Lim Eng Beng @ Lim Jia Le v Siow Soon Kim and Others (No 2)
[2003] SGHC 151

Case Number : Suit 140/2002, SIC 2984/2003

Decision Date : 17 July 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : A Rajandran (A Rajandran, Joseph & Nayar) for the plaintiff; Harbajan Singh (Daisy Yeo & Co) for both defendants; Ronald Lee (Daisy Yeo & Co) for both defendants

Parties : Lim Eng Beng @ Lim Jia Le — Siow Soon Kim; Chua Beng Guek; Siow Soon Geok; Siow Soon Lye; Kim Meng Supplier; S S Kim Enterprises Pte Ltd; ASD Trading Pte Ltd

1 This is an application for a stay of execution by the defendants against an order made by me on 29 April 2003, under which the defendants were, amongst other things, required to pay a sum of $221,894.75 and deliver up documents and materials to the plaintiff within three weeks from the date of the said order for the purposes of the accounts and inquiries to be held pursuant to the said order. The defendants did not pay the sum ordered, nor did they deliver up the requisite documents within the prescribed time or at all. Instead, on 19 May 2003, they applied to the court for a stay of execution of the judgment, pending the determination of their appeal.

2 The application came up for hearing before me first on 4 June 2003. The plaintiff's counsel resisted the application, stating that the defendants had no valid grounds for the stay and the first defendant's affidavit filed in support of the application singularly omitted to show any special circumstances that would justify the grant of such a stay. Realising the vulnerability, defendants' counsel then applied to the court and was granted permission to file a further affidavit, to apply, this time, for an extension of time to comply with the orders made. The application was then adjourned to a date to be fixed.

3 On 5 June 2003, the first defendant filed a further affidavit. In this affidavit, he requested the court to grant him an extension of eight weeks from 5 June 2003 to provide and deliver up the documents. As regards the payment of the sum of $221,894.75, he said that the defendants did not have, at present, the requisite funds to pay the sum since they had already posted a banker's guarantee for a sum of $900,000 in relation to the plaintiff's claim and recourse can be had to it, if the court so ordered. The first defendant filed a further affidavit on 15 July 2003. There was nothing much in it. The application came up for further hearing before me on 16 July 2003. After hearing arguments, I ordered that the defendants be given an extension of eight weeks from 5 June 2003 to comply with the order concerning the delivery and production of documents. As regards the payment of $221,894.75, the court was informed that this sum had, since the last adjournment, been paid by the defendants to the plaintiff. My reasons now follow.

4 The background facts in relation to the present application are fully set out in my grounds of decision delivered on 9 July 2003. Briefly stated, the plaintiff, Lim Eng Beng and the first defendant, Siow Soon Kim, registered a partnership firm known as Kim Meng Supplier, the fifth defendant in Singapore on 25 April 1985. The firm was engaged in the business of supplying an assortment of frozen food and provisions to restaurants and enterprises. The firm admittedly prospered and, in due course, its composition changed. Unfortunately, events took a turn for the worse and the plaintiff left the partnership on or about 18 July 2001, following a disagreement with the first defendant. According to the plaintiff, the first defendant and his cronies in the firm had concealed from him a large chunk of revenue generated by the partnership from cash sales and diverted it for the use of the first

defendant and his accomplices in derogation of the interests of the plaintiff.

5 In the action commenced by the plaintiff against the first and six other defendants, the former claimed damages as well as for accounts and inquiries in respect of monies concealed from him. The plaintiff's claim was that that at the time he left the partnership, there were only three partners, namely, himself, the first defendant and the third defendant and consequently, he was entitled to one-third of whatever sums held presently by the defendants from the partnership assets. The defendants, by their joint defence, denied that the plaintiff was entitled to any relief at all. There was also an averment by the defendants that there were altogether five partners that included the second as well as the fourth defendant in addition to the three mentioned by the plaintiff.

6 At the hearing, the plaintiff testified on his behalf and called three others to support his claim, including a chartered accountant who is presently a member of the academic staff of the accounting and finance department of the National University of Singapore's Business School, to comment on the accounts of the partnership from documents seized from the defendant's premises. The expert's testimony was that the records of the partnership revealed an understatement of sales in the region of S$7.8 million. Strangely, however, when it was the turn of the defendants to open their case, defendants' counsel, after conferring with his clients, informed the Court that his instructions were that his clients had elected not to offer evidence on their behalf. In the end, he said that his clients were fully aware of the implications of their choice. He then proceeded to make a submission of 'no case'.

7 His submission of 'no case', in sum, was that the Court should disregard the evidence of the expert and the CD-Rom which was produced at the trial on behalf of the plaintiff, which contained data retrieved from the computer of the defendants, in the course of the execution of an Anton Piller Order granted by the Court. In addition, counsel for the defendants also argued that inasmuch as the plaintiff was privy to a scheme by the first defendant to evade income tax payable in respect of a portion of the parnership's profits, his claim had been tainted with illegality and the Court should not entertain his claim.

8 Having considered the closing speeches of both counsel, I was led to the conclusion that the submission of no case by the defendants was not only premature but also lacked substance. I considered the defendants' move as nothing but a calculated ploy to escape cross-examination of their so called defence and several claims contained in their putative affidavits of evidence-in-chief. In the end, I held as, in ***Central Bank of India v Hemant Govindprasad Bansal*** [2002] 3 SLR 190 at 196, that a decision by the defendant not to adduce evidence in his defence should not be taken lightly and that so long as there was some prima facie evidence that supported the essential limbs of the plaintiff's claim, failure by the defendant to adduce evidence on his behalf would be fatal to the defendant. As regards the illegality point raised by the defence, I held that the plaintiff's somewhat foolish acquiescence to go along with a scheme contrived by first defendant to evade tax did not prevent the plaintiff from recovering his proprietary interests and shares in the partnership. In this, I was fortified by the opinions expressed in the English cases of ***Bowmakers Ltd v Barnet Instruments Ltd*** [1944] 2 All ER 579 (CA), ***Tinsley v Milligan*** [1993] 3 All ER 65 (HL); and ***Nelson v Nelson*** (1995) 184 CLR 538 read with ***Euro-Diam Ltd v Bathhurst*** [1988] 2 All ER 23 at 28-29.

9 In the result, taking into account (a) the election by the defendants not to come forward to give evidence at the trial; (b) the evidence proffered by and on behalf of the plaintiff which remained unrebutted and uncontroverted; (c) the admission by defendants' counsel that a sum of $221,894.75 was still due and owing from the fifth defendant to the plaintiff; (d) and a further admission by the same counsel that it would be proper and just for the Court to order accounts and inquiries, I granted the following orders in favour of the plaintiff:

(a) A declaration that the plaintiff's share in the assets of the fifth defendant is one-third up to the time the plaintiff withdrew from the partnership ie, 18 July 2001;

(b) An order that damages be assessed by the registrar, in respect of the plaintiff's losses, which shall be limited to the plaintiff's entitlement from the declared as well as the hitherto concealed funds and assets of the fifth defendant. There shall be an order for accounts and inquiries to trace and recover the assets referred to above, before the registrar;

(c) An order that the defendants do render an account to the plaintiff, of all sums of monies, both accrued and receivable, and belonging to the fifth defendant up to 18 July 2001 and the defendants shall make available to the plaintiff within three weeks from the date of this order, all the accounting records, bank accounts as well as documents relating to the disposition of the assets of the fifth defendant;

(d) An order that the defendants do render an account to the plaintiff of how the defendants had used, employed and/or disposed of the profits and receipts of the fifth defendant. They shall also in this regard make full and frank disclosure of all properties and assets acquired by them either in their individual names or otherwise using or employing funds channelled from the fifth defendant;

(e) An order that the defendants shall deliver up within three weeks from the date of this order, all documents and materials which are in the possession, power, custody or control of the defendants or any of them, pertaining to the business and bank records of the fifth defendant as well as the other defendants, insofar as they are relevant to the present proceedings;

(f) An order for payment by the defendants to the plaintiff, of all monies found to be due and owing to him on the taking of such accounts on the basis that the plaintiff is a one-third partner of the fifth defendant. Pending inquiry, the defendants shall pay the plaintiff a sum of S$221,894.75, within three weeks from the date of this order as admitted to be owing to him in part settlement;

(g) An injunction restraining the defendants and each of them by themselves, their servants or agents or otherwise from dealing with their assets, bank accounts and investments pending the conclusion of the accounts and inquiries, unless sufficient security is provided or until further order;

(h) Costs of this action up to this stage be taxed and be paid by the defendants to the plaintiff; if not agreed. Costs in relation to the taking of accounts and the issue as to interest be reserved to the registrar conducting inquiries and taking accounts; and

(i) There shall be liberty to apply.

10 As stated earlier, the defendants, after filing their notice of appeal, had taken out the present application for a stay of execution pending appeal. In this connection, it should be observed presently that the modern approach in relation to stay of execution pending appeal are set out by Staughton LJ in ***Linotype-Hell Finance Ltd v Baker*** [1992] 4 All ER 887 at 888 as follows:

> In the *Supreme Court Practice* 1991 vol 1, para 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an

appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in *The Supreme Court Practice* from *Atkins v Great Western Rly Co* (1886) 2 TLR 400, 'As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds', seems to be far too stringent a test today.

11 The foregoing view has been consistently adopted and applied, over the years, by the courts in Singapore and elsewhere. (See ***United Malayan Banking Corporation Bhd v Lim Kang and Anor*** (Suit No 93 of 1998 – unreported) and ***Tokuhon (Private) Limited (No 2) v Seow Kang Hong and Others*** [2003] SGHC 121 – yet to be reported).

12 In relation to the present application, the affidavit filed in support by the first defendant seemed to be dwelling only on the admission of the CD-Rom and matters connected with it. His criticism was that some segments of the evidence were wrongly admitted. The affidavit, however, was curiously silent as to the defendants' prospects of success at the appeals and did not set out any special circumstances, justifying a decision to suspend the rights of the successful plaintiff under the orders made by the Court on 29 April 2003.

13 In ***Lee Kuan Yew v JB Jeyaretnam*** [1990] SLR 740 (followed in ***Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd*** [2000] 1 SLR 701), it was stated that the court should not deprive a successful party of the fruits of his victory pending appeal, unless the unsuccessful party can show some special circumstances to justify the granting of a stay.

14 In my view, the defendants were at all times seen to be engaging themselves in a time-wasting exercise in relation to the delivery of documents to facilitate the accounts and inquiries, which their counsel himself conceded was the proper course to follow. However, the current request to have an extension of time to comply with the order concerning the delivery and production of documents was found by me within the realm of reason and, consequently, I granted the extension requested.

15 As regards the payment of the sum of $221,894.75, since this sum had already been paid, there was nothing further to be said on this.

16 After hearing counsel for both parties, I further ordered that the costs of this application be fixed at $1,500 payable by the defendants to the plaintiff.