Les Placements Germain Gauthier Inc v Hong Pian Tee
[2001] SGHC 185

Case Number : Suit 229/2000, RA 54/2001, 82/2001

Decision Date : 17 July 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Murugaiyan Sivakumar and Parveen Kaur Nagpal (Azman Soh & Murugaiyan) for the plaintiff; Manjit Singh and Sree Govind Menon (Manjit & Partners) for the defendant

Parties : Les Placements Germain Gauthier Inc — Hong Pian Tee

Civil Procedure – Striking out – Statement of claim – No reasonable cause of action disclosed

Civil Procedure – Summary judgment – Unconditional leave to defend – Whether leave can be implied – Whether issue of summary judgment decided previously – Whether plaintiff entitled to appeal against order granting unconditional leave to defend

Conflict of Laws – Foreign judgments – Enforcement – Inapplicability of enforcement of foreign judgment statues – Whether plaintiff entitled to sue on foreign judgment alone – Conclusive effect of foreign judgment

Judgment:

1. There were two appeals before me from decisions of the assistant registrar below. The first was an appeal by the defendant against the dismissal of his application to strike out the plaintiff's claim. The second was an appeal by the plaintiff against the assistant registrar's order granting unconditional leave to the defendant to defend.The facts and issues were enmeshed and, consequently, the appeals were dealt with conveniently, at the same time.

2. The plaintiff is a Canadian registered company. Germain Gauthier was a shareholder and director of the plaintiff company. On 25 April 1995 the plaintiff loaned a sum of C$350,000 to a Singapore company called Wiraco in which Germain Gauthier's son, Pierre, was a shareholder and director. The defendant's wife was also a shareholder and director of Wiraco. One month prior to the loan the defendant signed a letter (dated 20 March 1995) addressed to Germain Gauthier stating that:

> "In consideration of your agreement to extend a loan of C$350,000 to WIRACO, I Hong Pian Tee (hereinafter known as "P.T.Hong") I/C No: 0274819/C of 48 Leedon Road, Singapore 1026, hereby irrevocably guarantee the due payment of the said sum of C$350,000 upon expiry of 24 months from the date of the loan.
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> Though I am surety only for WIRACO yet as between us, I shall be deemed to be the principal debtor for the monies extended by you, the payment of which is hereby guaranteed and accordingly, I confirm that my obligation shall not be affected or diminished in any way by any act or omission by WIRACO."

3. When the Wiraco did not make payment the plaintiff sued the defendant in the Superior Court of Montreal in Canada to recover the debt. The defendant challenged the jurisdiction of that court but his challenge was dismissed. There was no appeal against that order by the defendant. After a three-day trial in which the defendant appeared and contested the claim, the court found in favour of the plaintiff and granted judgment in its favour. The defendant appealed, but was unsuccessful.

4. The enforcement of foreign judgment statutes in Singapore are inapplicable to the present case because the Canadian court was not a scheduled court under our legislation concerning the enforcement of foreign judgments. The plaintiff was therefore, obliged to commence a writ action against the defendant based on the Canadian judgment for the purposes of enforcement. Having done so, it applied for a summary judgment. Assistant registrar Vivian Wong, allowed the application and gave judgment against the defendant. The appeal by the defendant went before a judge in chambers on 29 August 2000. There is no record of any argument before the court, but the orders of the court were, however, extracted by the defendant and reads as follows:

> "1. The judgment of the learned assistant registrar Ms. Vivian Wong given on 14 August 2000 be set aside/reversed with no order as to costs.
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> 2. Leave be granted to the Plaintiffs to amend their Statement of Claim and to file a fresh Order 14 application.
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> 3. The Defendant undertakes not to object to the Plaintiffs' fresh Order 14 application, save on merits.
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> 4. By consent, there be no order as to costs on the amendments to the Statement of Claim."

There is a minor oddity of no great significance but it ought to be mentioned nonetheless. The first order of the judge was minuted as "The judgment of the learned assistant registrar Ms. Vivian Wong given on 14 August 2000 be set aside with no order as to costs." However, the extracted copy approved by both parties included the word "reversed" as an alternative, and appearing next to the words "set aside".

5. Mr. Sivakumar, counsel for the plaintiff, stated that counsel for the defendant began his submission by saying that a letter of guarantee dated 20 March 1995 was not pleaded and therefore the claim was inadequate. The judge then made the above orders after suggesting to Mr. Sivakumar that the plaintiff amends its statement of claim by setting out the underlying contract and not merely relying on having obtained the Canadian judgment. The plaintiff subsequently did so, and consequently, filed a fresh application for summary judgment. The hearing before the judge in chambers on 29 August 2000 is relevant because an issue arose as to whether the plaintiff is precluded from relying on the Canadian judgment in its appeal before me. Counsel for the defendant, Mr. Manjit Singh submitted that when a judge had already adjudicated and reversed an order for summary judgment made by an assistant registrar no appeal is permissible under the Supreme Court of Judicature Act. I shall revert to this submission shortly.

6. In the meantime, on 29 January 2001, the defendant applied before assistant registrar Tan Boon Heng to strike out the amended claim on the ground that it disclosed no cause of action. The defendant's case was that the letter of guarantee of 20 March 1995 was issued by the defendant to Germain Gauthier and not the plaintiff. Mr. Sivakumar then successfully applied to adjourn the striking out hearing and obtained leave to make further amendments the statement of claim. This time, the plaintiff amended the claim to include the reference to a loan document dated 25 April 1995 which was not referred to in this suit, but was the subject matter of the trial in Canada.

7. The application to strike out was reinstated for hearing after the amendments were made. The striking out and order 14 applications were heard by the assistant registrar Toh Han Li who dismissed the defendant's application to strike out. AR Toh who also dismissed the plaintiff's application for summary judgment and granted unconditional leave to the defendant to defend. The appeals before

me concern the abovesaid decisions of the assistant registrar Toh.

8. Mr. Manjit Singh submitted before me that the re-amended statement of claim still discloses no cause of action because there was no privity of contract between the plaintiff and the defendant. The loan document of 25 April 1995 was signed by the plaintiff as the lender, WIRACO as the borrower, and the defendant described only as "a private individual". For the reasons appearing below I do not consider this argument as having any significance, but in any event, clause 3 of the agreement provided as follows:

> "3. The Borrower hereby represents and warrants as follows:
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> > (c) if the Borrower is unable to fulfil all or part of its obligations towards the Lender, the obligations relating to this loan shall be fully guaranteed and assumed by [the defendant] … as evidenced in a deed of obligation signed by [the defendant] on March 20, 1995 with respect to the loan to be granted, a copy whereof is annexed hereto as Schedule 'B'."

There was no dispute that the defendant was a signatory to the 25 April 1995 loan agreement.

9. I shall put aside for the time being the point that this was an action on a foreign judgment and that the plaintiff was suing on the judgment itself. In my view, even if the plaintiff was suing on the original cause of action the pleadings do disclose a reasonable cause of action. On the material before me, I am of the view that the pleadings should not be disturbed by the court at this stage. Both parties must be entitled to test the issue of whether there was any liability by the defendant to the plaintiff arising from the documents cited in the statement of claim. Therefore, whether there was privity of contract is a substantive defence and if pleaded, is a matter for trial. Thus, the defendant's appeal against the assistant registrar's dismissal of the striking out application by the defendant fails and is therefore dismissed. My decision in respect of this appeal will, however, be of no practical importance in view of my decision in respect of the plaintiff's appeal.

10. I now turn to Mr. Sivakumar's appeal against the assistant registrar's order granting unconditional leave to the defendant to defend. If counsel relied on the case as amended then it must follow, from my decision above (that there are sufficiently pleaded issues for trial), that the plaintiff's appeal must also be dismissed. However, Mr. Sivakumar sought to advance the argument that the plaintiff is entitled to rely solely on the Canadian judgment. Mr. Manjit challenged its right to do so because he said that that argument was the only one available to the plaintiff in its first application for summary judgment. On the strength of that argument, the assistant registrar Wong granted judgment, but that judgment, Mr. Manjit pointed out, was "set aside/reversed" by the judge in chambers.

11. Mr. Manjit objected to this appeal before me on the ground that this issue was closed on 29 August 2000 when the judge "set aside/reversed" the assistant registrar Wong's summary judgment. Mr. Sivakumar's point before me was that the judge did not hear his submission on the issue and therefore I am free to consider it afresh. Mr. Manjit conceded that at the hearing before the judge in chambers Mr. Sivakumar did not present his submission, but he argued that nonetheless, technically, there is an order reversing an order for summary judgment and, it must follow that unconditional leave to defend must have been given implicitly even though the orders of court did not explicitly say so. Counsel's argument was that as a court of co-ordinate jurisdiction, I cannot overrule the previous decision, and there being no right of appeal against an order granting unconditional leave to defend, the plaintiff's appeal must necessarily be dismissed. Ordinarily, that must be correct; but this case is

unusual. First, the plaintiff's counsel did not present his arguments through no fault of his. Secondly, there was no specific order that there be unconditional leave to defend. Such leave cannot be implied in this case not only on account of the foregoing point, but also because the judge specifically granted leave to the plaintiff to amend its pleadings (I note counsel's point that he did not make an application to amend) and file a fresh application for summary judgment to which it was recorded that the defendant undertakes not to object. These two further orders must be taken into consideration because, ordinarily, if a summary judgment is set aside, no further orders would be necessary other than ancillary orders such as the granting of conditional or unconditional leave to defend. In either case, there would be no necessity to grant leave to amend the pleadings or to file a fresh summary judgment application. A plaintiff who desires to amend his pleadings is always entitled to make the necessary application to do so. In this case, the plaintiff did not think it necessary to make any amendment and so it seems to me, therefore, unfair if it was to be denied the opportunity of presenting its argument based on the Canadian judgment just because it was directed to amend some other parts of its claim. The plaintiff was entitled at law to present its argument twice – once before an assistant registrar and once before a judge in chambers. It had only one shot thus far.

12. Mr. Manjit also submitted that the effect of the judge's order "setting aside/reversing" the assistant registrar's order granting summary judgment is that the defendant must have been given unconditional leave to defend since in setting aside the order no conditions were imposed. That there can be no appeal against a judge's decision granting unconditional leave to defend is a statutory provision under the Supreme Court of Judicature Act. I accept that there is no exception to that provision; and I cannot even invoke any inherent powers of the court in aid. And yet, there is every compelling reason why the plaintiff must be permitted to raise the argument it did not raise before at this level, that is, before a judge in chambers (through no fault of his). Without guidance from any notes of arguments or the reasons for the decision, and there being no specific order granting unconditional leave to defend, I find myself hearing the case afresh, unencumbered, and unhindered.

13. I now come to the gravamen of the plaintiff's application for summary judgment, and that is whether the plaintiff is entitled to judgment on the strength of the Canadian judgment. Mr. Manjit argued that the plaintiff is not entitled to judgment here unless the "underlying basis" of the foreign judgment is pleaded and tried in the Singapore courts. He submitted that neither the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA") Ch. 264 nor the Reciprocal Enforcement of Foreign Judgments Act ("REFJA") Ch. 265 applied in this case so as to enable the plaintiff to merely register its Canadian judgment. Mr. Sivakumar disagrees. Mr. Manjit further submitted that when a foreign judgment is not registrable under either of the above statutes they cannot rely on the benefit of the "conclusive effect" provisions. It is, however, in my judgment, too vast a leap to say that it thus follows that the plaintiff with a foreign judgment in hand must re-litigate all over again in Singapore. The law in this regard is straightforward and I need only recite 1007 of Halsbury's Laws of England, vol. 8, 4th edition to emphasize the point:

> "1007. Foreign judgment generally conclusive. Subject to certain exceptions, a judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on their merits is conclusive in England between parties and privies as to any issue upon which it adjudicates. It is not impeachable or examinable on the merits, whether for error of fact or of law.
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> It has, however, been held that a foreign judgment will not be recognised if it shows on its fact a perverse and deliberate refusal to apply generally accepted doctrines of private international law. In the interest of international comity English courts will recognise the validity of the decisions of foreign arbitration tribunals whose competence is derived from international law or practice.

> Although every presumption is to be made in favour of a foreign judgment, and the burden of proof lies on the party who seeks to impeach it, such a judgment may be impeached on the ground that it was obtained by fraud, or that its recognition or enforcement would be contrary to public policy, or that it was obtained in proceedings which were contrary to natural or substantial justice."

In this case, the defendant not only challenged the jurisdiction of the Canadian court (in Canada) but also the correctness of the Canadian trial judge's decision by filing an appeal that was duly heard and dismissed. The defendant was also represented by counsel in the Canadian proceedings. There is therefore no ground for the courts here to re-hear the case on its merits (which is what Mr. Manjit is saying we ought to do). It is pointless, therefore, to plead the underlying cause of action in this suit because that is only relevant for the purpose of determining the issues for trial, which, in this case, is unwarranted as the only issue is whether the judgment in Canada was properly obtained. I set out the exposition of law from Halsbury's Laws of England because it represents the position of the common law in respect of the rules of private international law concerning the enforcement of foreign judgments. If litigants here expect that a judgment of the Singapore courts on the merits will be respected in a foreign jurisdiction that abides by the rules of private international law that I referred to above (or similar rules) then the courts here ought to do likewise. The position that Mr. Sivakumar takes which finds my approval is not a novel one. It is well defined and based on time-honoured affirmation in cases such as *Ralli v Anguilla* [1915-1923] XV SSLR 33 where the principle that a foreign judgment creates a new and independent obligation distinct from that of the underlying or original cause of action is reiterated. In this instance, the plaintiff is suing on a debt – a judgment debt. Correspondingly, the defence will have to be based on the premise that there was no such debt, as for instance, the judgment was in respect of some other defendant, or was falsely obtained. To say that there is no debt because the foreign court would not have created that debt had the merits been properly argued or that the court of this forum would have decided otherwise is untenable because that is a defence on the merits of the original cause of action. If the original cause of action has not merged with the judgment the courts would allow the plaintiff to sue in the alternative but if it had, suing on the judgment done is sufficient.

14. Mr. Manjit raised the point that the Canadian judgment was improperly obtained because of the fraudulent conduct of the plaintiff in failing to disclose to the Canadian court that the letter of 20 March 1995 was addressed to Germain Gautier and not the plaintiff. However, as I had noted above, the text of that letter was incorporated into the loan agreement and signed there by the defendant. The more important point, however, is that this issue ought to have been raised at the Canadian trial. Mr. Sivakumar submitted that it was, in fact, there raised, but even if it was not, a Singapore court is not the proper place to raise it. I agree with him. It is inappropriate for either party to have a second opportunity to re-litigate the Canadian action here. Thus, for these reasons the authorities, including some of my own decisions such as *Commerzbank Aktiengesellschaft v Lim Kee Ban Heng Pte Ltd*, unreported, cited by Mr. Manjit for the proposition that no evidence is admissible to contradict the letter of guarantee, are not relevant in this appeal before me.

15. Accordingly, the plaintiff's appeal is allowed with costs. There will therefore be judgment for the plaintiff as claimed.

Sgd:

Choo Han Teck

Judicial Commissioner