Karuppannrgounder Paramasivam t/a Sri Maharaja Industries v Kearns Pte Ltd [2003] SGHC 267

Case Number : Suit 1188/2002/Z

Decision Date : 29 October 2003

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Lee Chin Soon (C S Lee) for plaintiff; Leslie Netto and S Magintharan (Neeto Tan and S Magin) for defendant

Parties : Karuppannrgounder Paramasivam t/a Sri Maharaja Industries — Kearns Pte Ltd

Contract – Contractual terms – Whether contained in contemporaneous documents.

Contract – Formation – Relevance of conduct of parties.

1 The plaintiff (PW1) ("Mr Karuppanna") is the sole proprietor of a firm known as Sri Maharaja Industries. His place of business is in Tamilnadu, India. He belongs to a group referred to as the "Maharaja Group" which comprises two partnerships. The Maharaja Group has substantial physical trades in palm oil and olein and paper trades which are also referred to as "wash outs", as I will explain later. The defendants are registered as a company in Singapore and they deal mainly in the export of palm olein. The parties had initially carried out many physical sales and purchases from July 2000 till April 2002.

2 Later, the plaintiff alleges that the parties started to deal in "wash out" contracts through one Mr Divakaran Nadarajan (PW2) ("Mr Diva") of Messrs Grainoil (M) Sdn Bhd. Both the plaintiff and Mr Diva claimed that he dealt with Mr Kang Kee Beng (DW1) (also known as Mr Henry Kang) ("Mr Kang"), a director of the defendants and that their wash out contracts did not involve any other party.

3 Wash out contracts do not involve the physical delivery of the goods. There was no need for the usual international trade and trade financing documentation, such as commercial invoices, packing lists, bills of lading, drafts and/or letters of credit. In such a contract, a party would sell or buy, as the case may be, a certain quantity of olein and would buy or sell back the same goods at a later date. A party would buy forward if he thinks the price will rise and sell if he anticipates a drop in price. The profits or loss arising would depend on the variation of the market price between the time of the sale and purchase or the purchase and sale, as the case may be. I was told that this kind of trade is common practice in the palm oil and palm olein trade, even though the parties involved may be situated in different countries.

4 The plaintiff's claims against the defendants is for the balance outstanding on such wash out trade amounting to USD149,740.00, due on debit notes nos. 1 to 12 as set out in the Amended Statement of Claim.

5 All the debit notes in question, I was satisfied on the evidence, were issued in the course of the transaction as reflected in the particulars.

6 The relevant particulars of the debit notes are set out below:-

S/N	Debit Note No	Date	Amount (US$)
1	1	21.11.01	16,250.00
2	2	07.12.01	23,750.00
3	3	13.11.01	30,500.00
4	4	13.11.01	30,500.00
5	5	13.11.01	30,500.00
6	6	08.01.02	7,250.00
7	7	08.01.02	10,500.00
8	8	16.01.02	1,250.00
9	9	26.02.02	2,250.00
10	10	18.03.02	750.00
11	11	18.03.02	1,750.00
12	12	18.03.02	7,500.00

Less:	Credit Note No. 1 dated 26.06.02	4,500.00
	Credit Note No. 2 dated 26.02.02	3,500.00
	Part-Payment received	5,000.00
	Total Amount due	US$149,750.00

7 According to the particulars, the defendants did not lose all the time. The plaintiff did sustain losses under two wash out contracts as reflected in credit notes Nos. 1 and 2. Credit was given for a payment of USD5,000 "received".

8 Whether in fact the transactions did take place as reflected in the particulars set out above is the central dispute in relation to the claims of the plaintiff.

9 The defendants in their defence deny that they had entered in any wash out contracts with the plaintiff. All their dealings with the plaintiff, they say, were conducted through the plaintiff's broker, Mr Diva, and the defendants' agent, Mr Casim Fareed Jaffardeen ("Mr Casim"), a Malaysian who conducted business out of Kuala Lumpur, Malaysia. They said they had thought that these debit

notes were sent out to them by the plaintiff through Mr Diva for the plaintiff's own purposes, either for banking or foreign exchange requirements. I will return to this part of the evidence later in greater detail.

10 In addition, the defendants assert three counterclaims against the plaintiff:-

(a) they claim the sum of USD68,102.65 being the costs of palm oil supplied by the defendants by M/T "BONVOY V";

(b) they further claim the sum of USD4,241.67 being demurrage charges incurred by the defendants and payable by the plaintiff in respect of the shipment by m.v. "FALCON"; and

(c) they also claim the sum of USD8,231.40 being demurrage incurred by the defendants and payable by the plaintiffs in respect of the shipment on m.v. "KUNIT".

The Evidence

11 Mr Karuppanna said in evidence that the wash out trades in question were conducted solely through Mr Diva. He therefore relied on the latter's evidence. Mr Diva confirmed that each of the trades as set out in the debit notes was transacted entirely through him, in his capacity as the plaintiff's authorised agent. In all the trades in question, it was the defendants who had sold goods to the plaintiff and the plaintiff at a later date resold the same to the defendants. The differences in the prices at the two different dates represented the profits earned by the plaintiff. He pointed to the fact that under the two credit notes in favour of the defendants, the transactions ended in the defendants' financial favour.

12 Mr Diva said he always dealt with Mr Kang. Mr Casim was not involved in the trades. He pointed out that in Malaysia parties dealing in palm old commodities required a licence. He said he had dealt with Mr Casim previously as principals when Mr Casim was operating a Malaysian company with a licence. That company had folded up, and owed Messrs Grainoil (M) Sdn Bhd some MR200,000 which had to be written off.

13 By para 11 of his affidavit evidence in chief, he exhibited several letters written by his company requiring the defendants to make payment against the debit notes. These letters were collectively marked under exhibit "DK4". The exhibit included three documents. The first is a copy of what appears to be a debit note dated 8 July 2002 from 'HSBC' for USD5,000 debiting its un-named customer's account and crediting the same to Mr Diva's company, Grainoil (M) Sdn Bhd. This was claimed to relate to the payment of USD5,000 by the defendants to the plaintiff, as credited for in the particulars of account stated above. There followed a copy of the letter of 8 July 2002 from Grainoil (M) Ltd to the plaintiff, purportedly advising of the payment by the defendants, with copies extended to the defendants and 'Mr Henry Kang'. The third document exhibited is a copy of a letter of 9th July 2002 from the plaintiff to the defendants. It purportedly acknowledged that the plaintiff's agent had received USD5,000 and demanded the payment of the balance sum of USD145,611.00.

14 The significance of the payment of USD5,000 is self-evident. If in fact the defendants had paid this sum in July 2002 towards their indebtedness to the plaintiff under the debit notes, which ranged from 21 November 2001 to 18 March 2002, such payment would be strong evidence that the defendants had admitted to the transactions having taken place. There was, however, no viva voce evidence led by the plaintiff from either Mr Karuppanna or Mr Diva to confirm that the defendants had made the payment to the plaintiff by the remittance to the plaintiff's agent. More important for its

omission was the absence of any cross examination of Mr Kang for having remitted the USD5,000 to Grainoil (M) Sdn Bhd. Why wasn't he asked this significant question? It was not proved that the two letters were written and in fact sent out. All we now have are copies of letters written by the plaintiff and his agent. They are one-sided and self-serving. Even if they were written and the last letter was sent out to the defendants, the fact is the letter was written months after the alleged transactions.

15 I now return to the defendants' allegations about the debit notes. Sometime in early September 2001, Mr Casim informed Mr Kang that the plaintiff through Mr Diva had requested the defendants to do him a favour by providing him with a debit note for USD377,475.00. The plaintiff merely required a debit note. No transaction was involved. It appeared to be common practice that such a document had been required by traders in India to facilitate the repatriation of money out of India. As far as Mr Kang was concerned, it was no skin off his nose to issue the debit note which purported to evidence the indebtedness of the plaintiff to his company. Whilst I do not appreciate his rationalising the issue of a false document, I also recognise that businessmen from time to time, out of what they think would facilitate business, had not acted in a manner which would accord with what actually had happened or would happen. Mr Kang also mentioned that the debit note might be needed for the plaintiff's 'bank lines' or for clearance with the Indian Customs. I had my doubts about these relatively innocuous suggestions. I thought he was keeping his position open so far as the authorities controlling foreign exchange in India were concerned.

16 Mr Kang told the court that he sent Mr Casim the debit note as requested. However, Mr Casim sent the debit note back to him with corrections. Mr Casim told him that Mr Diva wanted some details changed. The details of the changes appeared in the document in Mr Diva's handwriting, although he denied it was his. Mr Casim said in evidence that Mr Diva had told him that the amendments were necessary so as to be consistent with the details of price fluctuation of palm oil "for presentation to governmental authorities concerned with imports and exports" as published regularly by the Palm Oil Registration and Licensing Authority ("PORLA") of Malaysia. By this, I understand the evidence to be that the amendments would add to the verifiability of the debit note, should any governmental authorities, including those in India, would want to check on the reliability of the particulars of any debit note presented to them.

17 Mr Casim explained to Mr Kang about the amendments by noting on the copy in his handwriting: 'Sorry need to change again bec of PORLA date". So Mr Casim asked Mr Kang for an amended debit note, which he (Mr Kang) sent on to Mr Diva.

18 Later, Mr Kang received the debit notes in question from time to time. Those debit notes never came through Mr Diva. He did not think anything about them, in the light of the Debit Note sent earlier to the plaintiff. He thought those debit notes were for the purpose of reducing the 'paper balance of payment' that still remained on paper in favour of the defendants. He explained that he did not protest after receiving the debit notes which totalled USD162,750 because he thought the strategy of the plaintiff was to reduce the amount of the fake debit note that the defendants had issued to him for his (the plaintiff's) own purposes.

19 Mr Kang denied having received copies of the trade confirmations. He was confronted by copies of the documents which were produced in the plaintiff's supplemental bundle of documents and the fax transmission record. He referred to PSBD2 and PSBD4: on the transmission report there was recorded 3 pages. But we took a look at the whole bundle of copies of trade confirmations. For 18 September 2001 there were only 2 pages of trade confirmations and the question arose as to why 3 copies were transmitted. Mr Kang also found another extraordinary feature about the fax transmission record. Despite the difficulties of faxing to a receiver in India, he found on PSBD 2 transmission reports. The first showed that 3 pages were transmitted at 4.25pm. Usage time column

showed that it was 2 minutes 9 seconds. Mr Kang then referred to the second transmission record about a fax to Maharaja . The start-time was 4.28pm. By the end of the first transmission the time would have been 4:27.09pm. The second transmission was supposed to have started at 4.28pm. Therefore, it took only 51 seconds for the transmission to get through to India. Mr Kang said according to his experience it was impossible to fax through within 51 seconds.

Evidence on the counterclaims

20 The three counterclaims are supported by contemporaneous documents. These documents established that the plaintiff was liable to pay the defendants the three sums. The plaintiff is unable to deny that he received the goods shipped per M/T BONVOY V.

21 In relation to the counterclaims, Mr Diva affirmed under oath in para 12 of his affidavit that 'within (his) personal knowledge …the alleged export of the consignment of 247.646 metric tonnes of RBD Palm Olein on the vessel M/T Bonvoy referred to (in) the defendants' sale contract dated 18 December 2002 **did not** take place at all…" (emphasis of Mr Diva; words within the brackets are added). He was proven wrong in cross examination. All he could say was that he made a mistake.

22 Mr Karuppanna was also asked to explain the different amounts of claims which were asserted by the plaintiff at different times. On page 10 of the amended statement of claim the amount claimed was USD149,750.00. In another document, PBD55, the amount was stated as USD154,500.00. On yet another document, PBD59, the amount was stated in the second paragraph as USD150,611.00. Yet again, in document PBD62, the amount was stated as USD145,611. The Indian solicitors of the plaintiff in their letter of demand claimed the amount of USD233,500.00.

23 Mr Karuppanna was patiently given the opportunity to explain. By way of background, he said he as a businessman had 'sister concerns'. They are Sri Maharaja Refineries; it was a partnership; secondly, Sivam & Company, in which he was a partner at the material times. The third 'sister concern' is Maharaja Industries, the plaintiff, of which he is, as noted, the sole proprietor. In business, these sister concerns were referred to as the Maharaja Group of Companies.

24 Both Maharaja Industries and Maharaja Refineries had entered into wash out contracts. The defendants owed Maharaja Refineries the sum of USD78,750.00 under wash out contracts. That amount was included in a statement of accounts under the letter head of the 'Maharaja Group of Companies': see PBD65. The total owing was shown as USD233,500.00.

25 Mr Karuppanna said that the defendants had shipped 247.646 MT of RBD palm olein and that Mr Kang informed him that the shipment was to settle the debt due to Maharaja Refineries. Mr Karuppanna said: "(t)he defendants shipped the cargo to the plaintiff as the named consignee, but was a set-off against the larger sum of USD78,750.00 in favour of the plaintiff's group of companies, as agreed by Mr Kang …through Mr Diva.". According to Mr Karuppanna, he deducted the sum of US$78,750.00 from his original claim of USD233,500.00. So that came to the sum of USD154,750,00. He said he received the sum of USD$5,000,00 from the defendants through Mr Diva. This was a bare allegation; there was no reason for Mr Kang to discount the difference.

26 The alleged set-off would have been quite of out of character with the way the plaintiff treated the debit notes in question. The plaintiff did not set off or attempt to set out the outstanding debit notes, if they had been real transactions, against the sums he had to pay the defendants for his purchases of substantial quantities of palm olein at the material times. It was not at all disputed that the defendants had sold to the plaintiff 3 lots of about 500 MT of RBD palm olein each to the plaintiff at the prices of USD142,476.63, USD186,250.00 and USD185,388.19 respectively. They were

sold and purchased by documentary letters of credit.

27 The defendants had also sold 7 other lots of 500MT each of palm olein to Sivam & Company during the period from 19 November 2001 to 30 November 2001. Again, these purchases were paid for by letters of credit and no attempt was made to set off the outstanding notes.

28 The outstanding feature is the total lack of any effort on the part of Mr Karuppanna or his agent, Mr Diva, to collect on the debit notes. The demand was made much later, when the defendants were asserting their three claims against the plaintiff.

29 There was also no reasonably credible explanation for a number of curious features. In the plaintiff's solicitors' letter of demand of 20 August 2002, the plaintiff's claim was described as "being the balance due on various trades made with (the defendants) through Messrs Grainoil (M) Sdn Bhd. In paragraph 1 of the Statement of Claim, the claim was originally described as "being the agreed fees payable for commission for work done and services rendered. After Mr Kang filed his affidavit to resist the plaintiff's application for summary judgment, the statement of claim was amended on 22 November 2002 to read as "being the balance of price difference for wash-out Olein contracts".

30 Mr Karuppanna did not appear to know the mechanics of wash out contracts. Early in his cross examination, he was asked to explain how the transaction referred to under debit note No. 1 came about. He said that generally Mr Diva used to telephone him to purchase palm olein at FOB rate to have 'wash out business'. He went on to say in respect of debit note No. 1: "In this transaction, I purchased 500 MT at $305 PMT." He was challenged about this obvious mistake, which could not have been made by a person reasonably in the wash out business. It was pointed out to him about the error. He then said he was sorry and that he had purchased the lot at USD272.50 PMT. He later sold this lot to the defendants at USD305.00 PMT.

Findings of Court

31 On the evidence, I am satisfied that the defendants did not enter into any wash out contracts with the plaintiff. The story about the debit notes must begin with the first debit note which the plaintiff obtained from the defendants in early September, 2001 after amendments were made by Mr Diva to be consistent with the prices at the relevant dates of the alleged transactions and as published by PORLA. Obviously, the plaintiff wanted the debit note for his own purposes. I do not need to go one further step to find what the purpose was. It was for a purpose best known to the plaintiff. Similarly, the underlying purchase and sale contracts in support of the debit notes were prepared as part of the plaintiff's purposes, which had nothing to do with the defendants.

32 The defendants had received the debit notes; they might even have received copies of the supporting sale or purchase trade confirmations. But their receipts of those documents were to them of no significance; they did not signify any contract between them and the plaintiff. They thought, as Mr Kang said and I accept his evidence, that the debit notes were used in the same vein and for the same purposes. Their effect was to reduce the 'paper outstanding amount' which the plaintiff allegedly owed the defendants under the September 2001 debit note.

33 On the evidence, I am persuaded by the evidence of Mr Kang and Mr Casim. I do not believe Mr Karuppanna and Mr Diva. Both of them were not credit-worthy as witnesses.

34 I now turn to the counterclaims. As I noted, the defendants did ship the palm oil to the plaintiff who collected the goods against a letter of indemnity which he presented to the carriers. He has not paid for the goods. The two demurrage claims were also proved by the defendants.

Conclusions

35 In the circumstances, I dismiss the plaintiff's claims against the defendants with costs and I allow the 3 counterclaims of the defendants against the plaintiff with interest thereon at 6% calculated from the date of the invoice, or the debit note, as the case may, up to the date of payment. As for the costs of the counterclaims, I will hear further submissions from the parties.

Plaintiff's claims dismissed with costs
Defendants' counterclaims allowed with costs

Copyright © Government of Singapore.