Bansal Hermant Govindprasad and Another v Central Bank of India and Another Case [2003] SGCA 3

Case Number : CA 6/2002, Suit 1045/1999, 1046/1999

Decision Date : 18 January 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : N Sreenivasan, Ms Chia See Kim Sharon (Straits Law Practice LLC) for the Appellants; Tan Tuan Meng, Wong Khai Leng (Mallal & Namazie) for the Respondents

Parties : Bansal Hermant Govindprasad; Aneeta Bansal — Central Bank of India

Civil Procedure – Pleadings – Submission of no case to answer – Circumstances where submission of no case to answer will succeed – Appropriate tests applicable to submission of no case to answer

Evidence – Proof of evidence – Onus of proof – Evidence not offered in defence – Burden of proof on plaintiff to discharge

Tort – Conversion – Whether prima facie case of conversion established – Whether respondents had standing to sue – Whether appellants dealt with goods with intention to convert

Trusts – Constructive trusts – Breach of trust – Dishonest assistance in breach of trust – Whether prima facie case of dishonest assistance in breach of trust established

Delivered by Chao Hick Tin JA

1 This was an appeal against the decision of Rajendran J where he decided that the appellants, Hermant Govindprasad Bansal ("Bansal") and his wife, Aneeta Bansal, (hereinafter collectively referred to as "the Bansals") were liable for conversion and for dishonest assistance in breach of trust in connection with certain shipping and related documents belonging to the respondents, the Central Bank of India ("CBI"). Damages were awarded against the Bansals. We heard the appeal on 26 November 2002 and dismissed it. We now give our reasons.

The facts

2 The trial was a consolidation of three suits instituted by CBI against the Bansals and another party, Natsyn Fibres Pte Ltd ("Natsyn"). Natsyn was a company incorporated in Singapore with the Bansals as the only shareholders and directors. The action against Natsyn was not proceeded with because the latter was wound up before the trial began.

3 In 1997, Natsyn purchased certain goods from two Indian companies, Bhagwati Cottons Ltd ('Bhagwati') and GPB Fibres Ltd ("GPB"). Bhagwati and GPB were founded by Bansal's father and were family companies. At all material times, Bansal was a director and held substantial equity interest in both companies.

4 To effect the purchase, Natsyn obtained the issue of a letter of credit from Campagnie Financiere De Cic Et De L'Union Europeene ("CF Bank") and another from Mees Pierson NV, ("Mees Pierson"). Both LCs were governed by the UCP 500 and the credit was available by negotiation. The beneficiaries of the credit were Bhagwati and GPB. For the purpose of the trial, the parties had not differentiated between Bhagwati and GPB. Therefore, hereinafter, reference to "Bhagwati" shall include "GPB".

5 Upon shipment of the goods, Bhagwati presented the requisite documents to CBI for negotiation under the LCs ("LC documents") and was paid. CBI placed its stamp on all the documents. Subsequently, CBI handed the LC documents back to Bhagwati, without having received payment from either Bhagwati or any other party. Eventually, the documents came into the possession of Natsyn, who, without paying for the same, used the documents to obtain delivery of the goods. Thereafter, Natsyn sold the goods to a third party. By the time CBI realised what had happened and sought payment, Natsyn did not have the funds to pay in full. It effected only partial payments leaving outstanding the sums of US$1,190.893.28 and $274,319.04 under the two LCs, which formed the subject matter of the action.

Decision below

6 The action was based on conversion, conspiracy and dishonest assistance to a breach of trust. The trial below ended with the Bansals electing to submit that they had no case to answer. The trial judge, accepted that submission insofar as the claim was based on the tort of conspiracy. In his view, there was simply nothing to indicate any conspiracy as no evidence was presented to show the circumstances under which the LC documents were handed over by CBI to Bhagwati and, in turn, to Natsyn.

7 However, the judge found that there was a *prima facie* case of conversion and dishonest assistance. He based his determination primarily on the fact that CBI were entitled to the documents having paid for them. Natsyn, and in turn the Bansals, would have known that CBI had negotiated the documents as the CBI stamp appeared on all the documents. Ordinarily, the documents would have come through the issuing banks, i.e., CF Bank and Mees Pierson, in exchange for payments by Natsyn. However, Natsyn did not pay for the documents and the Bansals, being the directors in charge of Natsyn, would have known of that. The Bansals, being the mind behind Natsyn, nevertheless used the documents to obtain delivery of the goods and disposed of them.

Appeal

8 In the appeal, the Bansals raised two broad issues. The first was that the trial judge had not applied the correct test in determining whether there was a case to answer. The second was, whether there was sufficient evidence upon which the court could enter judgment in favour of CBI.

9 The Bansals submitted that, in the absence of any evidence to show how, and why, the documents were handed over to Bhagwati, there was no basis to hold that they had committed conversion or rendered dishonest assistance to a breach of trust.

The correct test

10 The trial judge, having noted the views of the authors of the book, *Aronson & Hunter on "Litigation: Evidence and Procedure"* (16th Edn), at p. 732, stated (at ¶21 of his Grounds of Judgment) that –

> "A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story. So long as there is some prima facie evidence that supports the essential limbs of the plaintiff's claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant."

11 Counsel for the Bansals submitted that, in accordance with the views of the Court of Appeal in *Storey v Storey* [1960] 3 All ER 279, there were two different circumstances where a defendant could submit that there was no case to answer and the consequence might not be the same for both circumstances should the submission fail. First, a no case submission could be made on the basis that, accepting the plaintiff's evidence at its face value, no case has been established in law. Second, the submission could be made on the basis that the evidence led for the plaintiff was so unsatisfactory, or unreliable, that the court should find that the burden of proof had not been discharged.

12 We should point out that *Storey v Storey* was examined by the trial judge, but it was distinguished on the ground that there the appellate court was considering the circumstances in which it could nevertheless, in a case where a submission of no case to answer had not been upheld, direct that a new trial be held. In that case, there was an appeal from an order of the Divisional Court directing that there should be a re-hearing of a summons for maintenance issued by the appellant wife against her husband based on persistent cruelty and desertion. The summons was first heard before justices of the peace where the husband elected, in submitting that there was no case for him to answer, that he would not call any evidence. The submission was accepted by the justices and the complaint was dismissed. The wife appealed. Though the Divisional Court thought that the justices were wrong to have accepted the submission of no case to answer, it did not make an order for maintenance in her favour or to have the case remitted to the same justices for further findings of fact. Instead, it ordered a new trial before a fresh panel of justices. Ormerod LJ, delivering the judgment of the court, said (at p. 282):-

> "There can, we think, be no doubt that in the former type of submission a defendant is bound by his election, and there can be no new trial. This rule, in our opinion, however, does not of necessity apply to the second type of case where the judge is invited to dismiss the case because of the unsatisfactory or unreliable nature of the evidence. In some cases it may well be that the appellate court will be able to decide the case without sending it back, but in others,

> and this in our judgment is certainly one, justice could not be done without a re-hearing. …. In our opinion, if the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission."

13 It seemed to us clear that the English Court of Appeal there agreed that there should be a new trial, notwithstanding the election by the husband because, and this seemed to be an important consideration, the case raised a question of status and thereby some public interest was involved. Ormerod LJ said (on the same page):-

> "… .. it is better in matrimonial disputes for the justices to hear both sides before coming to a decision, particularly as a finding by them of desertion or persistent cruelty may form the basis for a subsequent petition for divorce."

14 The trial judge was clearly conscious of the second circumstance under which a submission of no case to answer could be made. He did not rule out that a submission of no case could also be made on that basis, as can be seen from this observation of his (¶25 of his Grounds of Judgment):- -

> "It may be that the view taken by *Aronson and Hunter* was too restrictive and that a submission of no case to meet may also be upheld where the evidence adduced by the plaintiff is so unsatisfactory or unreliable that the court is able to find that the burden of proof on the plaintiff has not been discharged. But that said, I nevertheless consider the summary by Aronson and Hunter a helpful one."

15 The summary of *Aronson and Hunter* that the judge referred to was the passage found at p. 732 of the book:-

> However, if the defence leads no evidence where there is a case to answer, its silence could (depending on the facts) be taken to strengthen the opposing case. In particular, circumstantial evidence which could cut both ways might well look stronger if the defendant or accused is in a position to dispel the doubt, but refuses to go into evidence: *May v O'Sullivan* (1955) 92 CLR 654; and *Weissensteiner v R* (1993) 178 CLR 217."

16 In electing not to adduce any evidence, the submission of the Bansals was that, even accepting the plaintiff's evidence on the face of it, no case had been made out against them. The submission made was not on the basis that the evidence led for the CBI was unsatisfactory or unreliable. This was a submission of no case to answer of the first type enumerated in *Storey v Storey*. Therefore, the trial judge did not apply any wrong test or principle.

***Prima Facie* case**

17 We now turn to consider the second issue as to whether the court below was correct to have ruled that a *prima facie* case had been made out in respect of the claims in conversion and dishonest assistance and given judgment in favour of CBI.

18 CBI called only one witness, Vijay Kumar Bhandari (Bhandari), its General Manager at the head office at Mumbai since 1996. The relevant records of accounts of Bhagwati were maintained at one of CBI branches at Mumbai. Bhandari had no personal knowledge relating to the transactions with Bhagwati and neither did he know why or how the LC documents were released to Bhagwati. He sought to adduce in evidence a pile of documents called "Process Notes", without the maker(s) being called to testify in court. The "Process Notes" were notes kept by officers of CBI of conversations with customers. The trial judge had ruled that those notes were inadmissible as evidence as they did not fall within the exceptions permitted under s 32(b) and s 34 of the Evidence Act.

19 The Bansals argued that, stripped of hearsay and other inadmissible evidence, what Bhandari stated amounted to no more than that CBI negotiated the documents tendered by Bhagwati under the LCs and that CBI obtained possession of the documents. Upon negotiation, the stamp of CBI was also placed on the documents. However, for reasons unknown, CBI passed the documents back to Bhagwati. The documents eventually found their way to Singapore into the hands of Natsyn, which used them to obtain delivery of the goods. On these bare facts, there was nothing to suggest that the Bansals committed the tort of conversion or of knowingly assisting in the commission of a breach of trust.

20 As at the close of the case for CBI, this was the view of the trial judge (¶28 of his Grounds of Judgment) -

> " … there was evidence on which the court could come to the conclusion that the Bansals knew, when they (through Natsyn) dealt with the goods covered by the documents, that the documents were the property of CBI. In proceeding to deal with the goods despite that knowledge, the Bansals could well be liable in conversion and/or as constructive trustees. But, by electing not to testify, the Bansals have elected not to put before the court their explanation of the events that happened. In these circumstances, I can only conclude that they had no defence to these claims."

21 Before us, counsel for the Bansals made the following four points in contending that a *prima facie* case of conversion on the part of the Bansals had not been made out –

> (i) CBI did not have the *locus standi* to sue, as they had not shown that they had actual possession or an immediate right to possession of the LC documents and, in turn, the goods;
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> (ii) that the Bansals did not deal with the LC documents, and the goods; it was the staff of Natsyn who dealt with the documents;

(iii) the Bansals did not know that the documents belonged to CBI; and

(iv) there was no intent to convert since Natsyn subsequently made partial payments.

22 It is clear that conversion may be committed in many ways, the most obvious being to wrongfully take possession, dispose of, or destroy the goods belonging to or in the possession of another. In all cases, the essential element is that of dealing with the goods of another person in such a manner as to constitute an unjustifiable denial of his rights in them or the assertion of rights inconsistent therewith. It is settled law that for a plaintiff to be entitled to sue for conversion he must have actual possession or an immediate right to possession of the goods in question: see *Siew Kong Engineering Works (sued as a firm) v Lian Yit Engineering Sdn Bhd & Anor* [1993] 2 SLR 505, and *Winfield & Jolowicz on Tort (15th Edition)* at 597. This was the very point which the Bansals argued that CBI had not established.

23 The undisputed evidence was that CBI negotiated the LC documents submitted by Bhagwati. This fact of negotiation was indicated by the CBI stamp on each document. Following the negotiation, CBI were entitled to the documents and in turn the goods. Subsequently, the documents were handed by CBI to Bhagwati. There was no evidence as to the reasons for the documents to be handed over to Bhagwati. Neither was there any evidence that Bhagwati, or for that matter any other person, had purchased the documents from CBI. So *prima facie*, notwithstanding that physical possession of the documents was with Bhagwati, ownership of the documents remained with CBI and CBI were entitled to the documents, and in turn the goods. There was nothing to indicate how the documents arrived at Natsyn. But Natsyn did use the documents to obtain delivery of the goods. Again, there was no evidence that Natsyn paid for the documents. On the contrary, after discovery by CBI of what happened, Natsyn made part payments towards the purchase, leaving outstanding the two sums, which were the subject of the present action. Thus, entitlement to the documents had always remained with CBI and they therefore had the right to immediate possession of the documents and, in turn, the goods.

24 Turning to the second point, what must be borne in mind was that the Bansals were the only shareholders and directors of Natsyn. So, they were the ones in charge of Natsyn. Since the Bansals did not come to court to testify, in the absence of any evidence indicating the contrary, it would be reasonable to infer that they had handled the documents that came into the possession of Natsyn and they had directed their staff to obtain or they had by themselves obtained, delivery of the goods with the documents.

25 The third argument concerned the question of knowledge. The Bansals said that they did not know that the documents belonged to CBI. We would make two observations on this. First, it did not matter whether the Bansals knew the documents belonged to CBI. The important thing was that the Bansals knew that the documents did not belong to Natsyn (as Natsyn had not paid for the documents) and nevertheless proceeded to use them to obtain delivery of the goods and dispose of them. By so obtaining and disposing of the goods, the Bansal intended to deny the rights of CBI to the documents. Second, the goods were to be paid for by way of the LCs, and, in the ordinary course of business,

the LC documents would have come to Natsyn through the issuing banks. But here, the Bansals admitted that the documents came from Bhagwati. Putting it at the lowest, the Bansals would have known that Natsyn were not entitled to the documents and in dealing with the documents with such knowledge, they had committed conversion.

26 As for the fourth point, that the Bansals had not intended to convert the goods because Natsyn had made part payments, it must be rejected outright. Making amends, after the commission of a wrong, cannot erase the wrong although it would mitigate the damages payable. In this case, the material time to determine whether the tort of conversion had been committed was when the Bansals, on behalf of Natsyn, obtained the delivery of the goods with the documents.

27 In the premises, all the arguments raised by the Bansals on conversion failed. A *prima facie* case had been made out that the Bansals had dealt with the LC documents in a manner inconsistent with the rights of CBI and were thus liable for conversion.

Constructive trust

28 The judge below also found that the Bansals had dishonestly assisted Bhagwati in committing a breach of trust. The Bansals argued that they had not committed such a wrong. First, there was no evidence of a trust being imposed on Bhagwati when the documents were handed by CBI to Bhagwati. Second, there was also no evidence to implicate them that they had dishonestly assisted Bhagwati to commit a breach of trust.

29 The law on dishonest assistance was recently considered and elucidated by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64 where an airline sought a remedy against a tour agent's principal director and shareholder. The defendant director was held liable for dishonest assistance in respect of a breach of trust committed by his company.

30 For a third party to be liable for dishonest assistance of a breach of trust, there must be first, a trust, second, a breach of the trust, third, assistance rendered by the third party towards the breach, and lastly, the assistance rendered by the third party must be dishonest. What the decision in *Royal Brunei Airlines v Tan* clarified is that in determining such accessory liability, the pre-requisite of dishonesty was to be judged objectively.

31 From the facts which we have set out in ¶23 above, it was clear that when CBI handed the LC documents to Bhagwati, an implied trust arose. This was because the documents belonged to CBI and there was no evidence that Bhagwati, or any third party, had paid CBI for the documents. *Prima facie*, a resulting trust arose in favour of CBI.

32 The next point is that when Bhagwati, without authority, passed the documents to Natsyn in Singapore, Bhagwati was acting in breach of trust, and as Natsyn had not paid for them, Natsyn would, in turn, be holding the documents as trustees for the rightful owner, CBI. In obtaining delivery of the goods by using the documents and then disposing of them, Natsyn had accordingly committed a breach of trust.

33 As mentioned above, the Bansals were in complete charge of Natsyn. *Prima facie*, and in the absence of evidence to the contrary, it would be reasonable to infer that they were behind the actions of Natsyn and, were thus, accessories to the breach committed by Natsyn.

34 The main point of contention of the Bansals before us was that they had not dishonestly assisted Bhagwati in committing any breach of trust. They said that they had no knowledge of how the documents came into the hands of Bhagwati and neither was there any evidence that they have had a hand in transmitting the documents to Natsyn. That would appear to be so. But when Natsyn came into possession of the documents knowing full well that it had not paid for them, an implied trust arose in favour of the rightful owner. In using the documents to obtain the goods, the Bansals were thus guilty of assisting Natsyn in committing a breach of trust. In the circumstances of this case, the assistance rendered by the Bansals to Natsyn was clearly dishonest. Here, we would quote a passage from *Royal Brunei Airlines v Tan* where the Privy Council stated (at p.74-75):-

> "Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.
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> Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence and the reason why he acted as he did."

35 Natsyn had arranged for the goods to be paid by LCs. The Bansals, being experienced business persons in international trade, would have known that in the normal course of business, the LC documents would have come to them through the issuing banks, who would expect payment before the documents would be released to Natsyn. Natsyn had not paid for the documents and yet the Bansals proceeded to obtain delivery of the goods with the documents. They would have seen the

CBI stamp on the documents. They were clearly not entitled to the documents until they paid for them. They would have known that something was amiss. There was no evidence that they made any inquiries. An honest person in similar circumstances would have made an effort to establish how the documents could have come into his possession when no payment had yet been made. In our opinion, in the absence of any explanation offered, it would be reasonable to infer that the Bansals had acted dishonestly.

36 In our judgment, CBI had established a *prima facie* case that the Bansals had committed the wrong of dishonest assistance. It would be seen that the only aspect on which we differed from the trial judge is that we were of the opinion that the dishonest assistance rendered by the Bansals was not in relation to the breach of trust by Bhagwati but by Natsyn. This was because there was nothing to indicate that the Bansals had a hand in the breach committed by Bhagwati.

37 Accordingly, the appeal of the Bansals must fail.