Poondy Radhakrishnan and Another v Sivapiragasam s/o Veerasingam and Another [2009] SGHC 228

Case Number : OS 904/2008

Decision Date : 09 October 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Manimaran Arumugam (Mani & Partners) for the plaintiffs; B Ganeshamoorthy (Colin Ng & Partners LLP) for the defendants

Parties : Poondy Radhakrishnan; Visvalingam Naidu s/o Munisamy — Sivapiragasam s/o Veerasingam; Megatech System & Management Pte Ltd

Companies

9 October 2009

Belinda Ang Saw Ean J:

1 This is an application under s 216A of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for leave to bring a derivative action in the name and on behalf of the second defendant, Megatech System & Management Pte Ltd ("Megatech System") against the first defendant, Sivapiragasam s/o Veerasingam ("Sivapiragasam") for the breach of fiduciary duties as a director of Megatech System. I allowed the application on 26 March 2009 and the defendants have since appealed against my decision. I now set out my reasons for doing so.

Background

2 Megatech System was incorporated on 11 June 1994 with Sivapiragasam and one Ganapathy s/o P S Sundram holding one share each. At all material times, Sivapiragasam was the managing director of Megatech System. Later on, Sivapiragasam invited the plaintiffs to join Megatech System as part of an effort to secure funding for the company. Funding was required because the company was operating at a loss. At that time, Megatech System was involved in the business of providing security guard services and scaffolding for ship repairs. The plaintiffs did become shareholders and were subsequently appointed directors on 9 February 1999. The shareholding of Megatech System at that time was as follows:

Sivapiragasam	173,000 shares (57.6%)
First Plaintiff	25,000 shares (8.33%)
Second Plaintiff	30,000 shares (10%)
Mervyn Pereira	25,000 shares (8.33%)
Krishna Veni d/o Subramaniam	37,000 shares (12.33%)
Jenardhanan s/o Anandan Nambiar	10,000 shares (3.33%)

3 At the time the dispute arose, Sivapiragasam had bought over all the Megatech System shares of Mervyn Pereira and Jenardhanan s/o Anandan Nambiar, as well as 20,000 shares from the second plaintiff, Visvalingam Naidu s/o S Munisamy. This left Sivapiragasam, the first plaintiff, Poondy Radhakrishnan, the second plaintiff and Krishna Veni d/o Subramaniam as the minority shareholders of Megatech System.

4 At the material time, Megatech System became a resident contractor for Pan-United Marine Limited and ST (Tuas) Shipyard. As a result, the company was able to recruit foreign workers from non-traditional countries. Four to five recruitment exercises were carried out to hire workers from India through various recruitment agents.

5 In October 2005, Megatech Marine Engineering Pte Ltd was incorporated ("Megatech Marine"). The directors of Megatech Marine were Rajasingam s/o Thurairajah ("Rajasingam"), Selvam s/o Kumarasamy ("Major Selvam") and Sivapiragasam.

6 Sometime in 2006, Megatech System discontinued its business of providing security guard services. This was the genesis of the dispute between the parties. On 8 September 2006, Sivapiragasam called for an extraordinary general meeting in which his son-in-law, Rajasingam, was appointed as a director of Megatech System and included as a bank signatory for the same. On 30 October 2006, Sivapiragasam terminated the first plaintiff's employment with Megatech System as the operations manager of Megatech System's shipyard repair business for allegedly failing to secure payment in relation to three shipyard contracts.

7 At an extraordinary general meeting held on 3 September 2008, both the plaintiffs were removed as directors of Megatech System.

The Plaintiffs' assertions

8 From 2003 onwards, Sivapiragasam represented to the plaintiffs that Megatech System was operating at a loss and that he was keeping Megatech System solvent by providing personal loans to the company. After the first plaintiff's employment with Megatech System was terminated, the plaintiffs came to learn of irregularities in the company's accounts through some of Megatech System's ex-employees. The plaintiffs then requested inspection of Megatech System's records in November 2006, but were given as they claimed documents in bits and pieces. In any case, the plaintiffs claimed that the documents revealed that Sivapiragasam had, *inter alia*, (a) diverted for his personal use the recruitment fees and renewal fees received from Indian workers and a recruitment agent for employment with Megatech System; (b) improperly deducted the foreign worker levy component from the wages paid to the Malaysian workers of Megatech System and diverted that deduction for his personal use; and (c) made purported loans to Megatech System for purpose of creating an indebtedness owing by the company to Sivapiragasam. Mr Manimaran Arumugam for the plaintiffs also asserted that Sivapiragasam had sold off Megatech System's profitable security guard business contrary to the interests of the company.

9 Several affidavits and statutory declarations were made in support of the plaintiffs' allegations. In respect of the last allegation, it was not in dispute that Megatech System had closed down its security guard services business. The plaintiffs had affirmed in their joint affidavit that the business was doing well before being closed down on the instructions of Sivapiragasam. In relation to allegation (c), the plaintiffs confirmed in their joint affidavit that Sivapiragasam's assertion that he had loaned Megatech System various amounts of money over the years was false. For allegations (a) and (b),

the plaintiffs relied on the testimony given by ex-employees of Megatech System, namely Major Selvam, Murugas Thiagaras ("Murugas") and Ignatius Felix A/L A Amaloo ("Amaloo").

10 Major Selvam was a director of Megatech System and Megatech Marine. His late wife was also a relative of Sivapiragasam. In his affidavit, Major Selvam deposed that Sivapiragasam had on two occasions received payment from the recruitment agents for the recruitment of the Indian workers.

11 Murugas was employed by Megatech System from May 2005 to August 2006 as a security operations manager. He was in charge of managing the security guards employed by Megatech System, including the payment of their salaries. The payment of salaries was to be made twice monthly, on the 15th of the current month and the 5th of the following month. In his statutory declaration, Murugas declared that Sivapiragasam had directed him to deduct amounts ranging from $100 to $240 from the salaries payable to the guards on the 5th of each month. According to Murugas, Sivapiragasam had informed him that the deductions were reimbursements from the guards to Megatech System for the foreign worker levy paid by Megatech System. Sivapiragasam reminded Murugas to make the deductions each time he gave Murugas money to pay the guards. The deductions were then returned to Sivapiragasam by Murugas at Megatech System's office. Murugas also declared that he was asked by two relatives in India to apply on their behalf to Megatech System for employment. He approached Sivapiragasam with the request and was told that he had to pay $5000 to secure employment for each relative. Murugas added that Sivapiragasam informed him that this was the amount that each of the workers recruited by Megatech System from India had to pay. Subsequently, Murugas made payment of $10,000 to Sivapiragasam. No receipt was given for the payment.

12 Amaloo was employed by Megatech System from April 2006 to August 2006 as a security guard. His salary was $500 plus overtime, although this was subsequently increased to $600 plus overtime. In his statutory declaration, Amaloo declared that Megatech System would deduct the foreign worker levy of $240 from his salary when payment was made on the 5th of each month. He added that after his salary was paid and the deductions made, he would be asked to sign a payment voucher for the sum of his salary that did *not* reflect the deductions made.

13 Major Selvam corroborated the plaintiffs' evidence that Sivapiragasam closed the security business even though it was profitable. As the business development manager of Megatech System, Major Selvam maintained that he was privy to the profitability of the security business and the shipyard business, and he confirmed that it was not true that the security business was making a loss.

14 Despite the plaintiffs informing Megatech System of the allegations that constituted Sivapiragasam's breach of fiduciary duties as a director of the company, no action was taken against him.

The Defendants' assertions

15 Sivapiragasam claimed that the plaintiffs brought the present application in order to force Sivapiragasam to buy out the plaintiffs' shares in Megatech System. According to Sivapiragasam, the plaintiffs were given ample opportunity to look at all the account books of the company. The inspection was supervised by an accounts executive from Megatech System, Usha Devi, and she had filed an affidavit confirming the inspection of the books and documents of the company over a period of seven days. However, the plaintiffs still could not produce any documentary evidence to prove their allegations against Sivapiragasam. In fact, the plaintiffs' case was self-contradictory because it

made no sense for Sivapiragasam to take money due to Megatech System on one hand and concoct false loans to Megatech System on the other.

16 Sivapiragasam, in his first affidavit, claimed to have injected, throughout the years, various sums of money into Megatech System. He denied making the employees of Megatech System pay the foreign worker levy imposed on the company and instead alleged that the testimonies of ex-employees relied upon by the plaintiffs' were not reliable because of their relationship with the plaintiffs. Furthermore, there was no truth that the security guard business was profitable. It was operating at a loss and nobody wanted to take it over.

17 Sivapiragasam asserted that the first plaintiff was unable to perform his duties at the company because of a heart operation in December 2004. The first plaintiff also failed to perform his functions as the operations manager of the marine branch of Megatech System thereby causing loss to the company on the three occasions when he failed to chase for payments from three shipyard related contracts, namely, $112,000 from Keppel Hitachi; $69,770 from New Con Engineering; and $41,713 from Wan Soon Construction Pte Ltd.

The law

18 Generally, only the directors of a company may bring an action on behalf of the company. However, s 216A of the Act provides minority shareholders an avenue to enforce a company's legal rights on its behalf if its directors without cause refused to do so. The requirements of s 216A(3) for leave to bring a derivative action are as follows:

> No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that —
>
> (a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
>
> (b) the complainant is acting in good faith; and
>
> (c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

19 Mr B Ganesh for the defendants submitted on the requirements in subsections (3)(b) and (3)(c). He argued that the onus of proof was on the plaintiffs to satisfy the two requirements of s 216A(3). However, the burden was not discharged because the affidavits were not good enough. The plaintiff had not produced any documentary evidence of their assertions despite inspection of the account books. Mr Ganesh pointed out that the company and its subsidiary were doing well in the absence of both plaintiffs and there was no reason given to show how a derivative action would be in the interests of the company.

20 The requirement that the action to be brought should appear to be *prima facie* in the interests of the company has been interpreted to mean that there should be a reasonable basis for the complaint and that the action sought to be instituted is a legitimate or arguable one (see *Teo Gek Luang v Ng Ai Tong* [1999] 1 SLR 434 ("*Teo Gek Luang*") where Lai Kew Chai J adopted the reasoning of the Ontario Court of Appeal in *Richardson Greenshields of Canada Ltd v Kalmacoff* (1995) 123 DLR (4th) 628). In *Agus Irawan v Toh Teck Chye* [2002] 2 SLR 198 ("*Agus Irawan*"), Choo Han Teck JC (as he then was) held that the words "legitimate" and "arguable" should be given their common and

natural meaning, *ie*, the claim must have a reasonable semblance of merit, and "if proved the company would stand to gain substantially in money or money's worth" (at [8]). Choo JC added that at this stage, the court should not be drawn into adjudication of the disputed facts (at [6]).

21 Contrary to Mr Ganesh's submissions, under s 216A(3)(b), the party opposing the s 216A application bears the burden of proving that the applicant did not act in good faith (per Choo JC in *Agus Irawan* at [9]). In *Pang Yong Hock v PKS Contracts Services* [2004] 3 SLR 1, Tay Yong Kwang J delivering the judgment of the Court of Appeal stated that:

> 20 The best way of demonstrating good faith is to show a legitimate claim which the directors are unreasonably reluctant to pursue with the appropriate vigour or at all. Naturally, the parties opposing a s 216A application will seek to show that the application is motivated by an ulterior purpose, such as dislike, ill-feeling or other personal reasons, rather than by the applicant's concern for the company. Hostility between the factions involved is bound to be present in most of such applications. It is therefore generally insufficient evidence of lack of good faith on the part of the applicant. However, if the opposing parties are able to show that the applicant is so motivated by vendetta, perceived or real, that his judgment will be clouded by purely personal considerations that may be sufficient for the court to find a lack of good faith on his part. An applicant's good faith would also be in doubt if he appears set on damaging or destroying the company out of sheer spite or worse, for the benefit of a competitor. It will also raise the question whether the intended action is going to be in the interests of the company at all. To this extent, there is an interplay of the requirements in s 216A(3)(b) and (c).
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> 21 Having established that an applicant is acting in good faith and that a claim appears genuine, the court must nevertheless weigh all the circumstances and decide whether the claim ought to be pursued. Whether the company stands "to gain substantially in money or in money's worth" (*per* Choo JC in *Agus Irawan*) relates more to the issue of whether it is in the interests of the company to pursue the claim rather than whether the claim is meritorious or not. A $100 claim may be meritorious but it may not be expedient to commence an action for it. The company may have genuine commercial considerations for not wanting to pursue certain claims. Perhaps it does not want to damage a good, long-term, profitable relationship. It could also be that it does not wish to generate bad publicity for itself because of some important negotiations which are underway.

Decision

22 Sivapiragasam denied the truth of the testimonies of Ganesan (an ex-employee of Megatech System) and Murugas. The plaintiffs stated in their joint affidavit that Ganesan had said that payment of between $1,000–$2,000 (*ie*,renewal fees) had been requested and obtained by Sivapiragasam. The latter had also claimed to have made a series of loans to Megatech System thereby, presumably, offsetting any moneys he took from the company. It must be remembered that it is not the court's role at this stage to determine the veracity of the plaintiffs' witnesses or the validity of Sivapiragasam's loans to Megatech System. These issues are best dealt with at trial, since Sivapiragasam's liability, if established, may not be eradicated merely by proof that he was indeed a creditor of Megatech System. I disagreed that the plaintiffs' case was contradictory. It was entirely consistent to suggest that a director could on the one hand siphon off moneys due to the company and on the other hand concoct a series of false loans against the company.

23 The affidavit evidence and the statutory declarations provided by the plaintiffs disclosed a *prima facie* case that Sivapiragasam had indeed deducted the foreign worker levy sum from the

wages of Megatech System's employees; that Sivapiragasam have improperly siphoned off recruitment fees and renewal fees moneys due to Megatech System and in doing so breached his fiduciary duties as a director of the company. In my view, the plaintiffs have shown on the facts that a derivative action would lie as the claims against Sivapiragasam have a reasonable semblance of merit. As stated above, it is premature to judge the veracity of the testimonies, particularly, in relation to the closing down of the security guard business; but the fact remains that there exists reasonable evidence from third party witnesses in the form of affidavits or statutory declarations claiming first hand knowledge of the events pertaining to the claims against Sivapiragasam thereby satisfying the requirements of s 216A of the Act. In contrast, in *Teo Gek Luang*, the application was dismissed because it was based on a speculative assertion that the defendant had transferred money illegally without direct evidence supporting the claim. Again, the plaintiffs, in *Agus Irawan*, wished to mount a claim on behalf of the defendant company against another defendant they alleged received rebates wrongfully. However, the documentary evidence betrayed the fact that the party against whom the plaintiff wished to proceed was *not* the party to whom the rebates were paid. As a result, the application was partly dismissed.

24 Allowing the plaintiffs to pursue an action against Sivapiragasam on behalf of Megatech System would be in the interests of the company because it would lead to the recovery of moneys properly owing to Megatech System. I have to add that the deductions of foreign workers levy from the monthly wages of the security guards ran counter to the company's obligation as employer to pay the foreign worker levy imposed under the s 11 of the Employment of Foreign Manpower Act (Cap 91A, 2007 Rev Ed). The deductions as a whole expose the company to potential claims by the employees for the return of the deductions. By instructing the deductions and thereafter pocketing the money, Sivapiragasam would be in breach his duty as director not to disregard the interests of the company as a whole by exposing it to potential claims. In *Australian Agricultural Co v Oatmont Pty Ltd* [1992] 8 ACSR 255, the Court of Appeal of the Supreme Court of the Northern Territory observed (at 266):

> [W]here directors are acting in abuse of their powers by knowingly or recklessly acting contrary to the general law, as a result of which the company sustains loss, this breach of the directors' fiduciary duty could well give rise to a derivative action.

25 Sivapiragasam made several other assertions against the plaintiffs, namely that the first plaintiff was himself guilty of neglect in his duties to Megatech System, and that the entire application was brought about to pressure him into buying the plaintiffs' shareholding. As noted by the Court of Appeal in *Pang Yong Hock*, any dispute between shareholders would probably be mired in animosity and spite; but hostility alone does not indicate bad faith unless it is evident that the applicant's personal judgment is clouded by a personal vendetta (see [21] above). There is no lack of hostility in this case, but it does not appear to me that the plaintiffs' judgment has been clouded in the sense that they are pursuing such an action for purely personal reasons or against the interests of the company. As pointed out by the plaintiffs, their directorships with Megatech System were only terminated after service of the present application filed on 5 July 2008. I would also add that although the first plaintiff's employment was terminated by Megatech System, this in itself does not evidence bad faith. In *Teo Gek Luang*, the plaintiff had also left the employ of the defendant company under "less than happy circumstances" but Lai J nonetheless held at [20] that this fact alone was not sufficient to evidence bad faith.

Conclusion

26 For the reasons stated, I granted the plaintiffs' application to pursue a derivative action in the name of Megatech System against Sivapiragasam. The plaintiffs were granted control of the conduct

of the intended derivative action. The conduct of the derivative action was held over pending the parties' agreement on the matter failing which the court would give directions. The costs of the application were fixed at $6,500.