SH Sameyeh Pte Ltd v Hassan's Carpets Pte Ltd
[2001] SGHC 179

Case Number : DCA 30/2000

Decision Date : 11 July 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Andrew J Hanam [Hanam & Co] for the appellants/plaintiffs; Sumitri Menon [Jansen, Menon & Lee] for the respondents/defendants

Parties : SH Sameyeh Pte Ltd — Hassan's Carpets Pte Ltd

JUDGMENT:

1.The plaintiffs and defendants were companies incorporated in Singapore and carry on the business of carpet dealers. The plaintiffs were also the beneficial shareholders of a company in Bangkok, Thailand called Hassan's Carpets Co Ltd (Bangkok), referred to at the trial as "HCB".

2.In this suit the plaintiffs claimed the sum of US$8,000 being the value of a "kazak" carpet which (they alleged) were given to the defendants on consignment for sale. The statement of claim averred that on 23 July 1996 an oral agreement was reached between one Sameyeh, a director and shareholder of the plaintiffs, and one Baba, the general manager of HCB. By this agreement Sameyeh, representing the plaintiffs, handed over a Russian kazak carpet ("the kazak") to Baba who represented the defendants. If the carpet was sold the defendants were to pay the plaintiffs US$8,000; otherwise the carpet was to be returned within the week. The transaction took place in Bangkok. The carpet was not sold within the agreed period but Sameyeh agreed to an extension of time for the consignment. Eventually, the carpet was sold but no payment was made to the plaintiffs.

3.The defendants averred that they had no knowledge of the transaction in Bangkok. Their defence was that Baba was the general manager of HCB and the contract, if at all, was made between the plaintiffs and Baba either in his personal capacity, or on behalf of HCB. However, as a matter of precaution, the defendants took out a third party action against Baba. The interlocutory proceedings in the third party action did not keep pace with the main action. The trial judge commenced the trial without the third party action. There were two further twists to the plot. First, only days before the trial the defendants' counsel Miss Menon applied to have Baba present at the trial. Mr. Hanam, counsel for the plaintiffs objected and the court agreed with him and disallowed Miss Menon's application. Next, in a reversal of sorts, Mr. Hanam then subpoenaed Baba who duly appeared at the trial. However, when Mr. Hanam applied to call Baba as the plaintiffs' witness on the day of trial itself, Miss Menon objected on the ground that his affidavit of evidence-in-chief had not been filed. The trial judge refused leave to call Baba as a witness whereupon Baba left the court and the trial continued (without Baba; without the third party action). In my view, this is not a desirable state of affairs, but, for reasons below, the appeal before me was able to proceed in spite of what transpired at the trial. That included a finding of fact by the trial judge that the plaintiffs had no case against the defendants because the contract concerning the kazak was made between the plaintiffs and Baba in his personal capacity (and not as agent for HCB or the defendants). There will be cases, of course, where a court may rightly refuse leave for a witness who has not filed his affidavit of evidence-in-chief to testify, but in this case, Baba ought to be allowed to testify. He would naturally have to explain why his evidence-in-chief was not made by way of affidavit. The court has the discretion to disregard his evidence if it is not convinced that the evidence was not creditworthy. There were only two persons who could give direct evidence as to the transaction made in Bangkok. They were Sameyeh and Baba and there was no reliable evidence that can be gleaned from the record that Baba

made the contract on his personal account. Given these circumstances, and the fact that Baba, who was a party to the suit, was not allowed to testify, it was wrong to make a finding of fact that Baba acted in his personal capacity. However, in view of the nature of the plaintiffs' case, this finding by the judge was not material to the appeal. I now come to the appeal proper.

4.The plaintiffs' case as related by its main witness Sameyeh was as follows. On 25 July 1996, Baba collected the kazak from a shop called Isphan Carpets. He then signed a receipt for it under the plaintiffs' letterhead. (This was admitted in evidence and marked as "PB1". Two days later, Baba gave Sameyeh a letter, signed by Baba, acknowledging receipt of the kazak and the terms of the agreement made. This letter was typed on HCB's letterhead and admitted in evidence as "PB2". Both documents were photocopies and were admitted in evidence although the originals were not produced.

5.Before me, Mr. Hanam argued that the trial judge overlooked the significance of PB2. He stated that although the letter was on the stationery of HCB it set out a promise to pay Mr. Sameyeh in Bangkok or "at my H.O. in Singapore". The initials "H.O." were understood to mean "Head Office", and the printed footnote gave the address of the H.O. as: "H.O. 19 Tanglin Road, #01-28/32 Tanglin Shopping Centre, Singapore". It was not disputed that this was the address of the defendants. On the basis of PB2 Mr. Hanam submitted that in reality the contracting party was the defendants. He submitted that as HCB was wholly and beneficially owned by the defendants who controlled all of HCB's activities, HCB and the defendants must be regarded as a single economic unit. Thus, he argued that the corporate veil must be lifted, and once that was done, it will be seen that HCB was, in fact, the defendants.

6.The pleadings, however, do not reflect the plaintiffs' case as set out above. On the contrary, the statement of claim pleaded that the contract was made between "the plaintiffs and the defendants through their respective representatives Chamuel Sameyeh and M.A. Baba in Bangkok". That is a straightforward allegation that the defendants were the principal contracting party acting through the agency of Baba. The case for the plaintiffs floundered when their own evidence indicated that the contract was made by Baba on behalf of HCB. This compelled Mr. Hanam to take the position that HCB and the defendants were "a single economic unit" or, as he submitted, that "HCB was the alter ego of the defendants". This seems to me to be an unusual use of the term "alter ego" (which means "another side of oneself"). That term is usually used in law, at least, to refer to a company as the alter ego of a natural person not of another company.

7.It is necessary for me, at this stage, to address the use of the term "agent" in the statement of claim. After pleading that Baba acted as a representative of the defendants, the statement of claim referred to HCB "as agents of the defendants" (in paragraph 5) and alternatively, that the defendants were "in breach of their duty as an agent for sale" (in paragraph 8). It was also pleaded that HCB "as agents of the defendants" held the kazak on trust for the plaintiffs. Consequently, the plaintiffs were obliged to recite the alternative claim based on breach of trust. From this hazy set of pleadings, an averment that HCB and the defendants were a single economic unit was considered by counsel to be crucial.

8.An application was made by Mr. Hanam at the trial to amend the claim based on the "single economic unit" point. The trial judge refused leave to amend but no grounds were given for his decision. The plaintiffs adduced evidence through their sole witness, Sameyeh himself. All that he had stated in his affidavit of evidence-in-chief was that he believed that he was dealing with the defendants all the while. No evidence was adduced to indicate that HCB and the defendants were a single economic unit. To state, as he did , that the "Bangkok office was part of the defendants" is woefully inadequate. It would serve no purpose to allow the claim to be amended to accommodate

the "single economic unit" argument without the necessary nest of facts in support. I am, therefore, of the view that the trial judge rightly did not allow the amendment.

9.In any event, the amendment would not have salvaged the plaintiffs' case. Their case will fail even with the pleadings amended as sought because the evidence from their only witness shows that the contract was ostensibly made between the plaintiffs and Baba on behalf of HCB. In coming to the conclusion, as I do, that the evidence does not support Mr. Hanam's "single economic unit" argument, it will be necessary to consider what that issue was about.

10.An incorporated company has a distinct and separate legal entity from that of its shareholders. The distinction must be respected, and has been, since *Saloman v A Saloman* [1897] AC 22. That distinction has been the primary reason why the incorporated company exists - to limit the liabilities of its shareholders. Anyone who lacks the comfort or confidence to deal with an incorporated company is always entitled to seek such security or comfort as he may extract from the company or its shareholders. Otherwise, he must accept the company for what it is worth.

11.The courts have, however, from time to time lifted the "corporate veil" which hides the shareholders from the gaze of those dealing with the company. The purpose is to render the shareholders accountable for the act of the company but the precondition for lifting the corporate veil is clear. The veil will be lifted only if the company was used as a means of committing a fraud, or something close to that, on the plaintiff. It is in this sense that the company may be described as a facade.

12.Mr. Hanam referred to a number of cases on this point; I say "this point" with some reservation because it appears to me that counsel drew no distinction between the concept of "a single economic unit" and that of "lifting the corporate veil". The principal case prayed in aid by Mr. Hanam was *DHN Food Distributors Ltd and Ors v London Borough of Tower Hamlets* [1976] 3 All ER 462. In my view, this case is not, and should not be regarded as a true case of "lifting the corporate veil". It is similar to other cases in which the court was required to construe a statute, contract, or some document so as to ascertain who was the proper person which is being addressed. In the *DHN* case, the parent company leased property owned by its subsidiary company. The property was acquired by the local authority who paid compensation to the registered owner, namely the subsidiary for the value of the land. DHN then claimed to be entitled (by virtue of s 5 of the Land Compensation Act, 1961) to compensation for disturbance. The local authority contended that DHN was only a tenant from year to year and, therefore, not entitled to compensation for disturbance to its business. Under the 1961 Act only owners of acquired land were entitled to compensation for disturbance.

13.The court of appeal allowed the appeal of DHN and, in ruling that DHN was entitled to compensation for disturbance, lifted the veil and found that DHN and its subsidiary in fact operated as a partnership and the companies in that group ought to be viewed as one with DHN "treated as that one". Thus, it concluded that DHN was an owner who was entitled to compensation under the 1961 Act. The special circumstances of this case was noted in the judgment of Shaw L.J. at page 474.

14.Thus, lifting the corporate veil is obviously a necessary prerequisite in ascertaining whether the companies were a single economic unit. But, in my view, the single economic unit argument is relevant only where the case involves, as I mentioned, an interpretation of a statute or document. Where the case does not concern the interpretation of a statute or document, and the present case before me cannot be regarded as such, then the lifting of the corporate veil would be a relevant exercise only for the purpose of disclosing an iniquity or the concealment of fraud. Otherwise, a creditor is being licensed to pursue the shareholders of the debtor company for the non-payment of a commercial debt by the company. This was what the plaintiffs here were seeking to do. There was no allegation of

fraud in the pleadings on the part of the defendants, and nothing of that nature was averred to in the evidence. The mere fact that the defendants were the beneficial owners of HCB created no liability for contracts made between them and the plaintiffs. The term "single economic unit" cannot therefore be applied to HCB and the defendants in this case.

15.For these reasons, and based solely on the case as presented by Mr. Hanam before me, the appeal must fail. There was no prejudice to the plaintiffs' case in the trial judge's rejection of their application to amend the claim, nor his refusal to allow the plaintiffs to call Baba as a witness. Accordingly, I dismissed the plaintiffs' appeal on these points as well.

Sgd:

Choo Han Teck
Judicial Commissioner