

Mah Wand Hew v Ong Yew Huat & Another
[2002] SGHC 281

Case Number : OS 1495/2000
Decision Date : 25 November 2002
Tribunal/Court : High Court
Coram : Lai Kew Chai J
Counsel Name(s) : Siva Murugaiyan and Parveen Kaur Nagpal (Sant Singh Partnership) for plaintiff;
Siraj Omar (Drew and Napier) for defendants
Parties : —

Employment Law – Pay – Recovery – Whether plaintiff employee of company

Insolvency Law – Winding up – Liquidator – Notice of rejection of proof of debt – Whether liquidators wrongly rejected proof of debt

Insolvency Law – Winding up – Liquidator – Proceedings to reverse rejection of proof of debt – Plaintiff commencing proceedings after expiry of statutory period – Whether court should exercise discretion to extend time – rr 93,190 Companies (Winding Up) Rules (Cap 50, R1, 1990 Rev Ed)

Judgment

Cur Adv Vult

GROUND OF DECISION

Introduction

1 On 7 December 1998 the plaintiff filed her Proof of Debt in which she claimed US\$142,218.00. It is made up of overdue salary, unused annual leave, 13th month salary for 1997, three months' salary in lieu of notice and, by far the largest claim, for retrenchment benefits for 30 years amounting to US\$99,000.00. The defendants as the Liquidators of Hotel Equatorial (S) Pte Limited rejected the Proof of Debts on 3 April 2000. On 26 September 2000 the plaintiff filed this Originating Summons and applied to reverse the rejection of the Proof of Debt, some 5 months after the statutory period of 21 days, which expired on 24 April, 2000.

2 The threshold question is whether this court should exercise its power to extend time under Rule 93 of the Companies (Winding Up) Rules which provides as follows: "If a creditor...is dissatisfied with the decision of the liquidator in respect of a proof of debt, the Court may, on the application of the creditor...reverse or vary the decision but subject to the power of the Court to extend time, no application to reverse or vary the decision of the liquidator in a winding up by the Court in rejecting a proof sent to him by a creditor...shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection."

3 If time is extended, the determinative question is whether the plaintiff was at all material times in the employ of the defendants or of its venture in Guangzhou, Peoples' Republic of China ("PRC"). If that question is resolved and the defendants were the employer of the plaintiff, this court can then go further and determine if the defendants are liable to pay each of the constituent claim of the plaintiffs as an employee following the retrenchment of the staff of the defendants.

The background

4 The plaintiff has worked initially for the defendants and later (to use a neutral expression) in other establishments with which the defendants have had some business dealings for some 29 years from 10 August 1969 to 13 August, 1998. On or about 4 December 1998 the defendants were placed under creditors' voluntary liquidation and the defendants were appointed as liquidators of the company.

5 The plaintiff began her career with the defendant company as a waitress but was soon promoted to work in the company's finance department. In January 1989, the plaintiff accepted an offer by the company to work as a Accounts Assistant. The plaintiff accepted and

following her acceptance she proceeded to work at the Guangzhou Hotel Equatorial, which the defendant company operated. I shall elaborate on the terms of the management contract. Whether she remained as an employee of the defendant company or whether she had become an employee of Guangzhou Hotel Equatorial is a central question to which I shall have to return.

6 It is common ground that the land and premises in which Guangzhou Hotel Equatorial operated were owned by a Chinese entity known as the Guangzhou International Investment Mansion ("the Owners"). The defendant company, having established some reputation in the hotel industry, was appointed as managers under and pursuant to a management contract dated 15 May 1988 ("the Management Contract"). In my view, the key to determine the identity of the employers of the plaintiff lies in a precise understanding of the nature, scope and the respective duties and obligations of the Owners and the defendant company. Another significant key is to identify and understand the legal status of Guangzhou Hotel Equatorial under the laws of the PRC.

7 However, disputes arose between the defendant company and the Owners sometime in 1992/3. In 1994 the Owners commenced arbitration proceedings. In early 1998 an adverse final award was given against the defendant company. It is not relevant for present purposes to know in any detail the nature of the disputes. Suffice it to say that on or about 5 March 1998, the Owners entered upon the premises of the hotel and took possession of it. In the wake of this self-help operation, the hotel business ceased and most of the employees working in the hotel were forced to leave.

8 At the request of the defendant company, and it was not seriously disputed, the plaintiff remained on the premises to settle the outstanding financial matters between the defendant company and the Owners. She looked after and acted in the best interest of the defendant company at, I would add on the evidence, some peril to her own personal safety. She feared for her safety but she stayed behind on the promise of the managing director of the defendant company that representatives from the defendant company from Singapore would be sent to assist her. Help never came. After two weeks of living in fear and trepidation, the plaintiff escaped from the Owners on 24 March 1998, carrying with her only her handbag, passport and clothes on her back. She made her way from Guangzhou to Hong Kong, and thence to Kuala Lumpur and Singapore.

9 After her return to Singapore, the plaintiff attended the defendant company's managing director on at least 10 occasions. She gave information regarding the takeover, including the handing over of the accounts. She repeatedly asked for her salaries. Finally she was paid her October and November 1998 salaries of US\$3,300 per month. According to her, the managing director promised that she would be paid her outstanding salary shortly.

10 Instead of paying her the arrears of salary, the defendant company on 13 August 1998 wrongfully terminated the plaintiff's employment with effect, retrospectively, from 31 March 1998. In September, 1998 the plaintiff engaged solicitors to recover her outstanding salary and other benefits due to her from the defendant company. Owing to the liquidation of the defendant company, legal proceedings were discontinued and a Proof of Debt was lodged.

11 The claims amounted to US\$142,218.00 and the particulars of the claims are as follows:

PARTICULARS

Overdue salary from December 1997

To July 1998 at US\$3,300 per month

US\$26,400.00

US\$ 1,383.00

Overdue salary from 1 August 1998

To 13 August 1998 (pro-rated)

Unused annual leave for 1997 (21 days)

US\$ 2,235.00

13 th months salary for 1997	US\$ 3,300.00
3 months' salary in lieu for 1997	US\$ 9,900.00
	US\$99,000.00
Retrenchment benefits for 30 years of service	
At US\$3,300.00 per year	
Total	US\$142,218.00

12 About 1 year after lodging her Proof of Debt, the Liquidators of the defendant company issued their Notice of Rejection of Proof of Debt. They alleged that the documents they had did not support the claims.

13 The plaintiff, not unexpectedly, encountered serious financial difficulties, not having received any income for some time and not been able to find employment until August 1999. She had to resort to loans from friends and relatives. When she was financially able and after obtaining more documentation in this case, she instructed solicitors to pursue her claims. Financially, she commenced these proceedings on 26 September 2000.

Extension of time

14 The power of the Court to extend time is set out in Rule 190 of the Companies (Winding Up) Rules which provides:

"The Court may, in any case which it fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding"

15 On the evidence, I am satisfied that she did not commence these proceedings because she was financially unable to do so. She did not have money to pay her solicitors. I accept the evidence of Mah Seng Peng and Tan Lye Choo regarding her financial embarrassment. Her adverse financial position was due to the fact she had not been paid her remuneration and other benefits. The period of her financial embarrassment was lengthened when the Liquidators' adjudication of the Proof of Claim took almost 16 months. The defendants have not shown that they would be unjustly prejudiced by the extension of time. The liquidators were all too aware of the objections and they had not carried out any distributions of dividends to such an extent that they would not be able to meet the payment of these claims, if found liable, since these claims enjoy a very high priority in the liquidation of the assets of the defendant company. Having balanced the competing reasons, I am of the opinion that this is fit and proper case for the granting of the extension of time.

Was plaintiff employed by defendant company or Guangzhou Hotel Equatorial?

16 The Liquidators of the defendant company, relying on the evidence of its former Managing Director, concluded that the plaintiff was employed by Guangzhou Hotel Equatorial and not by the defendant company. She claimed that she was at all material times employed by the defendant company. I now turn to the question, namely who was her employers.

17 On or about 16 January 1989, the defendant company issued a letter of offer of employment to the plaintiff to work at the Guangzhou Equatorial Hotel as an Accounts Assistant. The plaintiff duly accepted the offer. The Managing Director of the defendant company gave evidence that the offer was made on behalf of Guangzhou Equatorial Hotel. I am unable to accept this evidence.

18 Under the Management Contract dated 15 May 1988 entered into between the defendant company and the Owners, read as whole, it is clear beyond any peradventure that the defendant company "shall have the undisputed right of management according to law": see Chapter Three, Article IV, Chapter Four, Article XXIII and Chapter Five, Article XV. By Chapter Five, Article XVIII (see 1AB19) it was clearly agreed between them that "Party B [i.e. the defendant company] shall be responsible for and settle on its own all the debts and claims within the period of contractual management." This was the re-interpreted version. The central feature of the Management Contract was this: the

defendant company undertook to pay the Owners a fixed sum, regardless of the profitability or otherwise of managing the hotel in Guangzhou. Its duration was at least 16 years subject to earlier termination if there was a breach.

19 In truth and in fact, the defendant company managed the hotel on its own. It was responsible for the revenue from the running of the hotel. All payments for rooms, food and beverages and other services were paid to the management of the hotel and out of the revenue earned the salaries and all other outgoings and expenses were paid. In fact, the financial results of the management of the hotel in Guangzhou year on year was brought into the accounts of the defendant company. Mr Chong Leong Tian @ Mr Franklin Chong PW5, the Regional Financial Controller of the defendant company at the material time, in his affidavit evidence of 20 November 2001 said that Guangzhou Hotel Equatorial was not treated as a subsidiary of the defendant and, accordingly, the hotel's accounts were not reflected in the consolidated audited accounts. However, Guangzhou Equatorial Hotel's operations were treated as part and parcel of the defendant company's operations. The profits earned from and the losses incurred by the defendant company's management of the hotel were reflected as a single figure in the audited accounts of the defendant company. The defendant company did not challenge this evidence.

20 The auditor of the defendant company, Mr Yeo Oon Jin, PW2 confirmed that this accounting treatment with reference to the 1997 audited accounts of the defendant company. He said that the revenue reflected in the 1997 audited accounts of the defendant company included the revenue of Guangzhou Equatorial Hotel. Similarly, the expenses of Guangzhou Equatorial Hotel were included in the defendant company's expenses. In short, the operating results of Guangzhou Equatorial Hotel were aggregated with those of the defendant company. Mr Yeo Oon Jin further confirmed that whilst salaries were not specifically itemized in the accounts, salaries were included in the computation of the expenses of both Guangzhou Equatorial Hotel and the defendant company.

21 Mr Yeo Oon Jin further confirmed that the reason why the operations of Guangzhou Equatorial Hotel were consolidated with those of the defendant company was due to the Management Contract which provided that the defendant company would be responsible for the operating results of Guangzhou Equatorial Hotel. This accounting treatment is, in my view, consistent with the basic structure of the Management Agreement. The basic structure was this: the defendant company would manage the hotel exclusively and, win or lose, it has to pay the Owners a fixed sum yearly. Under the Management Contract, that payment was due and payable regardless of the profitability or otherwise of the hotel in Guangzhou.

22 The status of the plaintiff was further confirmed by the evidence of Mr Chong Leong Tian @ Mr Franklin Chong. As I had described earlier, he was at the material time the Regional Financial Controller of the defendant company. He was personally involved in both financial and human resource matters for the defendant company. In describing the nature of the plaintiff's employment, he said that she was an employee of the defendant company on assignment at the hotel in Guangzhou.

23 He said: "In addition to employing staff from Guangzhou, it was the intention of [the defendant company] to send some of their staff from Singapore to Guangzhou to work as expatriates at the hotel. The plaintiff was one of the employees of [the defendant company] who was offered an overseas assignment to work at the hotel. None of the expatriates working at the hotel was directly employed by the hotel as the recruitment of expatriates was solely the responsibility of and at the discretion of [the defendant company]. ...As the Regional Financial Controller..., I was authorized to oversee all financial and administrative matters...including the movement of human resources of the Hotel. The Hotel was required to seek final approval in respect of these matters and would approach me, the General manager of [the defendant company] or the final decision maker, the Managing Director of [the defendant company] for the approval. The Hotel would normally execute all operational matters according to the directives by [the defendant company]." The evidence of Mr Chong Leong Tian was not challenged by the defendant company.

24 The plaintiff was recruited by the defendant company. She was paid, in effect, by the defendant company for her work in Guangzhou Equatorial Hotel. She was directed and controlled in respect of her work by higher officers of the defendant company. She often took direct instructions from the Managing Director of the defendant company. The fact of control and direction was highlighted by the Court of Appeal in *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd and other appeals* [1997] 3 SLR 677. In my judgment, she was the employee of the defendant company.

Six Claims

25 I turn now to the particulars of claims of the plaintiff, which are described under six items. Of the six heads of claims, I will allow the

two claims for overdue salaries, the 3 months' salary in lieu of termination notice and the largest single claim of US\$99,000.00 as retrenchment benefits for 30 years of service at US\$3,300.00 per year. As for the claims for unused annual leave for 1997 and the 13th month salary for 1997 it is quite clear that the plaintiff is not contractually entitled to them.

26 In relation to the two claims for overdue salaries, there is no doubt that the last drawn salary received by the plaintiff was US\$3,300.00 per month. The General Manager of the defendant company confirmed this in his letter of 1 October 1996. It was also evidenced in the payment voucher recording the payment of her salary for the months of October and November 1997. The plaintiff had not received any other salary payment. Accordingly, her salary remained outstanding from December 1997. On 13 August 1998 the defendant company stating that her employment with the Guangzhou Equatorial Hotel had terminated on 31 March 1998 following the closure of the operations of Guangzhou Equatorial Hotel. In my view, the defendant company's letter was written on the erroneous assumption and mistaken view that the plaintiff was an employee of the Guangzhou Equatorial Hotel. For the reasons I had set out earlier, she was at all material times the employee of the defendant company. That the plaintiff had written to the Managing Director of the defendant company on 21 August 1998 claiming overdue salary from December 1997 to March 1998 did not take away the validity of her claim for overdue salaries. She did not have the benefit of legal analysis. That being so, the defendant company should have given her the 3 months' notice as from 13 August 1998 or pay 3 months' salary in lieu.

27 The next head of claim to consider is the claim for salary in lieu of notice. It is clear from the 'Termination of Employment' clause in the agreement, a copy of which is in 1AB24-27, she is entitled to be paid a sum equivalent to 3 months' salary if notice of termination was not given to her. She was not served the notice of termination because the defendant company had taken the wrong view that she was an employee of Guangzhou Equatorial Hotel. In *Alexander Proudfoot Production Services Co S'pore Pte Ltd v Sim Hua Ngee Alvin and another appeal* [1993] 1 SLR 494, it was held that the correct measure of damages for wrongful dismissal is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he could reasonably be expected to earn in other employment.

28 The plaintiff claimed the sum of US\$99,000.00 being the retrenchment benefits due from the defendant on the basis that it had decided and in their letters of 14 June and 15 August 1997 indicated that retrenchment benefits would be paid to **all** employees of the defendant company, whether unionised or non-unionised employees who had served continuously three (3) years or more at the rate of one month's last drawn basic salary for each year of continuous service and a proportionate part thereof for any incomplete year of service: see 3AB894, 903-913. As a matter of the common law of Singapore, it was common ground that an employee is not entitled to retrenchment benefits on the basis of long service. He is only entitled to be paid retrenchment benefits if the employer had agreed to do so: see *Bethlehem Singapore Pte Ltd v Ler Hock Seng* [1995] 1 SLR 1 and *Loh Siok Wah v American International Co Ltd* [1999] 1 SLR 281.

29 During cross examination, the Managing Director of the defendant company, confirmed that those who were paid retrenchment included non-unionised and executive employees of the defendant company. This was confirmed by Ms Tan Lye Choo, PW3, an executive who received retrenchment benefits herself. For an example of an executive non-unionised employee who was paid retrenchment benefits was Mr Chang Ying Hua, the Operations Manager of the defendant company. He had worked in Guangzhou Equatorial Hotel for a period of time. It was quite fortuitous that he had returned to Singapore when the decision to retrench was made. He was not out of sight and out of mind. He was paid S\$46,962.00 for 9 years of continuous service with the defendant company.

30 The only reason why the plaintiff was not paid was because of the mistaken classification of her as an employee of Guangzhou Equatorial Hotel. The defendant company's agreement to pay retrenchment benefits calculated on the formula stated above was meant for **all** employees of the defendant company. Since the plaintiff was the employee of the defendant company I have no doubt that the defendant company would have paid her the retrenchment benefits if she had been correctly classified as an employee. I refer to the 1st affidavit of the Managing Director of the defendant. In paragraph 20 she stated: "Before [the defendant company] was placed in liquidation, a list of all the employees along with their retrenchment entitlement was drawn up. The plaintiff's name was not on this list because she was not an employee. **If the plaintiff had been an employee, the company would certainly have paid her any retrenchment benefits due to her. There was no reason for the company to try and swindle her while paying its other employees.**" (emphasis added).

31 Accordingly, the decision of the Liquidators in rejecting the Proof of Debt is reversed in part. There will be an order that the items of claims allowed in accordance with this judgment be paid according to the priority as set out in the Companies Act. The defendant company is to pay costs to the plaintiff.

Sgd:

Lai Kew Chai

Judge

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