Central Bank of India v Hemant Govindprasad Bansal and others and other actions [2002] SGHC 1

Case Number : Suit 1045/1999, 1046/1999, 1047/1999

Decision Date : 07 January 2002

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Tan Teng Muan and Wong Khai Leng (Mallal & Namazie) for the plaintiff; N Sreenivasan and M Rajaram (Straits Law Practice LLC) for the first and second defendants

Parties : Central Bank of India — Hemant Govindprasad Bansal and others

Civil Procedure – Dismissal for want of prosecution – Submission of no case to answer – Defendants electing not to give evidence in defence – Effect of such election – Whether any prima facie evidence to support plaintiffs' claims

Evidence – Admissibility of evidence – Hearsay – Statements made by persons not testifying at trial – Whether such statements admissible – Whether criteria for admission met – ss 32(b) & 34 Evidence Act (Cap 97, 1997 Ed)

: Central Bank of India (`CBI`), the plaintiff in this consolidated hearing, is a bank incorporated in India. Natsyn Fibres Pte Ltd (`Natsyn`), the third defendant in Suit Nos 1045/99 and 1046/99 and the defendant in Suit 1047/99, is a company incorporated in Singapore. Hemant Bansal (`Bansal`) and his wife Aneeta Bansal, the first and second defendants respectively in Suit Nos 1045/99 and 1046/99 (referred to collectively as `the Bansals`), were the only shareholders and directors of Natsyn.

On 3 August 2001, a few days prior to the commencement of these hearings, a winding-up order was made against Natsyn. As a consequence all proceedings against Natsyn were, by reason of s 263(3) of the Companies Act, stayed. Accordingly, the hearings before me proceeded only in respect of the claims against the Bansals in Suit Nos 1045/99 and 1046/99.

Natsyn, in late 1997, had purchased various goods from Bhagwati Cottons Ltd (`Bhagwati`) and GPB Fibres Ltd (`GPB`). Bhagwati - a public listed company in India - was founded by Bansal`s father. Bansal`s father had passed away in 1986 but Bansal and other members of his family continued to hold substantial interests in Bhagwati. Bansal was a director of Bhagwati.

GPB was also an Indian company. Bansal and other members of his family had substantial equity interest in GPB. GPB, at about the time of these transactions, was amalgamated into Bhagwati. In view of the close relationship between GPB and Bhagwati, the parties in the proceedings before me did not seek to make any distinction between the two companies. All references to Bhagwati in this judgment will therefore, where appropriate, be references to GPB.

To pay for the goods purchased from Bhagwati, Natsyn, through Campagnie Financiere De Cic Et De L`Union Europeene in Singapore (`CF Bank`) and Mees Pierson NV in Singapore (`MP Bank`) had opened various letters of credit (`LCs`) in favour of Bhagwati. The LCs were subject to UCP 500 and credit was available by negotiation.

Bhagwati, upon receipt of the LCs referred to above, approached CBI and discounted the bills under the LCs with CBI by presenting the requisite banking and shipping documents to CBI. Bhagwati received about US$2.8m from CBI pursuant to such negotiations. It was CBI`s pleaded case that after negotiation CBI, at Bhagwati`s request, handed the negotiated documents to Bhagwati for Bhagwati to courier to CF Bank/MP Bank in Singapore. The documents did not, however, find their

way to either CF Bank or MP Bank. It was pleaded that the documents, instead, found their way to the Bansals (and Natsyn) who then proceeded to arrange for the collection of the goods comprised in the documents without payment to CBI of the sums due under the LCs.

In their defence, the Bansals did not specifically deny CBI`s allegation that the documents had been handed to Bhagwati for transmission to CF Bank and MP Bank. The position the Bansals took (as stated in para 3 of the defence) was:

> *The 1st Defendant [ie Bansal] has no detailed knowledge of the business relationship between GPB, Bhagwati and the Plaintiff. The 2nd and 3rd Defendants [ie Aneeta Bansal and Natsyn] have no knowledge of the relationship between GPB, Bhagwati and the Plaintiff.*

Most significantly, there was no denial by the Bansals that they had received the negotiated documents from Bhagwati and had collected the goods comprised therein.

conspiracy conversion constructive trust CBI claimed that the Bansals were accountable to CBI for the goods/moneys received on the following grounds:

(1) : conspiring with Bhagwati to injure CBI by inducing CBI to part with the said documents purportedly for the purpose of delivering the documents to CF Bank or MP Bank when the Bansals and Bhagwati had no intention of so doing;

(2) : unlawfully obtaining possession of the goods represented by the said documents without CBI`s consent and appropriating those goods in conversion of the same; and

(3) : by knowingly receiving the documents and/or the goods, the Bansals become constructive trustees for CBI of all moneys received that relate to the documents/goods.

Alternatively, CBI claimed damages for the loss of the goods and/or bills.

The claim against the Bansals in Suit 1045/99 was for US$1,190,893.28 and the claim in Suit 1046/99 was for US$274,319.04, making a total claim of US$1,465,212. This figure was arrived at after giving the Bansals and Natsyn (`the defendants`) credit for the sum of US$1,325,033 (being US$1,291,694 in respect of Suit 1045/99 and US$33,339 in respect of Suit 1046/99) which sum the defendants had, it was alleged, paid to CBI on or about 11 December 1997 in part settlement of CBI`s claims in respect of these transactions. The Bansals, in their defence and in the cross-examination of CBI`s witness, did not seek to deny that such part-payments had, in fact, been effected.

The claims against the Bansals in the two suits were almost identical in nature. So were the defences filed. The Bansals were content, in their defence, merely to deny the alleged conspiracy, conversion and constructive trust. They did not seek to put forward any positive case as to why they were not accountable to CBI for the goods or the proceeds of sale thereof. However, in the course of the hearing, under pressure from Mr Tan Teng Muan, counsel for CBI, the Bansals amended their defence. In their amended defence, they alleged that Natsyn had purchased the goods from Bhagwati under terms which included the following:

(1) LCs would be opened with GPB/Bhagwati as the beneficiaries;

(2) the LCs would have certain conditions [which counsel referred to as `pre-conditions`] apparent on the face of them, which would have to be fulfilled for payment to be made. The effect of these conditions was that, if the conditions were not met, the third defendant had the commercial option to make payment outside the LC, through banking channels; and

(3) in prior transactions, as well as in some of the transactions relevant to the present

proceedings, payments outside the LCs (through banking channels) had been made and accepted by GPB/Bhagwati with the knowledge of CBI.

Mr N Sreenivasan, counsel for the Bansals, indicated that the reason his clients had been tardy in pleading a positive case was because of fears of adverse reactions in India from the foreign exchange regulatory authorities.

From the amendments made and from the questions put to CBI`s witness by Mr Sreenivasan, I gathered that the Bansals were alleging that under the terms under which Natsyn had purchased the goods from Bhagwati, Natsyn was at liberty to either pay for the goods under the LCs or, at its option, deliberately fail to meet the pre-conditions contained in the LCs and instead make payments for the goods directly.

The `pre-conditions` identified by Mr Sreenivasan in the course of his cross-examination of CBI`s witness were cl 7 in the LCs from MP Bank and Special Condition 3 in the LCs from CF Bank. Clause 7 of the LCs from MP Bank stated:

> *Inspection certificate issued by the applicant, duly signed by the authorised signatories of the applicant whose signatures must be verified by the issuing bank prior to negotiation, stating that the goods are strictly in accordance with the terms of the contract.*

whilst Special Condition 3 of the LCs from CF Bank stated:

> *Discharge port and notify party will be advised later by way of amendment to this credit.*

From the questions asked, the suggestion appears to be that CBI was privy to this arrangement wherein Natsyn had such an option. It was suggested to CBI`s witness that the release of the documents to Bhagwati by CBI (in the transactions related to the present proceedings as well as in some earlier transactions) signalled CBI`s willingness to receive payments outside the LC. It was further suggested that it was in this context that the part-payments amounting to US$1,325,033 (referred to earlier) were made to CBI.

CBI called only one witness in support of its claim. This was Vijay Kumar Bhandari (`Bhandari`), the General Manager since 1996 of the Head Office of CBI situate at Mumbai (India). In that capacity, Bhandari had supervisory powers over the branch offices at Mumbai. The accounts of Bhagwati relevant to the transactions in the present cases were maintained at one of the Mumbai branch offices. As Bhandari was stationed at the Head Office, he had no personal knowledge of the matters related to these claims. His evidence on the circumstances surrounding the release of the documents to Bhagwati was therefore based entirely on what he could gather from the documentation available at the office. In particular, he sought to adduce in evidence a pile of documents known as `process notes`. Process notes were notes kept by officers of CBI of conversations with customers and others having dealings with CBI.

In the process notes that Bhandari sought to produce to the court the officers of CBI who had been involved in the requests by Bhagwati for the discounted documents had allegedly noted the reasons for the requests and sought the directions of the senior manager at the branch - one Peter Soundararajan - on these requests. CBI, however, did not call any of these officers (or Peter Soundararajan) to testify.

Mr Sreenivasan objected to the admission of these process notes or to any testimony from Bhandari on the contents of the notes. Mr Sreenivasan pointed out that it was incumbent on CBI, in support of their allegation of conspiracy, to prove that the documents were released as a result of some misrepresentations by Bhagwati. This, he submitted, CBI could properly do only through the officers to whom those representations had allegedly been made. He submitted that in the absence of the testimony of those officers the process notes allegedly made by them were hearsay and therefore inadmissible. Mr Sreenivasan also pointed out that the notes were, in the main, illegible and submitted that the court should not engage itself in speculating what those officers had intended to write in the process notes.

Mr Tan conceded that in the absence of the testimony of the persons who wrote the process notes, the contents of the notes would prima facie be hearsay and inadmissible. He sought, however, to persuade the court that the provisions of ss 32(b) and 34 of the Evidence Act (Cap 97, 1997 Ed) were applicable in this case and that the process notes were admissible in evidence under those provisions.

The criteria for the admission of any statement, oral or written, under the provisions of s 32 is that the statement must be made by:

> *... a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable ...*

For CBI to be permitted to adduce the process notes under s 32(b), CBI would have to satisfy the court that the case fell within the above criteria. ***Sarkar on Evidence*** (14th Ed, 1993) Vol I, at p 559, in dealing with similar provisions in the Indian Evidence Act, states:

> *The general ground of reception of such evidence is that in the cases in question no better evidence is to be had. Such statements are admitted on the principle of Necessity. The person whose statement is offered being dead or not available, no better evidence can be had.* ***Before reception of this kind of evidence, the first condition of admissibility, viz death, etc must be proved to the satisfaction of the judge****. [Emphasis is added.]*

There was, in the present case, no evidence led on behalf of CBI to show that the makers of the process notes fell within the stipulated criteria. To the contrary, it appeared from the evidence of Bhandari that no serious effort was made by CBI to procure their attendance.

The other provision in the Evidence Act relied on by CBI, namely s 34, was also, in my view, of no assistance to CBI. Section 34 is a very limited provision that applies only in respect of books of account. In the present case, whilst some of the process notes appear to have some figures scrawled on them, those scrawls could not, in my view, have the effect of converting those process notes into books of account.

For the above reasons, I ruled that the contents of the process notes, in the absence of the testimony of the persons who wrote them, would not be admissible in evidence.

Encouraged perhaps by the fact that this ruling in effect meant that there was an absence of any direct evidence that the documents were handed over on the representation by Bhagwati that Bhagwati would, on behalf of CBI, courier the documents to CF Bank and MP Bank in Singapore, the Bansals, at the close of CBI`s case, elected not to adduce any evidence in defence of the claims but rely only on a submission of no case.

A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff`s version of the story. So long as there is some prima facie evidence that supports the essential limbs of the plaintiff`s claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant.

In their textbook, ***Litigation: Evidence and Procedure*** (16th Ed), at p 732, Aronson and Hunter summarise the effect of making such a submission as follows:

> *A no case to answer submission by a defendant or accused will succeed only if the evidence supporting the case of the plaintiff or prosecution (respectively) is fatally flawed. It is so flawed only if there is a complete absence of* ***any*** *evidence which could lead to an inference that a critical fact exists. If there is some evidence on each critical element, there is a case to answer, no matter how slender or unbelievable the judge might think it to be ... However, if the defence leads no evidence where there is a case to answer, its silence could (depending on the facts) be taken to strengthen the opposing case. In particular, circumstantial evidence which could cut both ways might well look stronger if the defendant or accused is in a position to dispel the doubt, but refuses to go into evidence:* ***May v O`Sullivan*** *[1955] 92 CLR 654; and* ***Weissensteiner v R*** *[1993] 178 CLR 217.*

This text was drawn to my attention by Mr Tan.

Mr Sreenivasan described Aronson and Hunter`s book as a `somewhat obscure Australian text` and urged me to reject that summary of the legal position and rely instead on what was said by the English Court of Appeal in **Storey v Storey** [1961] P 63[1960] 3 All ER 279. In particular, Mr Sreenivasan drew my attention to the following passage in the judgment of Ormerod LJ in that case ([1961] P 63 at 68; [1960] 3 All ER 279 at 282):

> *There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff`s evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.*

Mr Sreenivasan submitted that the evidence led by CBI did not satisfy either of the circumstances referred to by Ormerod LJ.

In ***Storey v Storey*** (supra), the Court of Appeal was considering the circumstances in which an appeal court can, in a case where a submission of no case had been upheld, direct that a new trial be held. This appears from the paragraph following the above quoted passage where Ormerod LJ states:

> *There can, we think, be no doubt that in the former type of submission a*

defendant is bound by his election, and there can be no new trial. This rule, in our opinion, however, does not of necessity apply to the second type of case where the judge is invited to dismiss the case because of the unsatisfactory or unreliable nature of the evidence. In some cases it may well be that the appellate court will be able to decide the case without sending it back, but in others, and this in our judgment is certainly one, justice could not be done without a re-hearing ... In our opinion, if the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission.

It was in that context that Ormerod LJ highlighted the two circumstances in the passage quoted in [para]23 above.

It may be that the view taken by Aronson and Hunter was too restrictive and that a submission of no case to meet may also be upheld where the evidence adduced by the plaintiff is so unsatisfactory or unreliable that the court is able to find that the burden of proof on the plaintiff has not been discharged. But that said, I nevertheless consider the summary by Aronson and Hunter a helpful one.

In the present case, CBI was the negotiating bank and as negotiating bank had given value for the shipping and other documents presented to them by Bhagwati. Having given value, the documents belonged to CBI and it was CBI that was entitled to the possession and use of the goods represented by the documents. However, the documents found their way to Natsyn and it was not in dispute that the goods represented by the documents were dealt with by Natsyn. Evidence was given by Bhandari that whenever CBI negotiated documents, it would rubber-stamp the documents with a unique rubber stamp that made it clear that the documents had been taken up by CBI. Natsyn in receiving the documents would therefore have had notice of CBI`s interest in the documents. In any event, Natsyn would have known that it had received documentation that should, since the goods were to be paid for by LC, have been received by CF Bank or MP Bank. As the Bansals were the only shareholders/directors of Natsyn, it is not an unreasonable inference to draw that Natsyn received and dealt with the documents with their full complicity.

There was no evidence before the court of the circumstances under which the documents had been handed over to Bhagwati by CBI. That being so, it could justifiably be said that there was, at the close of CBI`s case, no evidence before the court to support the allegation of conspiracy. But conspiracy is only one of the three heads of claim raised by CBI. The other two were conversion and constructive trust and one needs to consider whether, at the close of CBI`s case, there was prima facie evidence to support CBI`s claims under these two heads.

At the close of the case for CBI, there was evidence on which the court could come to the conclusion that the Bansals knew, when they (through Natsyn) dealt with the goods covered by the documents, that the documents were the property of CBI. In proceeding to deal with the goods despite that knowledge, the Bansals could well be liable in conversion and/or as constructive trustees. But, by electing not to testify, the Bansals have elected not to put before the court their explanation of the events that happened. In these circumstances, I can only conclude that they had no defence to these claims. I therefore give judgment in favour of CBI in the sum of US$1,190,893.28 in Suit 1045/99 and US$274,319.04 in Suit 1046/99. I also order that the Bansals pay the costs of the two suits and pay interest on the judgment sum at 6% p[thinsp]a from date of writ.

Outcome:

Claims allowed.