Mohamed Nizam s/o Mohamed Ismail v Sadique Marican Bin Ibrahim Marican and Others [2008] SGHC 189

Case Number : Suit 178/2008, RA 301/2008

Decision Date : 29 October 2008

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Mahendran, K Mathialahan (Guna & Associates Advocates & Solicitors) for the appellant; Sadique Marican, Anand Kumar s/o Toofani Beldar (Frontier Law Corporation) for the respondents

Parties : Mohamed Nizam s/o Mohamed Ismail — Sadique Marican Bin Ibrahim Marican; Anand Kumar s/o Toofani Beldar; Zulkifli Bin Mohd Amin

Civil Procedure

29 October 2008

Judith Prakash J:

Introduction

1 This action was started by Mohamed Nizam s/o Mohamed Ismail ("the plaintiff") to recover damages for negligence and/or for breach of contract from Sadique Marican bin Ibrahim Marican and two others ("the defendants"). In due course, the plaintiff filed Summons No 2354 of 2008 ("SUM 2354/2008"), an application for summary judgment against the defendants pursuant to O 14 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC"). This application was heard by Assistant Registrar Leong Kwang Ian ("the AR") who dismissed a preliminary objection by the defendants that the summons and supporting affidavit (in relation to SUM 2354/2008) had been served on them out of time and hence should not be heard. While the AR was prepared to consider the substantive merits of SUM 2354/2008, this hearing did not proceed at that time as the AR gave the defendants leave to file a further affidavit.

2 Being dissatisfied with the AR's decision, the defendants appealed. The appeal essentially turned on two related questions: (a) whether the court has discretion to extend time for service of an O 14 summons and supporting affidavit; and (b) even if the answer to (a) was negative, whether the defendants in the present case nonetheless waived the irregularity by taking a step in the proceedings. I dismissed the appeal with costs fixed at $1,500. The defendants have since appealed against my decision.

The facts

3 The writ was filed on 10 March 2008. Service was effected on the first and second defendants on 18 March 2008. The two defendants entered appearance on 20 March 2008 and the memorandum of appearance was served on the plaintiff on 25 March 2008. The defendants filed a joint defence on 11 April 2008. The plaintiff's reply was served on the defendants on 24 April 2008.

4 SUM 2354/2008 and the supporting affidavit were filed on 29 May 2008 and served on the first and second defendants on 4 June 2008, with the summons having been fixed for hearing on 2 July 2008. The plaintiff later filed a supplementary affidavit on 4 June 2008 and this was served on the

defendants on 6 June 2008.

5 The first and second defendants did not file any show cause affidavit by 2 July 2008, the scheduled date of the hearing. On this day, the second defendant appeared before another Assistant Registrar and informed her that he was representing the first and second defendants. He sought an adjournment to file the show cause affidavit. The matter was adjourned to 18 July 2008 with directions that the first and second defendants file the show cause affidavit by 8 July 2008 and that the plaintiff file his reply affidavit (if any) by 16 July 2008.

6 The show cause affidavit was eventually served on the plaintiff on 10 July 2008. The plaintiff duly filed a reply affidavit on 16 July 2008 and this was served on the first and second defendants the following day. Thereafter, SUM 2354/2008 was proceeded with and was heard by the AR on 18 July 2008.

Hearing before the AR on 18 July 2008

7 Before the AR, the defendants raised the preliminary objection that the plaintiff had failed to comply with the timelines prescribed under O 14 of the ROC. Specifically, they submitted that the plaintiff had failed to comply with the requirement that the summons (and the supporting affidavit) be served not more than three days after filing as the summons (and the supporting affidavit) in the present case had been filed on 29 May 2008 and only served four days later on 4 June 2008. The service was therefore *one* day out of time.

8 The defendants submitted that O 14 r 2(2) required technical compliance and that the court had no power to extend time for service. They pointed to the draconian nature of the summary judgment procedure to justify their proposition of the strictness of service timelines. On the other hand, the plaintiff considered that the service out of time was an irregularity that could be regularised by way of application and an adverse costs order, pointing out that there was, in any case, no real prejudice caused to the defendants as the time for service of the show cause affidavit started to run only after service of the summons and supporting affidavit. Thus, whether the summons was filed three or four days after the initial filing, the defendants would still be entitled to the full 14 days in which to file their show cause affidavit.

9 After considering the arguments of the parties, the AR dismissed the defendants' preliminary objection, holding that:

> I do not read Order 14, rule 2(7) as a bar to the court's power to extend the time for service of the SUM. Sub-rule 7 merely deals with costs, and it implies that there is a power to extend time for the filing & service of the affidavits. There is thus no express rule which prohibits the court from extending the time for service of the Order 14 SUM. In fact, sub-rule 7, by implying that the court has power to extend time for the filing & service of the affidavits, would also lend weight to the court's power to extend time for the service of the SUM as well.
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> This case is thus distinguishable from CCR Pte Ltd v Samsung Corp. In that case, there was a clear stipulation in the rules that no Order 14 application be made before Defence is filed. There was a clear reason for that rule, which the case went into.
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> In our present case, I invited the 1st Df to explain to me the rationale of the 3-day rule. I am not satisfied with the rationale for the 3 day rule provided by the 1st Df. If it were indeed an inflexible rule purely because of the draconian nature of the order, then there would also be no room for extension of time for the filing of affidavits, which, as I have noted earlier, appears to be an

implied power clearly brought in by sub-rule 7.

Secondly, I also note that the 1st Df has filed an affidavit contesting the Order 14 application on the merits. This step in the proceeding, in my view, constitutes a waiver of the preliminary objection which he is now taking. For example, if one is contesting jurisdiction of the court, one does not take a step in the proceedings by filing a Defence. Similarly, in our case, I think that the 1st Df's filing of a substantive affidavit to defend against the Order 14 SUM is a step in the proceedings which precludes him from now arguing that the 3-day service requirement has not been met.

I will proceed to hear the SUM.

Although the AR indicated that he was going to hear the substantive merits of SUM 2354/2008, the AR subsequently gave the defendants leave to file a further reply affidavit and hence SUM 2354/2008 was not proceeded with on 18 July 2008. Before the next hearing in relation to SUM 2354/2008, the defendants filed this appeal against the AR's decision to allow the plaintiff to file the summons and supporting affidavit one day out of time.

Whether the court has discretion to extend time for service of an O 14 summons and supporting affidavit

10 The first issue I had to decide was whether the court has discretion to extend time when an applicant in an O 14 application fails to serve the summons and/or supporting affidavit within the three days stipulated in O 14 r 2(2). If the court has no discretion to extend time in this situation, then the AR's decision below would be wrong.

11 Order 14 r 2(2) provides for specific timelines for the filing and service of the summons and supporting affidavit:

Manner in which application under Rule 1 must be made (O 14, r 2)

(2) The summons and the supporting affidavit or affidavits must be filed at the same time, and must be served on the defendant within 3 days from the date of filing.

Order 14 r 2(7) in turn provides as follows:

(7) Where a party files or serves an affidavit beyond the period of time specified in this Rule, the Court may make such order as to costs against that party as it considers fit.

12 The provisions speak for themselves. Whilst O 14 r 2(2) uses the apparently mandatory word "must" in stipulating the time period for service of the summons and the supporting affidavit, it does not follow as a matter of course that the court had no power to allow for extension of time or that the proceedings would thereafter become a nullity. Indeed, the second of these propositions is addressed directly by O 2 r 1(1) which provides as follows:

Non-compliance with Rules (O 2, r 1)

1. —(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a *failure to comply with the requirements of these Rules*, whether in respect of time, place, manner, form or content or in any other respect, the failure *shall be treated as an irregularity*

and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein. [emphasis added]

As would be appreciated, O 2 r 1(1) (read with O 2 r 1(2)) leaves it to the discretion of the court to decide the consequence of any irregularity. An irregularity may be rectified by way of, *inter alia*, an extension of time supplemented by a cost order. This is exactly the situation in regard to non-compliance with O 14 r 2(2). O 14 r 2(7) clearly contemplates a power on the part of the court to make a cost order against the non-complying party. This implies that the court can allow for an extension of time. The reason for this is simple: the ROC does not provide for any penal sanction for non-compliance in the sense of the imposition of fines. A costs order is not a fine. Thus, a costs order (in relation to irregularities) without the attendant rectification of an irregularity cannot be contemplated, for that would be to impose a wholly penal sanction on the non-complying party.

13 To my mind, O 14 r 2(7) is clear insofar as it penalises the non-complying party for default with respect of timelines *but, at the same time*, preserves for the court the power to grant an extension of time. It would be wholly unacceptable, in my view, that the court should have no discretion to extend the time for service when the very same order in the ROC provides for the court to make a costs order should there be non-compliance with the time for service. This second discretion would be rendered otiose should the first discretion be non-existent. Whilst O 14 r 2(7) would only, strictly speaking, apply to the service of the supporting affidavit given the fact that the term "summons" does not appear in O 14 r 2(7), I agree with the AR's reasoning that O 14 r 2(7) lends weight to the position that the court has power to extend time for the service of the summons as well. In any case, it is clear that there is no express rule anywhere in the ROC which prohibits the court from extending time for service of an O 14 summons (or affidavits for that matter) in a situation like the present case. As such, O 2 r 1 is directly applicable in that non-compliance with the timelines in O 14 r 2(2) should be treated as an irregularity that will not nullify proceedings. I therefore rejected the defendants' argument that there is no discretion on the part of the court to grant an extension of time for the filing of the summons and supporting affidavit.

14 The case of *United Engineers (Singapore) Pte Ltd v Lee Lip Hiong and others* [2004] 4 SLR 305 ("*United Engineers*") cited by the defendants did not assist them. In that case, the High Court decided that a purposive interpretation of O 14 r 14 made it necessary to conclude that the time period within which a plaintiff could commence an application under O 14 was an absolutely strict one and could not be extended by the court. Leaving aside for the moment the methodology by which the court had applied the "purposive approach" (*ie*, whether it ought to be an actual (albeit implied) purpose or imputed purpose that the court was concerned with), *United Engineers* could be easily distinguished because that case was concerned with the *commencement* of an O 14 application whereas in the present case, I was concerned with the service of the summons and supporting affidavit which had been correctly filed (*ie*, the O 14 application had been commenced within the specified period). The reasoning of the court in *United Engineers* did not avail the defendants since the court there interpreted O 14 r 14 in the way it did because (as held at [26]):

> To achieve some measure of certainty for the defendant and for the registrar who is charged with the management of cases, there has to be an absolute point beyond which no application for summary judgment may be taken out. None existed before O 14 r 14 was introduced in the Rules of Court. That provision was inserted for this very purpose and would be negated if the court has to hear applications for extension of time and appeals emanating therefrom.

This rationale was completely inapplicable to the present case. Furthermore, O 14 r 14 reads:

> **Time limit for summary judgment applications (O14, r14)**

14. No summons under this Order shall be filed more than 28 days after the pleadings in the action are deemed to be closed

To my mind, the words "no summons… shall be filed" constitute a clear prohibition against the filing of O 14 applications more than 28 days after the pleadings are deemed closed. An attempt to file such an application after the stated period would not be an irregularity but a complete non-starter as this is something that cannot be done at all. In contrast, although O 14 r 2(2) uses the words "must be served", it does not specify the consequences of a failure to serve. In my view, the word "must" in the phrase "must be served" indicates that these are documents that have to be served on the other party and that if this is not done within a specified period or at all, there may be cost consequences (as envisaged in O 14 r 2(7)) or the court may choose not to extend time and dismiss the summons for lack of support. What does not follow, however, is that the court is deprived of discretion to extend time.

The exercise of the court's discretion to extend time

15 Whilst it was not argued before me in this way, perhaps a facet of the defendants' argument was also that the AR had wrongly exercised his discretion to extend the time for service. For completeness, I should also state that I was entirely satisfied that the AR had exercised his discretion correctly. The time for the filing of the show cause affidavit in an O 14 application begins to run only from the date of service of the summons and supporting affidavit. Thus no prejudice would be caused to a defendant if the documents are served slightly after time as the defendant would still be entitled to the full 14 days with which to file and serve his show cause affidavit.

16 Furthermore, while not conceptually related to the reasoning in the preceding paragraph, there were two other factors which I considered justified the extension of the time for service in this case. First, there was only a delay of *one* day. Although I acknowledge that whether the extension required was one day or a longer period would not affect the defendants' entitlement of 14 days to file and serve the show cause affidavit, the shorter the period of extension applied for, the more readily would the extension of time be forthcoming. Secondly, if there was any prejudice caused in this case, it was to the plaintiff as the defendants took more than 14 days to file the show cause affidavit and had in fact appeared before another Assistant Registrar to seek an extension of time. What is sauce for the goose must be sauce for the gander: if the defendants could avail themselves of an extension of time to file and serve their show cause affidavit, I saw no reason why the plaintiff could not avail himself of the same, especially when such an action caused no real prejudice to the defendants.

Whether the defendants waived the irregularity by taking a step in the proceedings

17 In any event, the first and second defendants had taken further steps in the proceedings, and thereby waived the irregularity caused by the plaintiff's failure to serve the summons and supporting affidavit on time. Instead of filing an application under O 2 r 2 of the Rules of Court objecting to the irregularity, the defendants took substantive actions in the action, including the following:

(a) Appearing before the Assistant Registrar on 2 July 2008;

(b) Seeking time on 2 July 2008 to file their show cause affidavit; and

(c) Filing and serving a show cause affidavit, done after the timeline fixed by the Assistant Registrar had expired.

18 In *Regenthill Properties Pte Ltd v Management Corporation Strata Title Plan No 2192*

[2002] 3 SLR 445, the Court of Appeal held that an irregularity had been waived by the taking a fresh step in the proceedings. The court added that even if a timely objection had been made, it would not have exercised its discretion to set aside the originating summons as the irregularity was not serious. Further, the party was not prejudiced by it. In this respect, the court observed at [21] and [22] that:

> 21 Be that as it may, there are two reasons why this objection has to be rejected. First, under O 2 r 2, it is provided that an application to set aside for irregularity 'shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity'. *Regenthill should have objected upon being served with the OS. Instead, they proceeded to file their substantive affidavit in response. Having taken a 'fresh step' in the proceeding, it shall be deemed that they had waived that irregularity*; see *Rein v Stein* (1892) 66 LT 469 at 471 and *Ong Heok v Ooi Bee Tat* [1982] 2 MLJ 326. It was too late to raise it at the time of the hearing.
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> 22 Second, even if the point was raised timely, the court would not have exercised its discretion to set aside the OS for non-compliance. Although spelling out in the affidavit the classes of documents required to be delivered does not regularise a defective OS, it nevertheless does indicate clearly to the defendants what the plaintiff, in fact, wants. Such an *irregularity is in no sense serious*. As far as Regenthill were concerned, they were *not prejudiced*. They knew the case they had to meet notwithstanding that the MC even made some oral additions at the hearing.
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> [emphasis added]

19 Accordingly, by virtue of the steps (outlined at [17]) taken by the defendants, I would have held (if I had not disposed of this appeal by upholding the AR's decision to extend time) that they had accepted the irregularity and had therefore waived their right to raise the preliminary objection that they advanced before the AR.

Conclusion

20 In the final analysis, I could not help but think that the defendants' belated attempt to thwart the O 14 application in SUM 2354/2008 was an afterthought. They had taken substantive steps in SUM 2354/2008. They had filed a show cause affidavit. They had not taken out an application to object to the supposed irregularity. They had, on the contrary, showed every intention of contesting the substantive merits of the O 14 application. Thus it was not open to them to subsequently raise an objection on the technical point of late service which had caused them no real prejudice.