CEF (Capital Markets) Ltd & anor v Goh Chin Soon & ors
[2000] SGHC 92

Case Number : Suit No 849 of 1998
Decision Date : 24 May 2000
Tribunal/Court : High Court
Coram : S Rajendran J
Counsel Name(s) : —
Parties : —

JUDGMENT:

Grounds of Judgment

1. Goh Teck Beng, the 2nd defendant in Suit No. 849/98, applied by way of SIC 601332/2000 to further amend the Amended Defence and Counterclaim filed by him in that suit.

2. The application for amendment was made at a time when the hearing of Suit No. 849/98 (which was heard together with Suit No. 24/98 and Suit No. 822/99) had gone into the third week of hearing. At the time the application was heard, the hearing was on its 24th day, all witnesses for the plaintiffs in Suit No. 849/98 (and Suit No. 24/98) had completed their testimony and the plaintiffs had closed their case. I rejected the application. The 2nd defendant has appealed against my decision and I now give my grounds.

3. A Memorandum of Charge executed by the 2nd defendant in connection with certain facilities granted by the plaintiffs, contained a personal guarantee from the 2nd defendant that the facilities would be re-paid. The 2nd defendant claimed that, at all material times, the plaintiffs and the 1st defendant (Goh Chin Soon) had intended only to have the 1st defendant and not the 2nd defendant as personal guarantor for the loans under the Facility Agreement and, by the proposed amendment, sought, for the first time, to introduce the defence of common mistake.

4. Counsel for the 2nd defendant submitted that as the 2nd defendant - in an affidavit filed as early as 14 August 1998 and, subsequently, in his affidavit evidence-in-chief filed on 18 February 2000 - had raised the matters covered by this application, the proposed amendments would not take the plaintiffs by surprise and would not cause any prejudice to the plaintiffs that could not be compensated by way of costs.

5. The plaintiffs had demanded payment from the 2nd defendant under the personal guarantee contained in the Memorandum of Charge as early as 13 May 1998. Not getting satisfaction, the plaintiffs had followed up on their demand by instituting Suit No. 849/98. In paragraph 6 of the Statement of Claim filed by the plaintiffs on 29 June 1998, the plaintiffs claimed against the 2nd defendant under the personal guarantee. In his defence to that claim, the 2nd defendant not only failed to raise the defence of common mistake, but, by paragraph 3 of his Defence and Counterclaim admitted, without qualification, that he executed the said personal guarantee. Even assuming that there was some unwitting error in the filing of that defence, the need to have that error corrected should have been evident to the 2nd defendant from at least as early as 14 August 1998 when he filed the affidavit relied on by his counsel. Yet no application for leave to amend was made until 17 March 2000 and no satisfactory explanation was proffered by the 2nd defendant to explain this failure.

6. It cannot be over-emphasized that parties to a suit must ensure that all necessary amendment to their pleadings are effected as early as possible. To effect amendments at a late stage or in the course of the trial itself is undesirable. In general terms, the longer a party takes to amend his pleadings after it is clear that an amendment is called for, the more prejudice it will cause and the less likely it is that the application for amendment will be granted. If this application for leave to amend was merely to clarify

the issues already raised in the pleadings, I may well have considered the application favourably, late though the application was. But the amendments sought in this application not only raised a completely new defence but a defence that would have been patently obvious to the 2nd defendant and his advisors from a long time ago. To allow the 2nd defendant to raise such a defence, at so late a stage, would, in my view, be prejudicial to the plaintiffs.

7. In *Hong Leong Finance Ltd v Famco (S) Pte Ltd & Ors* [1992] SLR 1008, Judith Prakash JC (as she then was) was faced with a similar application to amend the defence after the plaintiffs had closed their case. There too the defendants had the necessary material to have applied for the amendment at a much earlier time. Her Honour held that the application, if granted, would put the plaintiffs in great difficulty and the injustice to the plaintiffs was not only a matter of costs. It would involve a re-presentation of their case, investigation of the defendants' allegations and a consideration of whether to allow the defendants another opportunity to cross-examine the plaintiffs' witnesses. For those reasons, Her Honour was not prepared to allow the amendments.

8. *Alegemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd* [1991] SLR 708 is also a case where an application to amend the defence was made after the plaintiffs had closed their case. Chao Hick Tin J (as he then was) refused the application for reasons, summarised in the headnotes, as follows:

> "(4) The defendants' application to amend the defence was only made after the plaintiffs had closed their case and the defendants had begun to call their first witness and while the parties were waiting for dates to be allocated for the resumed hearing of the actions. The proposed amendments were of a material nature and would unfairly prejudice the plaintiffs. Moreover, the plaintiffs had already closed their case and an award of costs alone would not undo the harm which the amendments would cause. In any case, the points sought by the defendants to be included in their defence could and should have been raised by the defendants very much earlier. In view of the above, it would not be proper and just to allow the defendants' application to amend their defence."

The circumstances of the present case are similar to those considered in *Hong Leong Finance Ltd* and *Alegmene Bank Nederland NV*. There was, in the present case, an additional factor: At the close of the cross-examination of John Low (a former employee of the 1st plaintiffs who had procured the execution of the Memorandum of Charge by the 2nd defendant), counsel for the plaintiffs had drawn attention to the fact that there were allegations contained in the affidavit evidence-in-chief of the 2nd defendant that had not been put to John Low and invited counsel for the 2nd defendant, if he was going to rely on those matters, to cross-examine John Low thereon. That invitation was not taken up. Having elected not to cross-examine John Low (on matters which would be relevant to the plea of common mistake) when John Low was in the witness stand, the 2nd defendant should not, at this late stage be permitted to amend his pleadings to include that plea.

9. Counsel for the 2nd defendant submitted that any prejudice that the plaintiffs might suffer in this case can be compensated by costs and that in order to do justice between the parties the amendments ought to be allowed. I could not accept that submission. The principal witness of the plaintiffs relevant to the proposed new defence was John Low. John Low had completed his testimony and had returned to Hong Kong where he resides. If the amendments were allowed, there could be no certainty that the plaintiffs would be able to procure his further attendance in court. That fact alone was prejudicial to the plaintiffs and was sufficient to dispose of the submission.

10. But even if the attendance of John Low could be procured, whether leave to amend should be granted still remained a matter for the court's discretion. As Lord Griffiths said in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38 at 62:

> "Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice to invariably allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on

> terms that an adjournment is granted and that the defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.
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> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion of his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other."

Lord Griffith, at page 62 of his judgment, made another observation which is worth noting. He said:

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings."

These comments by Lord Griffiths are apposite in our context. The application for amendment to include the plea of common mistake, in this case, was made at so late a stage after the need for the amendment became apparent that it would be prejudicial to the fair conduct of the trial for the application for amendment to be allowed.

11. For the above reasons, I dismissed with costs the application by the 2nd defendant to amend his pleadings.

S Rajendran

Judge