IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 258

Suit 281/1995

Between

Sushma Pte Ltd

… Plaintiff

And

FNT Singapore Pte Ltd

… Defendant

GROUNDS OF DECISION

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Sushma Pte Ltd v FNT Singapore Pte Ltd

[1996] SGHC 258

Suit 281/1995
Choo Han Teck JC
07 November 1996

Judgment:

JUDGMENT

1. This suit was taken out by the Respondents as Plaintiffs against the Appellants (Defendants) for payment in respect of goods supplied and services rendered. The Appellants filed a defence in which they alleged, first that the agreement which formed the basis of the Respondents' claim was a forgery. Secondly, they did not receive any invoice from the Respondents and thirdly, only a fee of between $7,000 and $8,000 was due to the Respondents and the Appellants had already paid that fee.

2. On 7 May 1996 by way of a Summons for Directions the learned Assistant Registrar ordered, inter alia, that the parties serve a list of documents with an affidavit verifying the list respectively on each other within 60 days. The parties failed to do so.

3. The order of court was extracted on 28 June 1996. On 2 August 1996 the Registrar conducted a pre-trial conference pursuant to Order 34A of the Rules

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of Court and ordered, inter alia, that both parties file their list of documents and affidavit verifying the list by 30 August 1996 failing which the action is dismissed or Defence is struck out .

4. The Respondents filed their affidavit and list on 30 August 1996. The Appellants did not. They filed their affidavit on 4 September 1996. On 6 September 1996 the Respondent obtained judgment against the Appellants for failure to comply with the Registrar's orders of 2 August 1996.

5. The Appellants applied immediately to have the judgment set aside and the time limited for filing their affidavit verifying list of documents extended to 4 September 1996. The Assistant Registrar dismissed the application and the Appellants appealed against his decision.

6. In the course of argument during the appeal before me counsel for the Appellants submitted that the delay was only a short one of a few days. Secondly, he agreed that the matter was handled by the Appellants' director Masao Hosoda who was away and could not return to Singapore in time as originally scheduled. Thirdly, the Appellants had changed solicitors on 28 August 1996. Fourthly, he submitted that there would be no injustice to the Respondents if the judgment was set aside and the time for filing the affidavit extended to 4 September 1996.

7. The Appellants' affidavit verifying list of documents was affirmed by their general manager Masafumi Otsuka who also affirmed the affidavit in support of the Appellants' application to set aside the judgment entered against them. In the very brief latter affidavit all he stated were as follows:

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2. The facts relating to this subject matter was first handled by our managing director Mr Masao Hosoda who had personal knowledge of the said matter.

3. We had informed Mr Hosoda that the Affidavit Verifying List of Documents had to be filed on or before 30 August 1996. However, Mr Hosoda could not return to Singapore in time to affirm the List of Documents.

4. Our earlier solicitors were Messrs Emmanuel & Partners.

5. Subsequently, we instructed Messrs Gourdeep Singh & Partners to act for us in place of Messrs Emmanuel & Partners. The file relating to the subject mater were handed by Messrs Emmanuel & Partners to Messrs Gourdeep Singh on 28 August 1996 and I was informed that Mr Hosoda would be arriving from Tokyo soon.

6. However, I was later informed that Mr Hosoda was held up in Macau and that he would be arriving soon. As we were unable to get in touch with Mr Hosoda, I then on 3 September 1996 affirmed the Affidavit Verifying List of Documents and the same was filed on 4 September 1996.

7. There was no contumelious disregard of the Order of Court. It was due to events beyond our control and the impossibility on the part of Mr Hosoda to make a trip to Singapore who was well versed with the subject matter herein. In the circumstances, there was no wilful or deliberate flouting of the order of the learned Registrar.

8. The judgment entered against the Appellants was for failure to comply with the Registrar's directions made during a pre-trial conference. It is helpful to consider, first the relevant parts of order 34A of the Rules of Court. They are

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found in Rule 2(2), (3) and (4), and for convenience I am setting out the three relevant sub-rules below: 2.-(1) ... (2) At the pre-trial conference, the Court may consider any matter including the possibility of settlement of any or all of the issues in the action or proceedings and require the parties to furnish the Court with any such information as it thinks fit, and may also give all such directions as appear to be necessary or desirable for securing the just, expeditious and economical disposal of the action or proceedings.

(3) The Court, having made directions under Rule 292) or Rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or make such order as it thinks fit.

(4) Any judgment or order made under Rule 2(3) may be set aside by the Court, on the application of the party, on such terms, if any, as it thinks just. ...

9. It was not disputed that a court has the power to extend time for compliance with an order of court notwithstanding that the order was an unless order as was the case here. However, it is axiomatic that court orders are meant to be obeyed and a failure to obey is generally regarded as contumacious conduct by reason of which the defaulting party can expect no indulgence from the court unless he can convince the court that his conduct was not contumacious. A court may excuse the defaulting party if he can show that the failure to comply was due to circumstances beyond his control. He must show an intention to obey the order and reasonable effort had been made to comply with it. If the party concerned has reason to believe that the order could not be complied with he ought to appeal against the order or apply for an extension of time before the time for compliance had passed. If such an application could not be made in time then

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he must satisfy the court that he had good reasons for not making the application for an extension of time before the deadline for compliance.

10. In this case, there was an order for the filing of the Affidavit Verifying List of Documents within 60 days of 7 May 1996. That expired by 7 July 1996 without compliance by both sides. The Registrar's order of 2 August 1996 was essentially on extension of time for compliance of the 7 May order.

11. From 2 August to 30 August the Appellants did nothing to comply with the order other than the assertion by Masafumi Otsuka that they had informed Mr Hosoda that the < affidavit > had to be filed by 30 August 1996 . Nothing in Otsuka's affidavit merits any sympathy for the Appellants' failure to comply with the order of court.

12. It is pertinent that while the Appellants say that Mr Hosoda was the man in charge, it was Otsuka who eventually affirmed the affidavit. That was not a mere rubber-stamping action. If Mr Otsuka could affirm the affidavit on 3 September 1996 he could easily have done so on 30 August 1996.

13. When the Appellants decided to instruct new solicitors compliance with an outstanding order of court must surely be in the forefront of the minds of the new as well as the old solicitors and the Appellants themselves. Nothing was said in Mr Otsuka's affidavit as to when they instructed their new solicitors and how compliance with the order of court was intended to be performed. In the absence of any detail of circumstances outside the control of the Appellants their failure was inexcusable even though they breached the order by only four days. I do not regard the mere fact that their Mr Masao Hosoda could not return to Singapore in time to be of any assistance to the Appellants. I do not know when Mr Hosoda left Singapore, when he was scheduled to return and whether he

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could have given instructions by telephone, telex or telefax. In an application for an extension of time particulars of this nature must be adduced by the party applying.

14. There is one aspect in which a breach of an unless order may have far greater consequences on a defendant than a plaintiff. Where the claim is not time-barred a plaintiff may commence a fresh action if his claim was struck out on account of the breach. In the case of a defendant, his case is lost for good. Hence, the strength of the defence may be considered in the context of whether greater injustice may be caused if the defence is struck out. I should say that this is only a factor for consideration. If the conduct of a party is clearly contumacious his action or defence may still be struck out even if it has reasonably strong merits if on the facts of the case, a striking out is warranted.

15. Counsel for the Appellants in this case hardly submitted on the merits of the defence before the Assistant Registrar and also on appeal before me. It was counsel for the Respondents who argued before me that the defence was transparently weak. I see nothing in the list of documents filed by the Appellants (out of time) which could reasonably support their defence of forgery. There was no reference to any expert's report or such similar document. Counsel for the Respondents also argued (without reply from the Appellants' counsel) that the other aspects of the defence also appeared contradictory in the light of the documents listed.

16. I considered, although not referred by counsel, the case of Samuels v Linzi Dresses < 1980 > 1 ALLER 903 that the Court of Appeal there endorsed the High Court's decision to extend time for the defendant when he filed his further and better particulars three days out of time and in breach of an unless order . The Court of Appeal found that there was a real effort on the part of the

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appellants in that case to comply with the order. The same cannot be said of the Appellants in this case. For the reasons given above, I dismissed the Appellants' appeal.

CHOO HAN TECK

Judicial Commissioner ...ENDJ

Choo Han Teck JC

Gourdeep Singh [Gourdeep Singh & Partners] for the defendants
Edwin Tay [Edwin Tay & Co] for the plaintiffs

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