

Beng Tiong Trading, Import and Export (1988) Pte Ltd v Maria Janda Achmad Bin Abdullah
Wachdin Basharahil alias Maria and Others
[2003] SGHC 232

Case Number : Suit 1255/1996
Decision Date : 08 October 2003
Tribunal/Court : High Court
Coram : Dawn Tan Ly-Ru AR
Counsel Name(s) : George Lim Teong Jin (Wee, Tay & Lim) for the applicants (1st, 9th, 10th & 12th defendants); Stanley Wong Hoong Hooi (Jing Quee & Chin Joo) for the plaintiffs
Parties : Beng Tiong Trading, Import and Export (1988) Pte Ltd — Maria Janda Achmad Bin Abdullah Wachdin Basharahil alias Maria; Abd Rahim bin Awad bin Achmad Abdullah Wachdin Basharahil alias abd. Rahim Awad Wachdin; Abd. Rachman bin Ali bin Achmad Abdullah Wachdin Basharahil alias Abd. Rachman ali Wachdin; Salim bin Hasan bin Achmad Abdullah Wachdin Basharahil alias Salim Hasan W; Ishak Bin Saad Bin Achmad Abdullah Wachdin Basharahil alias Ishak Wachdin Be; Quresh bin Muchsin bin Achmad Abdullah Wachdin Basharahil alias Quraish Wahidin S.H. alias Quresh Muchsin Wachdin; Abubakar bin Achmad bin Abdullah Wachdin Basharahil alias Abubakar Wahdin; Abd Azis bin Achmad bin Abdullah Wachdin Basharahil alias abd. Aziz Wahdin; Wachin bin Achmad bin Abdullah Wachdin Basharahil alias Dr. H. Wachdin Achman; Harith bin Achmad bin Abdullah Wachdin Basharahil alias Harits Ahmad Wahdin; Abd. Malik Muhammad Wachdin alias H. Abdul Malik Dr.; Futum binti Achmad bin Abdullah Wachdin Basharahil alias Futum; The Public Trustee of Singapore; Jak Alhadad & Co Pte Ltd

1. This was an application made by way of summons-in-chambers (number 600440 of 2003) ("SIC 600440 of 2003") to set aside the order of court dated 19 July 1999 ("the order of court"), *inter alia*, declaring that the plaintiffs were entitled to the rights, interests, benefits and entitlements of the 1st, 2nd, 3rd, 5th, 6th, 9th, 10th and 12th defendants in the immovable properties identified in an agreement dated 12 August 1993. The four named applicants were the 1st, 9th, 10th and 12th defendants, and in this application they prayed that the order of court be set aside to the extent that all references to them in paragraphs 1, 2 and 5 thereof be deleted.

2. I allowed the application and now give my reasons.

The background

3. The facts are not in dispute, and are succinctly summarised in the judgment of the Court of Appeal in related proceedings: see *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 4 SLR 559. It is thus proposed to restate only those facts that are directly relevant to the application at hand.

4. The four applicants are among the beneficiaries, numbering 14 in total, of the estate of one Shaik Ahmad bin Abdullah Wachdin Basharahil, deceased, under a will dated 3 September 1938. Shaik Ahmad passed away in 1953 and probate was granted to one of the executors and trustees named in the will. By an order of court dated 11 October 1976 in Originating Summons No 80 of 1976, the Public Trustee was appointed sole trustee of the will, and the properties belonging to the estate became vested in the Public Trustee. The properties continued to be held by the Public Trustee as trustee of the trusts under the will until they were subsequently sold with leave of court obtained in Originating Summons No 1030 of 2000.

5. Sometime in August 1993, the 1st to 12 defendants claiming to be the beneficiaries of the

estate entered into an agreement with the plaintiffs, by which the 1st to 12th defendants consented to the sale of the properties to the plaintiffs for the sum of \$8.26m ("the beneficiaries agreement"). A draft agreement for sale and purchase was annexed to the beneficiaries agreement, which was titled "Consent to Sale of Properties by Private Treaty." The 1st to 12th defendants also agreed to appoint one Syed Ali Redha Alsagoff and one Robert Ng, or "such other persons as the competent Court, Singapore shall decide" as trustees of the estate and upon such appointment in place of the Public Trustee, to direct the trustees to ratify, confirm and execute the sale agreement. In consideration, the beneficiaries received the total sum of \$240,000 (inclusive of a sum of \$108,000 paid earlier through one Lee Siong Kee) and a receipt for that amount in the name of the plaintiffs.

6. The beneficiaries duly took out an application in Originating Summons No 489 of 1993 seeking an order to appoint Syed Ali and Robert Ng as trustees. That application had been filed prior to the beneficiaries agreement, but it appears that shortly after the beneficiaries agreement was signed, 11 of the 12 beneficiaries changed their minds and sought instead to repudiate it. The application was also opposed by the Public Trustee on the ground that only 12 out of 14 beneficiaries under the will had signed the beneficiaries agreement. The application was eventually abandoned or withdrawn sometime between November 1993 and January 1994.

7. In the event, an agreement for the sale of the properties by the estate to the plaintiffs was never signed. In fact, at a meeting with some of the beneficiaries in November 1993, the plaintiffs' managing director, one Chiang Siew Chee Maggie, was informed that the majority of the beneficiaries was opposed to the sale of the properties to the plaintiffs.

8. Relying on the beneficiaries agreement, the plaintiffs instituted the present action against the beneficiaries claiming, *inter alia*, the following reliefs:

- (a) specific performance of the beneficiaries agreement;
- (b) a declaration that the plaintiffs were entitled to the rights, interests, benefits and entitlements of the 1st to 12th defendants in the properties under the will; and
- (c) an order that the 13th defendant (the Public Trustee) as trustee of the will, take such steps as are necessary in cognisance of the above and to vest the rights, interests, benefits and entitlements to the properties of the 1st to 12th defendants in the plaintiffs, including but not limited to the execution of a Deed of Assent.

9. A declaratory judgment in default of appearance was entered against eight of the beneficiaries on 19 July 1999, *inter alia*, declaring that the plaintiffs were entitled to the rights, interests, benefits and entitlements of the named defendants in the properties. It is this order of court that the applicants sought to set aside, to the extent that references in various paragraphs therein were made to them.

The law

10. Order 13 rule 8 of the Rules of Court states:

The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

Where a defendant wishes to defend the action notwithstanding the entry of a regular judgment

against him, he may apply under this provision to set aside the judgment. It is also established that the application should be made as promptly as possible, and must be supported by an affidavit stating facts showing a defence on the merits and the reasons for allowing judgment to be entered.

11. Whether or not a defence on the merits is disclosed is the major consideration, not as a rule of law but as a matter of common sense: there is no point in setting aside a judgment if the defendant has no defence, conversely, if the defendant can show merits, the court will not let judgment pass on which there has been no proper adjudication. The unconditional discretionary power of the court to set aside a default judgment is unfettered, and in exercising its discretion the court does not only weigh the evidence in support of the defence against the evidence in support of the claim – it balances the strength of the putative defence against the excusability of the defendant's conduct in allowing judgment to go by default. In this regard, it is incorrect to elevate into the status of a condition precedent to relief the establishment of a satisfactory explanation for the default. See *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co, Inc; The Saudi Eagle* [1986] 2 Lloyd's Rep 221, CA, followed in the local cases of *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 and *Zulkifli Baharudin v Koh Lam Son* [2000] 2 SLR 233.

The application

12. In their affidavit in support, the applicants did not seek to allege that the judgment was irregular or otherwise bad. It is pertinent to note in this connection that the 6th defendant had previously succeeded in setting aside the order of court in summons-in-chambers 600275 of 2003 in so far as it affected him, on the basis that the service of the writ was bad. The plaintiffs' appeal vide registrars' appeal 600020 of 2003 was dismissed on 24 July 2003, and the 6th defendant is no longer bound by the order of court.

13. The applicants relied upon the following substantive grounds. First, it was argued that the appointment of Syed Ali and Robert Ng as trustees was a condition precedent to the sale agreement, and as the appointment was never made and the condition not fulfilled, the sale was null and void. Second, the Court of Appeal in *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* (supra) stated that the proposed sale of the properties by the estate to the plaintiffs was "fatally impinged." Third, the court in that case also noted that there had been a breach of s 35 of the Conveyancing and Law of Property Act (Cap. 61) ("CLPA"), and the sale of the properties would not have been sanctioned by the court as required by that section. Fourth, there was no cause of action for which relief could be granted – contrary to the plaintiffs' contention, the beneficiaries agreement was not an agreement for the conveyance of personal inheritance rights.

14. By way of explanation, in addition, the applicants stated that the order of court was never served on them and the same only came to their attention sometime in 2001, in the course of the proceedings in OS No 1030 of 2000. Moreover, they were innocent and poor country folk from Indonesia, were not conversant in English, and did not appreciate the significance of the service of the writ of summons on them.

15. It will be convenient to deal with each of the substantive grounds before reverting to the applicants' stated reasons for allowing judgment in default to be entered against them. Counsel for the applicants, Mr George Lim, accepted that it was not sufficient for the applicants to show that they had an "arguable" defence: they must go further and show that the defence had a "real prospect of success" and "carried some degree of conviction." See *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 4 SLR 578, applying *Alpine Bulk Transport* (supra).

16. First, the appointment of the two trustees named in the beneficiaries agreement was a condition

precedent to the sale of the properties. Counsel for the plaintiffs, Mr Stanley Wong, did not dwell at length on this, but I understood the plaintiffs' position to be that the appointment of the private trustees in place of the Public Trustee was merely a mechanism by which it was envisaged the sale of the properties would be carried out. When the beneficiaries decided to renege on their agreement with the plaintiffs, "the course of action for putting into effect the intention of the parties failed to materialise," but the "primary purport" of the beneficiaries agreement remained intact. (See the affidavit of Chiang Siew Chee Maggie filed on 14 August 2003 at paragraph 9.) That the appointment of the private trustees was the means by which the sale would be effected finds some support in the statement of the Court of Appeal in *Lee Siong Kee* (supra) that unless the application in OS No 489 of 1993 was allowed, "there would be no agreement for the sale of the properties to the [plaintiffs] as contemplated in the agency agreement." (at paragraph 25) [Emphasis added.]

17. A condition precedent by definition is an obligation upon which the whole existence of the contract rests, and where a contract may be suspended until the happening of a stated event, it is said to be subject to a condition precedent. See the locus classicus *Aberfoyle Plantations Ltd v Cheng* [1960] MLJ 47, the holding of which has been applied in several local cases (see, eg, *Chiang Hong (Pte) Ltd v Ong Boon Pok Realty (Pte) Ltd* [1987] 2 MLJ 37; reversing [1982] 1 MLJ 242). A plain reading of the beneficiaries agreement, however, which also provided for the appointment of alternative trustees ("such other persons as the competent Court, Singapore shall decide"), did not support the applicants' argument that the condition precedent (if it was such) had failed where it was not shown that the alternative was unworkable or had been exhausted. In short, it was not entirely clear on a balance of probabilities that as framed this argument, although not without merit, had a real prospect of success.

18. Next, Mr Lim relied upon the pronouncement of the Court of Appeal that the proposed sale of the properties was "fatally impinged." This should be considered with the contention that in any event, court sanction of the sale as required by CLPA s 35 would not have been granted, because the plaintiffs although willing to pay the sum of \$8.26m for the properties were willing to pay an additional sum of \$4.64m to one Lee Siong Kee to procure the sale. The words used by the Court of Appeal in *Lee Siong Kee* must be read in context. When the court arrived at the conclusion that the sale of the properties by the estate to the plaintiffs could not proceed, it was on the basis that the majority of the beneficiaries had had a change of heart as evidenced, *inter alia*, by the eventual withdrawal of OS No 489 of 1993. It was in that particular context, together with various other developments, that the court remarked: "These events *fatally impinged* on the proposed sale of the properties by the estate to [the plaintiffs]." (at paragraph 26) [Emphasis added.] It was accepted that the remarks of the court that the proposed sale was doomed to failure were *obiter* since the beneficiaries agreement was not before it, nonetheless, there was much force to Mr Lim's submission that the beneficiaries agreement, which formed the cause of action upon which the order of court was based, was bad.

19. More importantly, Mr Lim contended – and this went to the crux of the s 35 point – that there was no cause of action for which relief could be granted. The beneficiaries agreement was for the sale of properties and not the conveyance of personal inheritance rights. Mr Wong, on the other hand, contended that by the beneficiaries agreement the 1st to 12th defendants had intended and agreed to sell their inheritance rights in the estate to the plaintiffs. Indeed, it was by demonstrating that a binding contract to convey personal inheritance rights "survived" although the "selected course of action" failed (affidavit of Chiang at paras 9-10) that the plaintiffs obtained judgment, albeit in default. In any event, the Court of Appeal did not decide whether the defendants were bound to convey their personal inheritance rights to the plaintiffs, as that question was not submitted to it for consideration.

20. To the extent that the issue before the Court of Appeal was whether or not in the

circumstances Lee Siong Kee could have caused or procured the conveyance of the legal title to the properties in the estate to the plaintiffs, that contention is correct. The court could not, and did not, determine the question whether the beneficiaries agreement was for the conveyance of property or personal inheritance rights. It was clear that pursuant to the agency agreement between Lee and the plaintiffs, the former was to secure the execution by the estate of an agreement for the sale of the properties to the plaintiffs by a certain date. Lee failed to do so, and hence was not entitled to claim the sums under the agency agreement. But still less does the order of court stand for the proposition that what was intended to be and was conveyed, were personal inheritance rights. It was difficult to see how a judgment obtained in default of appearance, upon which there had been no proper adjudication and which was not based on the merits, or by consent, could be said to be a recognition of the nature of the rights acquired by the plaintiffs through the beneficiaries agreement. For completeness, Mr Wong in the course of oral submissions stated that it was not clear that the signatories to the beneficiaries agreement were second tier beneficiaries; if indeed they were second tier beneficiaries, it would stand to reason that they had sold their rights in the estate. I would only note that all the four applicants in SIC 600440 of 2003 are original first tier beneficiaries.

21. As against these considerations, the wording of the beneficiaries agreement appears to support Mr Lim's contention that the sale contemplated was in respect of the properties belonging to the estate. There were also the comments of the trial judge in *Lee Siong Kee*, with which the Court of Appeal concurred, to the effect that the proposed sale was for the sale of the properties. Mr Wong's submission that the court's view that the sale was "fatally impinged" related only to the impossibility of conveying the legal title to the properties was unarguable, but it did not follow that the court based its decision on the beneficiaries agreement *and* endorsed the plaintiffs' reading of it. It would, however, stand to reason that the court, by disallowing in part the plaintiffs' counter claim for the amount of \$360,000 (paid to Lee) on the basis that the plaintiffs were estopped from asserting that that sum had been paid on Lee's account (when \$240,000 of that amount was the basis of the order of court), implicitly acknowledged that the beneficiaries agreement was not wholly null and void. It was certainly not an executory agreement, and \$240,000 of the plaintiffs' money had been paid to and received by the defendants.

22. Mr Lim submitted that since July 1999, the courts have consistently not attached any weight to the order of court. This was plain from the judgment of the Court of Appeal in *Lee Siong Kee* (supra) and from the result in OS No 1030 of 2000, where the Public Trustee's application to sell the properties was allowed. By implication, it was said, the beneficiaries agreement was not enforceable. That conclusion did not necessarily follow. Mr Lim's submission presupposed and depended on a specific interpretation of the beneficiaries agreement, but the purport of the agreement and the nature of the rights it transferred, if any, is not a question upon which full adjudication on the merits has taken place. As Mr Wong correctly stated, what is now at stake are the proceeds of sale, and that question though not unrelated to the question of the enforceability (or otherwise) of the beneficiaries agreement, is separate and distinct from it. Mr Lim himself stated that this application was taken out so that the applicants could claim their share of the proceeds.

23. Turning to the applicants' explanation for the default, it was somewhat less than satisfactory. The applicants may well be poor and ignorant country folk not conversant in the English language, but that did not explain why they waited almost four years to challenge the order of court. Indeed, even on the supposition that the default judgment came to their attention sometime in 2001 in the course of the proceedings in OS No 1030 of 2000, as was alleged by Mr Lim, there was still no explanation why the present application was taken out only this year. It was also unclear whether the applicants' position was that the writ was never served on them, or that they did not appreciate the significance of the writ although it was served. In short, there was no satisfactory explanation as to how it came about that the applicants found themselves bound by a judgment regularly obtained and

to which they now say they could have set up a serious defence. This court was also entitled to take cognisance of the defendants' conduct. They were at least sufficiently astute not only to go back on their agreement to appoint the private trustees, but also to seek an order appointing four of them as trustees of the estate in place of the Public Trustee in Originating Summons No 754 of 1994. That does not appear to be conduct consistent with a state of ignorance or a lack of savvy.

24. The absence of good reasons or even excuses for allowing judgment to go by default would entail a more rigorous examination of the merits of the defence (see, eg, *Singapore Gems Co v The Personal Representatives for Akber Ali (dec'd)* [1992] 2 SLR 254). However, I was mindful of the stricture not to elevate into a condition precedent for relief the establishment of a satisfactory explanation for the default. There was also the overriding and general question, whether allowing the judgment in default to stand would cause injustice based on all the facts and surrounding circumstances – and to which the answer in the instant case was, arguably, in the affirmative.

25. With that in mind, in conclusion, I was satisfied that the applicants had discharged the burden in relation to each of the substantive grounds raised by them. There was at least some degree of conviction and a real prospect of success vis-à-vis the submissions that the subject of the beneficiaries agreement was the sale of the properties and not inheritance rights, that CLPA s 35 applied and the proposed sale would never have received court sanction, that as a result the proposed sale was fatal, and that – possibly, the failure of the mechanism provided for in the agreement (the appointment of the private trustees) rendered the completion of the sale impossible. I therefore allowed the application and set aside the order of court to the extent that references in paragraphs 1, 2 and 5 therein are made to the applicants.

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