Yuninshing v Edward Mondong
[2001] SGHC 194

Case Number : Suit 595/2000, RA 56/2001

Decision Date : 23 July 2001

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : R Palakrishnan and Malathi Das (Palakrishnan & Partners) for the plaintiff/respondent; Soh Gim Chuan (Soh Wong & Yap) for the defendant/appellant

Parties : Yuninshing — Edward Mondong

Conflict of Laws – Natural forum – Parties Indonesian nationals – Entry into foreign exchange agreement in Indonesia – Plaintiff remitting Rupiahs to defendant's bank account in Indonesia – Action for defendant's failure to remit sum in US dollars into plaintiff's bank account in Singapore – Series of defences of overpayment – Defendant commencing action in Indonesia and seeking stay of Singapore action – Plaintiff obtaining Mareva injunction against defendant's substantial assets in Singapore – Defendant revoking Indonesian action – Defendant fugitive in Indonesia – Whether Indonesia more appropriate forum – Whether alleged illegal smuggling of Rupiahs out of Indonesia relevant

: This was an appeal (in RA 56/2001) against the assistant registrar`s decision on 28 March 2001 in Suit 595/2000 refusing to grant a stay of proceedings on the ground of forum non conveniens. I dismissed the appeal on 17 April 2001 and the defendant has now appealed against my decision (in CA 600060/2001).

The facts

This was a claim by the plaintiff (`Yuninshing`) against the defendant (`Mondong`) for damages of US$530,000 arising from an alleged breach of a foreign exchange contract.

Both parties are Indonesian nationals; they are also related in that Mondong is the uncle of Yuninshing. The claim arose out of an oral agreement reached in a conversation between the parties sometime in June 1999, at the home of Yuninshing`s parents in Surabaya, Indonesia. At that time, Yuninshing desired to buy US dollars to deposit into her Singapore account, while Mondong wished to convert US dollars in Singapore to Indonesian Rupiahs in his Jakarta account. It struck them that by entering into a direct exchange agreement, they would save on the exchange rate in the open forex market.

The arrangement worked well initially and transactions took place between June 1999 to mid-November 1999 without any problems. During this period, Yuninshing remitted sums in Indonesian Rupiahs (`IR`) from her accounts with Bank Central Asia and Bank Danamon in Surabaya, to Mondong`s accounts in the Jakarta branches of the respective banks. In return, Mondong would usually fax her a telegraphic transfer application form showing the corresponding remittance in US dollars into her Singapore account with Republic Central Bank (`RCB`) or NM Rothschild & Sons (`Rothschild`). Such telegraphic transfers were done via Thomas Cook Travel Services Pte Ltd (`Thomas Cook`), HBZ International Exchange (`HBZ`), and Christiana Bank, Singapore (`Christiana Bank`), depending on which had the most attractive prevailing rate, and also via Dutair & Sea Cargo Services Pte Ltd (`Dutair Singapore`), a company controlled by Mondong. On certain occasions, when

Mondong had bank notes to exchange, cash payments in US dollars would also be made to Yuninshing`s representive, Mr Ko Ahok, in Jakarta.

The subject of Yuninshing`s claim was the following two sums of moneys which were deposited into Mondong`s account:

(1) IR2,047,400,000 (equivalent to US$290,000), deposited on 25 November 1999; and

(2) IR1,722,000,000 (equivalent of US$240,000), deposited on 29 November 1999.

After these deposits were made, Mondong faxed to Yuninshing two telegraphic transfer application forms from Thomas Cook indicating the remittance of the sums into her Rothschild`s account. However, the plaintiff was later informed by Rothschild and Thomas Cook that no such remittances had been made. Yuninshing therefore claimed that Mondong had failed to remit to her account the sum of US$530,000, equivalent to IR3,769,400,000, which was the combined total of the two deposits.

Yuninshing filed this claim against Mondong on 7 August 2000. The first round of proceedings was, however, largely unfruitful. Mondong entered an appearance on 25 September 2000 and took out an application for, inter alia, a declaration that the Singapore courts had no jurisdiction to hear the matter. The application was allowed by the assistant registrar on 9 January 2001, but the order was subsequently set aside by consent on 30 January 2001 (in RA 9/2001).

In the second round of proceedings that followed, Mondong sought, inter alia, a stay of proceedings on the ground that Singapore was not the appropriate forum to try the matter. The application was heard by the assistant registrar on 28 March 2001. She refused to grant a stay on the ground of forum non conveniens and ordered costs against Mondong. It was against her decision (which I affirmed) that Mondong lodged the present appeal.

Preliminary issues

There were three preliminary issues which I took into consideration in determining this appeal:

(1) Firstly, Mondong had in the interim commenced legal proceedings in the District Court of Surabaya on 19 March 2001 (Register Case Number: 141/Pdt.G/2001/PN). In those proceedings, he claimed that he had overpaid Yuninshing and that it was the latter who in fact owed him IR1,250,450,000 from the series of transactions. The Surabaya action was, however, quite inexplicably revoked upon Mondong`s request on 11 April 2001.

(2) Secondly, it was noteworthy that the Surabaya proceedings constituted the conclusion of a series of vacillating defences advanced by Mondong. These defences were relevant as they indicated the type of evidence required in the main action itself.

Initially, Mondong claimed that he had made part payment of US$450,000 out of the US$530,000 in the following manner:

Date	Payment	Amount
25 November 1999	Cash payment to Mr Ko Ahok	US$100,000
30 November 1999	Cash payment to Mr Ko Ahok	US$30,000
30 November 1999	Deposit into bank	US$200,000
2 December 1999	Deposit into bank	US$100,000

2 December 1999	Deposit into bank	US$20,000

He admitted that he had failed to remit the remaining US$80,000 as his courier was apprehended by the Indonesian customs authorities and fined as a result.

Yuninshing, however, contended that these cash payments and deposits were in respect of previous remittances and not the present claim in question. Mondong subsequently revised his position and claimed that due to a miscalculation, he had actually made full payment of the US$530,000 and that he had in fact overpaid Yuninshing a nett amount of IR1,673,950,000 (in his third affidavit affirmed on 29 December 2000 at para 33). He later revised this figure to IR1,810,450,000 (in his fourth affidavit affirmed on 12 February 2001 at para 33). Finally, he adjusted the figure once more to IR1,250,450,000 (in his fifth affidavit affirmed on 22 March 2001 at para 77), which was the amount eventually claimed against Yuninshing in the Surabaya proceedings. In fact the IR figures which appeared in Mondong`s third and fourth affidavits are incorrect as they are in millions instead of billions.

It was clear from Mondong`s affidavits that the crux of the dispute did not lie with the remittances he received from Yuninshing in Jakarta. The contested issue is whether he had satisfied his contractual obligation to remit US dollars back to Yuninshing in Singapore. I also note that Mondong did no great favour to his credibility by repeatedly miscalculating the quantum of what was merely six (6) months` worth of transactions, which were all in large lump sum amounts.

The third issue of note is the fact that Mondong has substantial assets within the jurisdiction against which a judgment can be enforced. To this end, Yuninshing had obtained a Mareva injunction from the High Court on 2 April 2001 preventing Mondong from dissipating his individual and matrimonial assets in Singapore up to the value of US$600,000, in particular:

(1) a residential property (held on joint tenancy with his wife Baliati) at No 5 Tanjong Rhu Road, [num]02-02 Waterside Condominium, Singapore 436002;

(2) a commercial warehouse at 3, Upper Aljunied Link, [num]01-04, Blk B, Joo Seng Warehouse, Singapore 367902; and

(3) majority shares in Dutair Singapore, held by Mondong and his wife Baliati, with an authorised capital of S$150,000 and a paid-up capital of S$100,003.

The law

The principles governing a stay on the ground of forum non conveniens are well established; the locus classicus of this area of law is **Spiliada Maritime Corp v Cansulex** [1987] AC 460[1986] 3 All ER 843. For ease of reference I lay out the key passage in this case by Lord Goff of Chieveley ([1987] AC 460 at 476; [1986] 3 All ER 843 at 854-855):

> *(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

> *(b) As Lord Kinnear`s formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay ... Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.*

The Spiliada has been affirmed and applied locally by our Court of Appeal in **Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia** [1992] 2 SLR 776 , **Eng Liat Kiang v Eng Bak Hern** [1995] 3 SLR 97 , **Oriental Insurance Co v Bhavani Stores** [1998] 1 SLR 253 , and most recently in **PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings)** [2001] 2 SLR 49 .

In ***PT Hutan*** , Chao Hick Tin JA commented that whether the process contemplated by Lord Goff in ***The Spiliada*** was a two-stage process or a one-stage process, telescoping two into one, did not really matter, for, as he explained (at [para]17):

> *The ultimate question remains the same: where should the case be suitably tried having regard to the interest of the parties and the ends of justice.*

I respectfully agreed and applied the ***Spiliada*** test as follows: Had the defendant satisfied this court that the Indonesian court, having competent jurisdiction, was the appropriate forum for trial of the action, having regard to the interests of all the parties and the ends of justice? If so, had the plaintiff shown that there were any special circumstances why the trial should nevertheless have taken place before this jurisdiction?

Appropriate forum

RESIDENCE OF THE PARTIES

Both parties are Indonesian citizens, and Yuninshing herself resides in Surabaya.

It was unclear where Mondong habitually resides. He purported to reside at Greenville Blk Q, No 5, Jakarta, Indonesia, and admitted that he was under police investigations for deception and fraud, which arose when Yuninshing and other parties lodged complaints against him. As a result, the Indonesian police had issued a police order dated 28 June 2000 requiring him to report on Mondays and Thursdays to the Directorate of General Offences, Indonesian Police Intelligence. However, he had stopped reporting to the Directorate since 11 September 2000 on the grounds that he was ill and receiving treatment at Mount Elizabeth Hospital, Singapore. Consequently, the Indonesian police had placed him on the wanted list.

Mondong, however, maintained that he still resided in Indonesia but had gone into hiding as `unwanted elements` might resort to `strong arm tactics` if he turned up at the police station. He further alleged that Yuninshing and her mother wielded substantial influence in Indonesia and might

use force against him to resolve the dispute. To support this claim, he referred to a letter purportedly written by Yuninshing informing him that `if the matter could not be settled immediately, Mama would pay somebody (known to Mama`s Boss) to solve this matter, definitely they would use a force (***sic***)`.

Conversely, Yuninshing alleged that Mondong frequently visited Singapore and had strong family ties here. She alleged that his wife, Baliati, resided here, his three children were educated here, and that they lived at the Waterside condominium he owns.

Having considered the evidence, I found that Mondong`s account did severe disservice to his appeal. If he truly lived in fear in Indonesia from both legitimate as well as illegitimate scrutiny, it seems, quite contrarily, that it would have been to his personal advantage to have the matter heard in Singapore. Ironically, it should have been Yuninshing who would express preference for litigation in Indonesia. Whatever the truth may be as to Mondong`s habitual residency, it is clear to me that as a fugitive in Indonesia, he would be ill-disposed to enter an appearance in any court of law within that jurisdiction. Conversely, in so far as he has both residential and commercial interests in Singapore, as well as freedom of movement within this jurisdiction, the issue of residency seems to me to weigh more heavily in favour of this forum.

WITNESSES AND DOCUMENTARY EVIDENCE

The crux of the dispute lay in Mondong`s alleged failure to perform his contractual obligation in Singapore. I would reiterate that the methods of contractual performance by Mondong included:

(1) cash payments of US dollars to Mr Ko Ahok in Jakarta; and

(2) telegraphic transfers from Thomas Cook, HBZ, Christiana Bank and Dutair Singapore, to Yuninshing`s accounts with Republic Central Bank and NM Rothschild & Sons in Singapore.

With regard to the cash payments, Yuninshing had represented that Mr Ko Ahok is an old family friend and would be willing and able to travel to Singapore to attend as a witness.

In respect of the telegraphic transfers, I likewise found that as contractual performance was to take place in Singapore, documentary proof would be easily attainable within this jurisdiction. The relevant institutions such as Thomas Cook, Rothschild, as well as Dutair Singapore are located in Singapore. It is unnecessary, as Mondong submits, to procure Indonesian witnesses who handled the transactions on the Jakarta end to prove the remittance. Further, the documents from the above-mentioned financial institutions in Singapore as well as from Christiana Bank and HBZ, would likely be in English and in any case, I could not see that translation of bank statements from Bahasa Indonesia would prove of much difficulty to this court. Accordingly, I found that with regard to the witnesses and documentary evidence necessary for the main trial, the balance of convenience clearly lay with a trial within this jurisdiction.

ILLEGALITY

Mondong had submitted at various stages of the proceeding that the oral agreement was illegal under the laws of Indonesia for several reasons, and as such best dealt with in an Indonesian court. Firstly, he claimed the agreement was in reality designed to flout currency controls in Indonesia, in that Mondong was effectively smuggling Yuninshing`s rupiahs out of Indonesia by courier to convert into

US dollars in Singapore. In support of this contention Mondong claimed that on one occasion his courier was caught and heavily fined. Secondly, he alleged that Yuninshing had also entered into the agreement for the purpose of tax evasion and money laundering.

With regard to currency controls, the law in Indonesia has been helpfully set out by Minang Warman Sofyan & Associates Law Offices, in a letter addressed to Yuninshing`s solicitors dated 23 October 2000 (see exh Y8 in Yuninshing`s third affidavit filed on 12 March 2001 at p 55). At the material time, the applicable provisions were Indonesian Government Regulation No 18 of 1998 dated 17 January 1998, the Decision of the Board of Executive Directors of Bank Indonesia No 30/181A/KEP/DIR dated 17 January 1998 and No 30/217A/KEP/DIR dated 6 March 1998. The combined effect of these provisions was that the transportation of a sum of between five million to ten million IRs into or out of Indonesia required the making of a declaration, and the transportation of a sum in excess of ten million IRs required a permit from Bank Indonesia.

The present transaction would clearly have been an illegal one if it had specifically provided for the transporting of rupiahs into or out of Indonesia without a permit, given the quantum of the sums involved. However, I did not find that the contract contemplated such a transaction. It is within ordinary commercial practice to effect a standing foreign exchange arrangement inter partes in order to save on losses resulting from open market trading. Furthermore, there is evidence that Yuninshing had performed such transactions legally via telegraphic transfer when Mondong had no US dollars to exchange with her. In such circumstances, she had purchased US dollars from Rothschild and remitted IRs into the ABN-AMRO Bank in Jakarta. It is highly unlikely that she would have done so if she had an arrangement with Mondong to illegally smuggle rupiahs out of Indonesia. Moreover, had Yuninshing been privy to an illegal contract, it is doubtful that she would have reported Mondong to the Indonesian authorities for fraud in the first place.

It seemed far more likely to me that Mondong had simply acted on his own initiative to illegally smuggle rupiahs out of Indonesia. Such action does not, without more, taint the contract with illegality. A contract capable of legal fulfilment is not rendered illegal simply because of the nefarious means by which the promisor chooses to fulfil it.

As for money laundering and tax evasion, I found that the claims made by Mondong were bare assertions and completely unsupported by evidence. Accordingly, I found that the issue of illegality was quite simply a red herring.

Special circumstances justifying refusal of stay

Had Mondong been able to convince me that, prima facie, Indonesia was the more appropriate forum for the hearing of this dispute, there would nevertheless have existed special circumstances in favour of refusing a stay of proceedings. The matter had already proceeded to an advanced stage within this jurisdiction. As of the hearing date, the parties had filed several affidavits (Yuninshing had filed five and Mondong six). Both parties had also adduced substantial documentary evidence within their affidavits. The statement of claim and the defence for the main action had likewise been filed. In addition, Yuninshing had obtained interim relief in the form of a Mareva injunction to secure her chances of satisfaction upon judgment.

In contrast, the Surabaya claim had quite inexplicably been retracted by Mondong on 12 April 2001. Further, in view of Mondong`s fugitive status, there was no indication that there would remain any

worthwhile assets in Indonesia against which a potential judgment could be enforced. Thus, even if Yuninshing succeeded in a fresh action in Indonesia, she would in all likelihood still have to apply to our courts to enforce the ruling as a judgment debt, if indeed by such time there were still assets remaining within this jurisdiction.

Conclusion

The burden was upon the defendant to persuade this court to exercise its discretion to grant a stay on the grounds of forum non conveniens. As emphasised by Lord Goff in ***The Spiliada*** and our Court of Appeal in ***PT Hutan*** (supra), this is not simply a question of practical convenience, but of whether the forum is the most appropriate one in the interests of all parties and the ends of justice. Although the oral agreement was concluded in Surabaya and remittances by Yuninshing took place in Jakarta, the central issue in dispute was contractual performance by Mondong in Singapore, that is, the remittance of US dollars into Yuninshing`s bank accounts in Singapore. Proof of this issue would largely be found within this jurisdiction. Further, Mondong`s fugitive status in Indonesia suggested that he was unlikely to enter an appearance before or place his assets at the disposal of, the Indonesian courts. Conversely, there was every indication that he had a residential presence in Singapore and, by his own account, it seemed to be to his personal advantage to attend court within this jurisdiction. Finally, proceedings in Singapore were at a very advanced stage, with numerous affidavits filed by both parties and a Mareva injunction obtained to secure enforcement of a prospective judgment. It was clear that the interests of the parties and the ends of justice pointed towards Singapore as the place of adjudication of this claim.

Outcome:

Appeal dismissed.