiff had no once of evidence providing reasons why the court should exercise its discretion.

45 In Summons No 4404 of 2003 and Summons No 6259 of 2003, AR Low was addressed on a similar point and she held that "the defect in failing to serve via the proper channel was so

fundamental that [she] should not exercise [her] discretion to cure it in the present case". Mr Shanmugam and Mr Hamid urged the court to take this into account, although they acknowledged that AR Low's decision was not binding on this court.

46 On the other hand, Mr Ng was asking the court to exercise its discretion to cure the irregularity. His principal reason was that the plaintiff has clearly taken all the necessary steps to ensure that the summons was served through the judicial authorities in India. He adopted the case of *Golden Ocean Assurance Ltd and Christopher Julian Martin (the "Goldean Mariner")* [1990] 2 Lloyd's Rep 215 where the English Court of Appeal considered the ambit and operation of the English equivalent of O 2 r 1(1) of the Rules. In this case, each of the defendants was served with a copy of the writ which correctly named them as defendants but which copy was intended for different defendants. The English Court of Appeal held that the failure was to be treated as an irregularity and would not nullify any step taken in the proceedings. Further, there was no evidence that the defendants had suffered any prejudice as a result of the process server's error and the court exercised its discretion against setting aside the service on the defendants.

47 Mr Ng used the *Goldean Mariner* to illustrate the point that although the wrong writ was served on the defendants, it did not detract from the fact that the writs that were served contained the names of all the defendants – *a fortiori* – the defendants were aware that a suit has been commenced against them. He likened the *Goldean Mariner* to the instant case as to how the plaintiff had gone to "extraordinary lengths" and there had been numerous attempts at service. It could not be the case that the defendants were completely oblivious to an action being commenced against them.

48 To my mind, the *Goldean Mariner* is distinguishable from the factual matrix the court is facing here. In that case, the procedural defect in respect of service was that the defendants were served with the wrong writs. In contrast, the situation the court is faced with here is one where the defendant has not been properly served in accordance with the laws of the country where service was effected. The differences in the *extent* of the procedural defects are as diverse as two ends of a spectrum. Further, as Mr Shanmugam rightly pointed out, the *Goldean Mariner* was a case where the procedural rules offered the plaintiffs the choice of serving in accordance with English procedure or with the procedure of the country where service was effected. It was the complete opposite here where O 11 r 4(2) of the Rules clearly stated that the service of the summons in a foreign country must comply with the method of service in that country. In the premises, I find the *Goldean Mariner* inapplicable to the facts present here.

49 Mr Shanmugam relied on *Fortune Hong Kong Trading v Cosco Feoso(s) Pte Ltd* [2000] 2 SLR717 ("*Fortune*') in which the brief facts were as follows. The service of an English writ on a defendant in Singapore was not effected in conformity with O 65 of Rules of Court 1997 but by a private agent by leaving the relevant documents at the registered office of the defendants. I find it useful to set out the pertinent parts of the observations by the Singapore Court of Appeal (at [25]):

> The first thing to note is that both *Sunkyong* and *Chow* involve the *interpretation of the respective provisions governing the service of process out of jurisdiction and they do not concern the interpretation of O 65 or its Malaysian equivalent*. It appears to us that the primary concern of the judges in these cases was that the procedure set out in O 11 prescribing the methods of service of process in a foreign jurisdiction must be strictly adhered to. Understandably, they were sensitive to the possibility that the foreign state might view such a service of process as being an encroachment upon its sovereign rights.
>
> [emphasis added]

50 Although this case accentuated the strict approach taken by our courts in adhering to O 11 of the Rules, in the same way the court in *Fortune* distinguished the *Chow Carl* case as it was premised on O 11, the same could be said for distinguishing *Fortune* on the basis that it centred on a discussion of O 65 of the Rules. However, I was of the view that this approach may well be too technical and there are certain principles in *Fortune* that command a general application.

51 This is a convenient point to add that Mr Ng referred the court to *Pacific Assets Management Ltd and Others v Chen Lip Keong* [2006] 1 SLR 658 ("*Pacific Assets"*), which coincidentally followed Fortune, to contend that a writ was a mere notification tool and the service of our writ abroad did not encroach upon the sovereignty of the country in which the writ was served. He relied on the following observations of Belinda Ang Saw Ean J:

> 21 The Singapore Court of Appeal in *Fortune Hong Kong* ([8] *supra*) dealt with the sovereignty point which was the critical reasoning on which *United Overseas Bank Ltd v Wong Hai Ong* ([19] *supra*) laid stress. As far as Singapore law is concerned, service of process out of the jurisdiction is not an assertion by the court of an extra-territorial jurisdiction for two reasons. First, L P Thean JA, who delivered the judgment of the appellate court, pointed out in [30] that since 1 February 1992, the form of our writ:
>
> > … is no longer structured in the form of a command to the defendant and does not contain any reference to the President of the Republic of Singapore and is not tested or witnessed by the Chief Justice. In its present form, *the writ is more of a notification to the defendant* that an action has been commenced against him in the court in Singapore than a command to him issued by the court. It seems to us that this change in the content of the writ has made it 'compatible with international comity to allow service out of jurisdiction' of the writ: (per the commentary at para 6/1/1C of the 1982 edition of *The Supreme Court Practice*). In its present form, the writ has lost its meaning of a judicial order, and it can hardly be contended that *the service of our writ abroad would interfere with or encroach upon the sovereignty of the country in which the writ is served*.
>
> 22 Second, there are safeguards in the rules against encroachment upon sovereign rights of a foreign country. Where there is no consensual service, service of process is controlled by O 11 of the SRC. For instance, O 11 r 4(2)(*c*) requires service to be in accordance with any method of service authorised by the foreign country's domestic laws for service of its originating process: see Thean JA in *Fortune Hong Kong* at [32].
>
> [emphasis added[

52 I cannot do more than reiterate that a perusal of the observations, in particular, [22], would demonstrate that the finding that the role of a writ was relegated to that of a mere notification device did not displace the stringent condition that O 11 r 4(2)(c) nevertheless had to be met, i.e. "in accordance with any method of service authorised by the foreign country's domestic laws for service of its originating process".

My decision

53 The Singapore Court of Appeal in *Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v QBE Insurance (International) Ltd*[1988] SLR 111 ("*QBE Insurance"*) discussed the limits of the court's discretion in curing irregularity and followed *Leal v Dunlop Bio-processes Ltd* [1984] 2 All ER 207:

22 In *Leal v Dunlop Bio-processes Ltd* [1984] 2 All ER 207, the plaintiff served a writ out of jurisdiction without obtaining the leave of the court. The limitation period had expired but the English Court of Appeal held that the writ could not be renewed. In particular, Stephenson LJ said (at 213):

> …if it is wrong to allow the plaintiff to continue these statute-barred proceedings by extending the validity of his writ under O 6 r 8 to enable the plaintiff to apply to issue a concurrent writ for service out of the jurisdiction under O 6 r 6, it must be wrong to allow him to continue them by giving him leave to serve it out of the jurisdiction under O 11 r 1. Order 2 r 1 should not be invoked to allow either course.

23 In the same case, Slade LJ said, at p 215:

> …it would have been an improper exercise of the registrar's discretion under O 2 r 1, to make good the irregular service of the writ retroactively in this case, where he could not properly have renewed the writ under O 6 r 8. When seeking the indulgence of the court under O 2 r 1, in circumstances such as the present, a plaintiff cannot, in my opinion, expect the court to exercise its discretion more favourably than it would be prepared to exercise it on an application under O 6 r 8. *If he cannot properly enter through the front door of O 6 r 8, he should not be allowed to enter through the back door of O 2 r 1*.

[emphasis added]

54 Further, the Court of Appeal in Malaysia pithily held in *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 that:

> "Even though the court has the widest possible power to do justice, not all irregularities can be cured under O 2 r 1(2). There is *no power to remedy irregularities of a more fundamental kind*. Sometimes the irregularity is so fundamental a defect in procedure that the court is unwilling to exercise the discretion in O 2 r 1(2) to disregard the irregularity. In such a case, the court will decline to exercise its power under r 1(2) to make any dispensing order waiving the irregularity. The power given to the court by O 2 r 1 is a power to cure irregularities consisting of failures to comply with the rules. There is no power to remedy failures of a more fundamental kind."

55 The court proceeded to demonstrate the type of irregularities that constituted fundamental defects which the court had no power to remedy. It cited *The Supreme Court Practice* 1997, Vol 1, para 2/1/1 which read: "If an action is brought by a non-existent company, it must therefore be struck out: except in the case of a mere misnomer, the non-existent plaintiff cannot apply to have another person joined as a co-plaintiff (*Dubai Bank Ltd v Galadari (No 4) The Times*, 23 February 1990)." In addition, the failure to renew a writ for service constitute such a fundamental defect in procedure that the court would not exercise the discretion to disregard it under O 2 r 1(2): *Bernstein v Jackson* [1982] 2 All ER 806.

56 In *Lam Kong Co Ltd v Thong Guan & Co (Pte) Ltd* [1985] 2 MLJ 429 ("*Lam Kong")*, the plaintiff entered a default judgment against the defendant when it failed to enter an appearance, but it acted contrary to the requirements of O 13 r 12 of Rules of the Supreme Court 1957 which was for the action to be set down on a motion for judgment. The Supreme Court of Malaya held that the irregular judgment constituted such a fundamental defect that it was not curable and Abdul Hamid CJ appositely held (at 431):

> It is to be observed that the effect of the rule [O 13 r 12] was to disentitle the respondents from

entering default judgment on a writ specially indorsed for specific performance. They were to proceed in the manner provided by the Rules and that was to set down the action on motion for judgment. It was only on the further step being taken that it was open for the court or judge to consider giving judgment as upon the claim the court or judge should consider the respondents to be entitled. At that point of time, therefore, judgment in default was not only given in breach of r 12 but had resulted in a failure to comply with r 11 of O 27. In the circumstances, we are *constrained to hold that the breach and the non-compliance were not merely irregularities but fundamental defects*. **The fundamental defect was not, in our view, curable as the effect of the breach and non-compliance was to defeat the right of the other party to the action**.

[original emphasis in bold and my emphasis added]

57 I pause here to comment on the legislative intention of O 2 r 1 of the Rules, which is *in pari materia* with O 2 r 1 of the Rules of the High Court 1980. "O 2 r 1 [of the Rules of the High Court 1980] should be applied liberally in order, so far as reasonable and proper, to prevent injustice from being caused to one party by mindless adherence to technicalities in the rules of procedure (Supreme Court Practice 1991 at p 10)": see the Supreme Court of Malaysia decision in *Tan See Yin Vincent v Noone & Co & Anor* [1995] 1 MLJ 705 at 718. In my view, an improper service which does not obey the laws of another country can and shall not be envisaged by the legislature as an irregularity which is curable. In this light, I set out a relevant excerpt from Jeffrey Pinsler, *Singapore Court Practice 2006*, Lexis Nexis: 2006, which reads (at 35-36):

"The improper service of process out of the jurisdiction may deprive the suit of its legal basis, a consequence which the court has shown itself to be disinclined to remedy. In *Ong & Co v Carl YL Chow* [1987] 2 MLJ 430, at 432, Chan Sek Keong JC said that by failing to comply with the pertinent provision, 'the plaintiff has in fact disregarded the legal basis upon which judicial powering Singapore may be exercised in Malaysia. That must render the purported service a nullity."

58 To my mind, the *Chow Carl* case was a case on all fours with the present which also involved the examination of O 11 of the Rules of Supreme Court 1970 ("1970 Rules), in particular, O 11 r 5(2) and O 11 r 6(2) of the 1970 Rules. First, O 11 r 5(2) of the 1970 Rules is now O 11 r 3(2) of the current Rules. Second, O 11 r 6(2) of the 1970 Rules is now O 11 r 4(2) of the current Rules, except that the current O 11 r 4(2) added in one more sub-provision (c), that is, "by a method of service authorised by the law of that country for service of any originating process issued by that country". Although O 11 r 4(2)(c) has been added to the current Rules, it did not change the guiding and unwavering principle of the Singapore courts that the requirement that O 11 of the Rules must be satisfied was the touchstone of proper service out of jurisdiction in Singapore, and I hold that the *Chow Carl* case remains good law in Singapore and is applicable to the present case.

59 Borrowing the words of Abdul Hamid CJ in *Lam Kong*, I hold that the services of the writ on the first and thirteenth defendants, which did not conform to Indian law, defeated the very objective of O 11 and were "not merely irregularities but fundamental defects". Although the effect of the improper service did not serve to defeat the right of the other party to the action as in *Lam Kong*, for the court to condone the non-compliance with not only the laws of India, but our own law under O 11 rr 3(2) and 4(2)(c) will send our civil procedural system into disarray, especially in an era where litigation has adopted an international pedigree and global outlook.

60 Our courts have always adopted a firm policy on international comity. Lai Siu Chiu J expressed this in *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat* [2004] 2 SLR 436 (at [30]): "The doctrine of comity of nations is not something courts in Singapore

should take lightly." In light of the express warning in O 11 r 3(2) and the basic principle of law that service is the legal basis of jurisdiction, I hold that the impropriety in the service of the writ on the first and thirteenth defendant do not fall within the purview of O 2 r 1.The court cannot correct a defect or error which is, to start with, not curable under the Rules. The improper services on the first and thirteenth defendants are tantamount to fundamental defects, cannot be said to be mere irregularities. Since the plaintiff failed to comply with the front door of O 11, it "should not be allowed to enter through the back door of O 2 r 1": *QBE Insurance* at [23].

61 Even if I am wrong and the court has the discretion to invoke its power under O 2 r 1, I do not think it would have been a proper exercise of discretion of the court to treat the service as proper. The plaintiff has not shown the court any good reason why the service ought to be deemed as proper even though the Indian laws were not complied with; there must be an extenuating factor or an extraordinary circumstance warranting and justifying a deviation from a fundamental principle of law. Therefore, it is a matter of principle for me to hold that the defect in the service was so fundamental and serious that the first and third defendants would be prejudiced by the procedural defect inasmuch as this action had *no legal footing* to begin with. To decide otherwise will be to fall freely into what is the anti thesis of the law and to render the strength and foundation of O 11 a paper tiger.

Conclusion

62 The onus of proof was on the plaintiff and I found that based on the specific factual matrix of the case, the plaintiff failed to discharge its case, on a balance of probabilities, that the service processes on the first and thirteenth defendant were proper. Accordingly, I set aside the service of both writs of summons on the first and thirteenth defendants.

63 For both Summons No 5593 of 2006 and Summons No 1775 of 2007, I will grant order in terms for prayer (1). I also order that costs are to be paid by the plaintiff to the first and thirteenth defendants, to be agreed if not taxed. Since I found that the services on the first and thirteenth defendants were not proper, consequently, there is no necessity for me to hear parties on the second issue of *forum non conveniens*, which will arise in future if and when the plaintiff effects proper service in India. The plaintiff is free to re-attempt service on the respective defendants in accordance with Indian law.