

Purwadi v Ung Hooi Leng
[2003] SGHC 211

Case Number : Suit 502/2003, RA 291/2003, SIC 5481/2003

Decision Date : 18 September 2003

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Leslie Netto and S Magintharan (Netto Tan & S Magin) for the appellant/applicant//defendant; Kesavan Nair (David Lim & Partners) for the respondent/plaintiff

Parties : Purwadi — Ung Hooi Leng

Civil Procedure – Judgments and orders – Application to set aside judgment in default of appearance – Whether merits of defence warrant matter proceeding to trial

Civil Procedure – Judgments and orders – Application to set aside order for substituted service of writ of summons – Whether defendant has waived any irregularity in the service of writ by seeking leave to file her defence or enter appearance

Civil Procedure – Judgments and orders – Application to set aside order for substituted service of writ of summons – Whether order irregular – Burden of proof – Whether defendant has discharged burden of proving that she was not within jurisdiction at the material time

1 In September 2000, the plaintiff ("Purwadi") received from one John Soh Chee Wen ("Soh") a United Overseas Bank Singapore cash cheque dated 15 September 2000 for the sum of \$1.6 million in part payment of a loan that Purwadi had granted to Soh. The identity of the drawer of the cheque was not apparent on the face of the cheque.

2 On 19 October 2000, Purwadi presented the cheque for payment but it was dishonoured and returned to him marked "refer to drawer". The advice slip from UOB identified the drawer of the cheque as Ms Ung Hooi Leng ("Ung") but gave no further details about Ung. Purwadi did not know anyone by that name. His solicitors therefore sent a notice of dishonour addressed to Ung to UOB with the request that UOB forward the notice to Ung. UOB responded to say that they were unable to accede to that request.

3 Purwadi sought to ascertain the whereabouts of Ung by making enquiries from his friends, looking up the Singapore Telephone Directory and by searching her name on the BizNet but was not able to locate her. In June 2003, he decided to commence legal proceedings (Suit 502/2003) against Ung to recover the amount of \$1.6 million stated on the cheque.

4 To effect service of the writ, Purwadi (vide SIC 3326/2003) applied for and, on 4 June 2003, obtained leave of court to effect substituted service by publication of a notice of the writ in one issue of the "Straits Times" and by posting a copy of the writ and the order for substituted service on the notice board of the court. The order for substituted service was complied with and as Ung did not enter appearance within the time stipulated in the advertisement, Purwadi obtained judgment in default of appearance against Ung for the said sum.

5 Sometime after obtaining the default judgment, Purwadi learnt that Reed Group Holdings Ltd ("Reed"), a public listed company in Singapore, had announced the placement of 10,000,000 of its ordinary shares with one "Ung Hooi Leng" at a price of \$0.05 per share (making a total of \$500,000). Purwadi suspected this "Ung Hooi Leng" to be the same "Ung Hooi Leng" who had issued the \$1.6 million cheque. Accordingly, on his instructions, his solicitors issued a Writ of Seizure and Sale against

Reed, the Central Depository and a number of broking houses (including Kim Eng Ong Asia Securities Ltd ("KEOA Securities") in respect of these Reed shares and any other shares that they might be holding for "Ung Hooi Leng".

6 On 9 July 2003, Ung Hooi Leng, through her Kuala Lumpur solicitors, Krish Maniam & Co ("Krish Maniam"), wrote to KEOA Securities (copied to the Sheriff in Singapore) to say that she did not know or have any dealings with any person by the name of "Purwadi" and that she had no knowledge of Suit 502/2003. In that letter Ung took the position that Suit 502/2003 was a frivolous suit as the writ did not state the defendant's identity card number and the identity of the defendant was therefore not known. The letter went on to say:

It must be borne in mind that there could be more than one Ung Hooi Leng and thus our client takes the position that this Writ of Seizure and Sale does not refer to her and does not involve her.

Krish Maniam in that letter demanded that their client's account be "unfrozen" and that the Sheriff be notified of this "grave error".

7 On 10 July 2003, M/s Netto Tan & S Magin ("Netto Tan") on instructions from Krish Maniam wrote to Purwadi's solicitors and asked for copies of the Writ of Seizure and Sale and other documents in relation to Suit 502/2003. In their response, M/s David Lim & Partners ("DL&P") referred, inter alia, to Krish Maniam's letter of 9 July 2003 to KEOA Securities and informed Netto Tan that the defendant in Suit 502/2003 was the holder of UOB account No 101-312-305-0 and that if their client was the holder of that account, then their client was the judgment debtor in respect of whom the default judgment in Suit 502/2003 had been obtained. DL&P requested Netto Tan to confirm whether their client held the said account. On 16 July 2000, DL&P repeated their request for confirmation. Netto Tan, in their response on 17 July 2003, confirmed that their client was the holder of the said account but went on to state that as DL&P had not provided sufficient information with regards to the identity of the judgment debtor they (Netto Tan) were unable to confirm if their client was the judgment debtor.

8 It is interesting to note that despite this refusal to admit that their client was the judgment debtor in Suit 502/2003, Netto Tan had, on 10 July 2003, already applied (in SIC 4256/2003) to set aside the default judgment. The orders prayed for in that SIC were:

- (a) that the execution of the Writ of Seizure and Sale No 52 of 2003 be stayed pending the outcome of the defendant's setting aside application;
- (b) that the judgment entered on 26 July 2003 against the defendant in default of appearance be set aside;
- (c) that the defendant be permitted to file her Defence within 14 days from the date of the order to be made.

This application – in particular prayers (b) and (c) – was a clear admission that the "Ung Hooi Leng" that Netto Tan were acting for was the defendant in Suit 502/2003. SIC 4256/2003 was subsequently amended by, inter alia, alleging irregularity in the manner of service as one of the grounds for the setting aside prayed for in prayer (b) and by replacing prayer (c) by a prayer that the defendant be permitted to enter appearance within 14 days.

9 The main ground of Ung's application in SIC 4256/2003 was that she was a citizen of Malaysia and a resident in Kuala Lumpur and was not aware of the issue of the Writ of Summons in

Suit 502/2003. Ung also stated that she did not have any dealings with Purwadi; did not even know who he was; had never given to Purwadi or to Soh any cheque; and that she was considering lodging a police report against Purwadi for fraud and forgery.

10 The application in SIC 4256/2003 was heard and dismissed on 11 August 2003 by the Asst Registrar, Joyce Low. In dismissing the application, the learned Asst Registrar stated:

The default judgment against the Defendant is upheld because she did not raise any defences on the merits to warrant the matter proceeding to trial.

The order for substituted service by advertisement in Singapore was bad since the very purpose of its issue, i.e. to bring the writ to the attention of the Defendant, had not been satisfied. The advertisement in Singapore did not or was not likely to bring knowledge of the writ to the Defendant who is a Malaysian and was resident there when the writ was issued.

However, the mere fact that the order for substituted service was bad is not, of itself, sufficient grounds for the court to set aside a default judgment. In exercising my discretionary power to set aside a default judgment, I considered all the defences raised by Defendant. First, that there was a total failure of consideration for the bill because she does not know the Plaintiff at all. Secondly, that one Soh, who gave the bill to the Plaintiff, did not have the authority from the Defendant to do so. Lastly, the Defendant's allegation that there was fraud on the Plaintiff's part.

None of these defences have a real prospect of success. By s 30(1) of the Bill of Exchange Act, every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. Hence, the Defendant is presumed to receive consideration from Soh for the bill since she signed it and she has the burden to rebut this presumption. However, the Defendant's affidavits and her counsel's oral submissions did not explain the relationship between the Defendant and Soh at all. Pursuant to s 30(2) of the Bill of Exchange Act, Soh, a holder of the bill, is prima facie a holder in due course for value. Consequently, by s 29(3), the Plaintiff, a holder who derives his title to a bill through Soh, a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of a holder in due course as against the Defendant. The effect of these provisions means that it is irrelevant that no consideration proceeded from the Plaintiff to the Defendant; that the Defendant did not know the Plaintiff; or that it was Soh who took a loan from the Plaintiff. The defence that Soh lacked authority to pass the bill to the Plaintiff is also without merit. This is because Soh, being a holder in due course of the bill, can endorse it to anyone including the Plaintiff. Lastly, with respect to the defence of fraud, the Defendant did not give any particulars of the fraud at all. To raise a defence of fraud with a real prospect of success, it is insufficient to make a bare assertion of fraud without providing any particulars. [Emphasis added]

Ung, in SIC 4256/2003, had asked for the judgment in default to be set aside. She had also asked that leave be granted for her to enter appearance. Ung had not, however, prayed for the service of the writ to be set aside. In those circumstances, the learned Asst Registrar, even though she found the order for substituted service of the writ to be bad, did not have to and did not consider the question whether the service of the writ ought to be set aside.

11 Alerted by the Asst Registrar's comments relating to the order for substituted service, Ung applied (vide SIC 5481/2003) for that order to be set aside. That SIC was heard by me together with the appeal by Ung against the Asst Registrar's decision.

12 The cheque on which Purwadi based his claim in Suit 502/2003 was a cheque drawn on a Singapore bank and was given to Purwadi in Singapore. Purwadi, at that stage, would have had no

reason to believe that the drawer of a Singapore cheque was not resident in Singapore. His application for substituted service by way of advertisement in the Straits Times was therefore a bona fide application made under the belief that Ung was a resident of Singapore.

13 If, in fact, Ung at the material time was not within the jurisdiction of Singapore, that order for substituted service could be sufficiently irregular for Ung to succeed in her application to have that order set aside. The burden of proving that she was not within the jurisdiction of Singapore was, however, on Ung. To prove that, Ung exhibited a few pages from her International Passport and asserted that those pages clearly indicated that at all material times she was a Malaysian citizen resident in Malaysia. I fail to see how those pages show anything more than that she was a Malaysian citizen. To state the obvious: a Malaysian citizen may well be a resident of Singapore.

14 Of course, Ung's assertion in her affidavit that she was, at the material time, not within the jurisdiction of Singapore could, by itself, be sufficient to discharge that burden of proof. However, Ung's conduct – including her failure in the affidavits before the Asst Registrar to make full and frank disclosure, her denials (even after instituting SIC 4256/2003) that she was the judgement debtor, her failure to particularise the allegations of fraud and forgery – cast doubts in my mind about her credibility. If Ung was in fact resident in Kuala Lumpur at the material time, it should have been very easy for her to adduce independent evidence of this fact. No such evidence was adduced. I was not satisfied, on the evidence before me, that Ung, at the material time, was not within the jurisdiction of Singapore. There was therefore no basis on which to rule that the order for substituted service obtained on 4 June 2003 was irregular. In the circumstances, there was no merit in her application in SIC 5481/2003 for the order for substituted service to be set aside.

Step in the proceedings.

15 Even if the order for substituted service that was obtained was bad by reason of Ung not being in Singapore at the material time, the question arises whether by applying for leave to file her defence/enter appearance, Ung had waived that irregularity.

16 Counsel for Purwadi submitted that by applying, at the initial stage, for leave to file her defence/enter appearance instead of applying to set aside the order for substituted service, Ung was indicating a willingness to "enter the fray" and was necessarily waiving any irregularity as to service. In *Development & Commercial Bank v Aspatra* [1995] 3 MLJ 472, Peh Swee Chin FCJ succinctly summarised the law on such waiver as follows:

A person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived.

I accept that summary of the law and I accept the submission of counsel for Purwadi that Ung, in seeking leave to file her defence/enter appearance, was clearly waiving any irregularity that may have existed and was submitting to the jurisdiction of the court.

Merits

17 The criterion that a court will use in setting aside a default judgment is summarised as follows in the Singapore Civil Procedure (2003 edition) at 131:

The discretionary power of the court to set aside a default judgment which has been entered regularly is unconditional, and the court should not lay down rigid rules which deprive it of jurisdiction. The

purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. *The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed*, not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication. [Emphasis added]

The merits of the defence is a matter that has to be considered when exercising the discretion to set aside a default judgment. The learned Asst Registrar had, in her judgment – which I have quoted above – found that the defences raised had no merit. It will suffice to say that I agree with the learned Asst Registrar's findings. Ung, in my view, has not shown merit in the defences she raised.

18 Subsequent to the hearing before the Asst Registrar, Ung filed a further affidavit stating, for the first time, that she had left cheques signed in blank with one Ho Seng Chuan – who conducted trades in the stock market on her behalf – for Ho Seng Chuan to settle contra losses incurred by him on her behalf. It would appear that Ung, in this affidavit, was resiling from the suggestion in her earlier affidavit that the cheque had been forged by Purwadi. The failure by Ung to disclose the role of Ho Seng Chuan in her earlier affidavits and her admission in the further affidavit that the cheque was in fact signed by her (and therefore not a forgery) reflect adversely on Ung. In an application to set aside a default judgment, full and frank disclosure of all relevant facts is expected from the applicant.

19 For the above reasons, I dismissed with costs both the appeal against the Asst Registrar's decision and the application in SIC 5481/2003.

Defendant's appeal in RA 291/2003 dismissed with costs.

Defendant's application in SIC 5481/2003 dismissed with costs.