Diva XL Pte Ltd v Goenka Mahesh Kumar
[2004] SGHC 143

Case Number : Suit 578/2003

Decision Date : 30 June 2004

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Goh Peng Fong (Rodyk and Davidson) for plaintiff; S Karthikeyan (Karthikeyan and Co) for defendant

Parties : Diva XL Pte Ltd — Goenka Mahesh Kumar

Tort – Conversion – Whether defendant converted moneys to own use

Tort – Inducement of breach of contract – Whether defendant conspired to cause moneys paid to company to be paid to himself and company to thereafter refuse performance on ground of non-payment

30 June 2004

MPH Rubin J:

Introduction

1 This action, which was heard by me on 15 March and 12 May 2004, is a sequel to an earlier High Court action in Suit No 929 of 2002. The earlier action was heard and determined by Choo Han Teck J in favour of the plaintiff, Diva XL Pte Ltd ("Diva"), against a Singapore-incorporated company known as Lalasis Trading Pte Ltd ("Lalasis"), in April 2003: see [2003] SGHC 97.

2 Both proceedings arose from the same set of circumstances and were instituted by the same plaintiff, Diva. The defendant in the earlier suit was Lalasis. In the action before me, the defendant is one Goenka Mahesh Kumar ("Goenka") who is the managing director as well as the substantial shareholder of Lalasis. The records placed before me showed that he holds 999,999 out of the 1,167,200 shares issued by Lalasis and the remaining 167,201 shares are registered in his wife's name.

3 In the earlier suit, Diva's claim against Lalasis was for the refund of moneys paid as deposits by Diva to Lalasis in respect of two contracts for the purchase of a product described as "Pentium P4 CPU" ("CPUs") by Diva from Lalasis. There was also a claim by Diva against Lalasis for damages for breach of contract.

4 In the event, Choo J awarded judgment in favour of Diva for a sum of $384,930 representing the deposits and damages in the sums of US$43,200 and $100. The facts that gave rise to the proceedings before Choo J are comprehensively set out in the judgment delivered by him on 25 April 2003. The background facts pertaining to both actions can be summarised as follows.

Background facts

5 Diva is a Singapore company engaged in the business of wholesale trading, importing and exporting of electronics and computer parts. Lalasis is a Singapore company engaged in the business of selling electronics and computer parts.

6 Diva entered into two contracts to purchase CPUs from Lalasis. Diva paid $950,000 in respect of the first contract (in two tranches – $100,000 on 11 June 2002 and $850,000 on 12 June 2002)

and another sum of $250,000 in respect of the second contract.

7 Had Lalasis performed the two contracts, a balance of $87,204.85 would have been payable to Lalasis by Diva in connection with the first contract and a sum of $692,796.80 in relation to the second contract.

8 Lalasis only delivered 2,000 CPUs out of the total of 3,000 CPUs on the first contract and delivered none of the 2,880 CPUs under the second contract. Lalasis, however, refunded $100,000 and US$15,000 (equivalent to S$26,400) to Diva, leaving a net balance of $382,130.10.

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9 Following the short delivery of the goods, Diva brought an action against Lalasis for the refund of a sum of $382,130.10. It also claimed US$4,000.00 as damages for loss of profit on the first contract, US$43,200.00 as damages for loss of profit on the second contract, interest and costs. The action was tried in the High Court before the Choo J from 14 to 16 April 2003.

10 Lalasis denied owing Diva the amounts claimed. Its defence was as follows:

(a) There was an inter-linked relationship between one Zirco International and Lalasis (both businesses were substantially owned and controlled by Goenka).

(b) Zirco International had done business with a Singapore company called Fifth Avenue Electronics Pte Ltd ("Fifth Avenue"). The principal person who ran the business for Fifth Avenue was one Rajesh Kumar Jain ("Kumar").

(c) As a result of some business dealings, Kumar's Fifth Avenue business owed Zirco International $348,988.20 as at 31 December 2000. Kumar agreed to pay off his debt in the near future.

(d) Later, Kumar approached Lalasis on a business deal to purchase CPUs. Goenka insisted that Kumar settle his debts (*ie*, the outstanding accounts with Zirco International) before Lalasis would agree to enter into fresh deals with Kumar. Kumar agreed to do so.

(e) Kumar paid $950,000 ($100,000 on 11 June 2002 and $850,000 on 12 June 2002) to Lalasis against which Lalasis set off $348,988.20 for the debt owed by Kumar. The remaining sum was taken as advance payment for the CPUs which Diva had contracted for as a result of which Diva had short paid Lalasis and was in breach of the two contracts.

11 In the event, Choo J did not accept Lalasis' account of the events or, for that matter, that of Goenka and gave judgment in favour of Diva in the sums of $384,930 and damages of US$43,200 and $100.

12 Following the judgment, Diva's attempts to receive payment on the judgment from Lalasis were to no avail. Having failed to obtain satisfaction through garnishee proceedings as well as judgment summons, Diva commenced the present action against Goenka.

The present action

13 Diva's present action against Goenka is founded in tort – conspiracy and alternatively conversion. After stating the background, Diva averred in paras 11 to 15 of its statement of claim as

follows:

> 11. The Defendant knew of the First and Second Contracts and their essential terms, having negotiated the same on behalf of Lalasis.
>
> 12. The Defendant caused, induced or procured the breaches of the First and Second Contracts pleaded by paragraphs 6 and 9 above. The Defendant caused the sum of $348,988.20 of the monies paid by the Plaintiff to Lalasis to be applied to his account and for his benefit by way of a purported discharge of debt allegedly owed by a company called 5th Avenue Pte Ltd to himself trading as Zirco International, and thereafter caused Lalasis to refuse further performance of the First and Second Contracts on the ground that it had not been paid by the Plaintiff.
>
> 13. The Plaintiff commenced action against Lalasis and judgment was given against Lalasis on 25 April 2003 in the sums of $384,930 and damages of US$43,200 and $100. This judgment has not been appealed against. Interest and costs were awarded against Lalasis on 9 May 2003.
>
> 14. By reason of the matters pleaded by paragraph 12, the Plaintiff has suffered loss and damage, namely in the sums of $384,930 and US$43,200 and $100. The Plaintiff will give credit for such sums as may be received from Lalasis in payment of these sums.
>
> 15. Further or alternatively, the Defendant converted the sum of $384,930 to his use, alternatively was a party to conversion of the same by Lalasis and is liable to the Plaintiff for the same in the tort of conversion or for money had and received to his use.

14 Goenka denied Diva's claim. After maintaining, contrary to the express findings by Choo J in the earlier action, that Lalasis was not in breach of any contract, he averred in paras 11 to 14 of his defence as follows:

> 11. The Defendant denies that the alleged or any breaches of contract were caused, induced or procured by the Defendant or at all. The Defendant further denies that he caused the sum of $348,988.20 of the monies paid by the Plaintiff to Lalasis to be applied to his account and caused Lalasis to refuse further performance of the contracts on the ground that it had not been paid. In further answer the Defendant states that at all times he acted for and on behalf of Lalasis as its alter ego and that all the money received was banked into Lalasis' bank account and only journal entries were made in the books of Lalasis in respect of the sum of $348,988.20 apportioned, being the sum in dispute with the Plaintiff. The Defendant further states that even if the sum of $348,988.20 were taken into account, there was thus a shortfall of $87,204.85 under the First Contract and a further shortfall of $866,791.97 under the Second Contract. The need to protect and safeguard the rights of Lalasis prevented the Defendant from taking any step to the detriment of Lalasis until the dispute, as aforesaid, had been resolved or lawfully determined. *In the premises the Defendant states that as a director acting as the alter ego of Lalasis, he exercised his duties bona fide for and on behalf of Lalasis and in the best interests of Lalasis*.
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> 12. Paragraph 13 of the Statement of Claim is admitted.
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> 13. No admissions are made as to the breach, loss and/or damage suffered by the Plaintiff and the cause thereof as alleged in paragraph 14 of the Statement of Claim or at all, and the Plaintiffs are put to strict proof of the same together with the cause thereof. If, which is denied, the Plaintiff have suffered the alleged, or any loss and/or damage, it is denied that the same was caused induced, procured or intended by the Defendant, as alleged or at all. The Defendant states that he had no knowledge, actual or constructive, that the Plaintiff were purchasing the

goods from Lalasis for resale or of the likelihood of the Plaintiff suffering damages as a consequence of the position taken by Lalasis in the matter.

14. Paragraph 15 of the Statement of Claim is denied and the Plaintiff are put to strict proof thereof. In further answer the Defendant reiterates that he acted as a director for and on behalf of Lalasis as its alter ego and all money received was banked into Lalasis' bank account and only journal entries made in the books of Lalasis in respect of the sum of $348,988.20, until the dispute, as aforesaid, could be lawfully resolved or determined.

[emphasis added]

Evidence

15 In so far as is relevant, Mirthipati Subramanyam, a director of Diva, who was the sole witness for Diva, said in his evidence-in-chief as follows:

10. In particular, the Court did not accept that it was Kumar who paid the $100,000 and the $850,000 to Goenka (this can be found in paragraphs 15 and 16 of the Judgment) nor did the Court accept that the payments of these sums were for the settlement of the debt between Kumar and the Defendant. The Court found that the sums were paid as deposits for the two contracts which the Plaintiffs had entered into with Lalasis (see paragraph 18 of the Judgment).

11. The Defendant admitted, at paragraphs 10 to 12 of his Affidavit filed on 11 February 2003 for Suit No 929 of 2002/Q, that he had used the sums of $100,000 and $248,988.20 which he received to the (*sic*) settle the alleged debt between Kumar and himself. He even produced 2 receipts at Exhibit GMK-4 of his Affidavit filed on 11 February 2003 for Suit No 929 of 2002/Q to prove this.

14(h). The Defendant knew of the First and Second Contracts and their essential terms, having negotiated the 2 contracts on behalf of Lalasis.

14(i). The Defendant by his own admission caused the sum of $348,988.20 of the monies paid by the Plaintiff to Lalasis to be applied to his account, supposedly for the discharge [*sic*] a debt allegedly owed by Kumar to the Defendant and then caused Lalasis to refuse further performance of the First and Second Contracts on the ground that it had not been paid by the Plaintiffs.

15. As a result of the Defendant using the sum of $348,988.20 for his own purpose (*ie* to discharge an alleged debt) and failing to cause Lalasis to perform the First and Second Contracts (the CPUs were not delivered to the Plaintiffs), he has caused Lalasis to breach the First and Second Contracts.

16 In so far as the evidence of the defendant, Goenka, is concerned, his averments in paras 5 to 8, the first sentence of para 10 and para 21 of his affidavit of evidence-in-chief bear reproduction and they read as follows:

5 Contrary to the Plaintiffs' contention, I did not convert any part of the sum of $384,930.00 or have any part of the monies received from Kumar and/or the Plaintiffs applied to my account and for my benefit as alleged. The cash money received was all banked into Lalasis Trading Pte Ltd's bank account and only a journal entry made in respect of the sum of $348,988.20 to signify that it was to being allocated according to my version of events. Produced before me and marked as exhibit "GMK-1" are copies of the journal entries from the books of

Lalasis Trading Pte Ltd showing that the full sum of $950,000.00 received from Kumar was banked into the bank account of Lalasis Trading Pte Ltd and further showing how the funds were allocated by Lalasis Trading Pte Ltd to reflect my version of events.

6 The truth of the matter is that in the capacity as a director of Lalasis Trading Pte Ltd, I had acted cautiously and in good faith and did not intend to or cause, induce or procure the breaches of the First and Second Contracts made between the plaintiffs and Lalasis Trading Pte Ltd as alleged by the plaintiffs. As the director of Lalasis Trading Pte Ltd I had to act cautiously and in the interests of Lalasis Trading Pte Ltd because as a director I had a duty to safeguard and protect the interests of Lalasis Trading Pte Ltd. This duty to act cautiously was all the more imperative in view of the dispute on what the terms of payment and delivery were. As stated herein, it was agreed with Kumar that he would not only make full payment of my debt of $348,988.20 but also full payment under the new contracts *ie* the First Contract and Second Contract. As the director of Lalasis Trading Pte Ltd I had acted bona fide exercising caution when dealing with the Plaintiffs who [*sic*] I knew the Plaintiffs had a paid up capital of only $2.00 and it was in this regard that I had to insist that the agreed terms of payment and delivery were fulfilled *ie* full payment before full delivery to the Plaintiffs. Produced before me and marked as exhibit "GMK-2" are copies of the Instant Information Search of the Plaintiffs showing, inter alia, the issued and paid-up capital.

7 Thus, if I had acted otherwise than with caution as I did, I believe I would have been negligent as there was nothing much Lalasis Trading Pte Ltd could do if the Plaintiffs were to default on their payment obligations after receiving full delivery of the goods. Further with my knowledge of prior dealings with Kumar, the Plaintiffs' representative, who had previously led me to incur a mountain of debt previously, I could not allow my guard to be let down. In the circumstances I had to exercise due caution to ensure that all payments due and payable were received by Lalasis Trading Pte Ltd. As a responsible director I could not authorise delivery by Lalasis Trading Pte Ltd before payment was received as such conduct would have been contrary to the agreement that payment would be made in full. If I had disregarded this cautionary step, the whole arrangement I made with Kumar to be paid in full for the past debt and for the new contracts would have been pointless. Although the Plaintiffs took issue with me I believe I acted bona fide and reasonably and had no choice subsequently when the Plaintiffs decided to have the dispute adjudicated by the Courts. Thus at all times no part of the monies received from Kumar and/or the Plaintiffs was applied to my account and for my benefit as alleged.

8. The Plaintiffs [*sic*] contention that I had caused the sum of $348,988.20 of the monies received by Lalasis Trading Pte Ltd to be applied to my account or for my benefit is therefore misconceived. In fact upon receipt of the order under the First Contract on 10 June 2002 Lalasis Trading Pte Ltd had already contacted their supplier in Hong Kong and ordered 3,000 CPUs. Thus it cannot be said that I caused, induced or caused the breach of the First Contract. That Lalasis Trading Pte Ltd had acted to place the order for 3,000 CPUs is evidenced by a letter dated 10 June 2002 from ST Agencies stating that the first batch of 2,000 CPUs were on the way and that the balance 1,000 CPUs would be following in a few day's time. Produced before me and marked as exhibit "GMK-3" is a copy of the letter dated 10 June 2002.

10. As for the allegation that I had caused, induced or procured the breach of the Second Contract this is again not true. …

21. In the premises it is certainly not true or fair to allege that I am responsible for having caused, induced or procured the said breaches of the First Contract and Second Contract by Lalasis Trading Pte Ltd as alleged[.] Further I have not converted the sum of $384,930.00 to my

use or was I a party to the conversion of the sum of $384,930.00 by Lalasis Trading Pte Ltd as alleged. As explained above all monies received were deposited into the bank account of Lalasis Trading Pte Ltd for the use by Lalasis Trading Pte Ltd. In the premises I humbly pray that the Plaintiffs' action herein be dismissed.

17 In cross-examination, Goenka claimed that although the records reflected the transfer of the deposit sums to his personal account, there was no actual remittance of the moneys to him. It was merely a journal entry and he had since then caused it to be reversed. With a view to substantiating his statements, Goenka referred to some printouts.[1] The actual account books or original documents were, however, not produced to the court. He claimed that the book entries transferring the subject moneys to him were made in several tranches on 12 June 2002 and the reverse entries were made sometime after Choo J awarded judgment against Lalasis in the earlier action. In this connection, his answers as to the date on which the reverse entry was made[2] were noticeably ambivalent. First he said it was in December 2002, but when his attention was directed to the fact that the judgment in the earlier action was handed down in April 2003 he back-footed and claimed that the reverse entries were made about one week after the judgment.

Arguments, issues and conclusion

18 The action by Diva in the present suit is founded on the premise that Goenka consciously and deliberately interfered with the contracts between Diva and Lalasis, diverted the deposits paid by Diva wrongfully to his credit and thereby caused Lalasis not to perform its obligations to Diva. Counsel for Diva submitted that such an action on the part of Goenka, the person who ostensibly controlled the will and the entire spectrum of Lalasis' operations, read in the context of Goenka's blatant boast that he did so as the alter ego of Lalasis, rendered him personally liable for the wrong caused and the loss suffered by Diva.

19 Goenka's counsel endeavoured to downplay the actions of his client. He contended that Goenka acted in good faith as a director of Lalasis and as a director he had to act cautiously and in the interests of Lalasis to ensure that full payment was received before goods were delivered to Diva. Another argument advanced by Goenka's counsel was that what Goenka did was no more than a book transaction and he had since then caused the entries to be reversed in the books of Lalasis. In this connection, he made reference to DB-1 to 5, all of them dated 31 December 2002. I must say presently that despite the fact that these documents were not agreed documents, Goenka did not call the maker of the entries or call any evidence to substantiate the authenticity of the alleged transactions contained in those documents. If it was true that he gave instructions to his employees to reverse the book entries after Choo J handed down his decision in April 2003, in my opinion the documents reflecting the various entries could not have been dated 31 December 2002. Furthermore, when queried as to what happened to the sums paid by Diva if they were in fact not taken out, Goenka could only reply feebly that Lalasis was experiencing some cash flow problems. I should add here that I found his explanations in this regard to be false and insincere.

20 The legal and factual ingredients necessary to establish the tort of inducing or procuring a breach of contract are adequately set out by the authors of *Bullen & Leake & Jacob's Precedents of Pleadings* (14th Ed, 2001) at para 51-01 as follows:

> The claimant … needs to plead and prove the following:
>
> (1) the defendant(s) knew of the contract in question and its essential, though not necessarily its precise, terms;

(2) they so acted or "interfered" whether by persuasion, inducement or procurement or other means (which the claimant may, as in cases of indirect inducement, need to establish are unlawful means) so as to show that they intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party;

(3) there was a breach of the contract attributable to such act or interference; and

(4) damage was occasioned, or was likely to be occasioned to the other party to the contract.

21 In respect of the first and fourth ingredients above, there was hardly any dispute over them. In any event, having regard to the evidence and pleadings, my finding was that Goenka was fully cognisant of the contracts as well as their terms and that there was indeed loss and damage occasioned to Diva. As regards the second and third elements, it was submitted on behalf of Goenka that Diva had not adduced any evidence of deliberate conduct on the part of Goenka to breach the contracts made between Diva and Lalasis. Counsel for Goenka contended that Goenka's actions were carried out in good faith and that there was no evidence that Goenka had applied or used moneys paid or converted them to his use.

22 In my determination, Goenka, who by his own admission is the alter ego of Lalasis, knowingly and deliberately interfered with the contracts referred to. His claim that he did it in good faith was found by me to be patently hypocritical, for the records clearly evince to the court that he was motivated by personal gain over legal consequences. As pointed out by Lord Macnaughten in *Quinn v Leathem* [1901] AC 495 at 510, "it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference". In Singapore, in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [17], the Court of Appeal held that to found a sustainable cause of action for the tort of inducing a breach of contract, a two- fold requirement needs to be satisfied: first, the plaintiff must show that the procurer acted with the requisite knowledge of the existence of the contract; and second, that the procurer intended to interfere with its performance. Intention to this end is to be determined objectively.

23 The issue whether there was any contractual relationship between Diva and Lalasis had already been determined by Choo J in the earlier action. As to the issue whether there was sufficient justification for the interference by Goenka with the contractual relationship, I was unable to agree with the arguments of Goenka's counsel that Goenka was acting in good faith, and that his intention was to protect the interests of Lalasis and nothing more. I found that Goenka was clearly interposing his personal interests and gain over the contractual obligations between Diva and Lalasis. The Court of Appeal in *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 at 387, [33] stated that "where directors order an act by the company which amounts to a tort by the company, they may be liable as joint tortfeasors on the ground that they have procured or directed the wrong to be done". In the case at hand, Goenka, by deliberately causing Lalasis not to perform its obligations to Diva, is liable for the actionable wrongs committed by him.

24 Goenka was seen to be twisting and turning in the witness box and I found his testimony substantially unreliable. Goenka's claim that the transfer of the moneys from Lalasis was merely a book transaction and that the entries had since been reversed was not supported by any credible, let alone admissible, evidence. In my view, there was clear, deliberate and direct unjustified interference by Goenka with the contracts referred to. His claim that the moneys were still with Lalasis was not supported by any valid evidence. A compelling inference was that Goenka spirited the deposit sums from Lalasis, hence the inability of Lalasis to pay its creditors.

25 In the premises, I awarded judgment in favour of Diva as claimed in the statement of claim and costs. Diva was also awarded interest at the rate of 6% per annum on the judgment sum from the date of writ until the date of judgment, *ie*, 12 May 2004.

Claim allowed.

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[1]Pages 195 to 199 of the bundle of affidavits as well as DB-1 to 5.

[2]Pages 80–82 of the Notes of Evidence.