Samsung Corp v Chinese Chamber Realty Pte Ltd and Others
[2003] SGCA 50

Case Number : CA 81/2003

Decision Date : 29 December 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J

Counsel Name(s) : C R Rajah SC (instructed), Koh Kok Wah, Gerald Ng and Daniel Chia (Wong and Leow LLC) for appellants; Latiff Ibrahim, Yeo Khung Chye (Harry Elias Partnership) for respondents

Parties : Samsung Corp — Chinese Chamber Realty Pte Ltd; China Square Holdings Pte Ltd; Church Street Properties Pte Ltd

Civil Procedure – Inherent powers – Whether court could invoke inherent powers to vary O 14 r 1 – Order 92 r 4 Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Civil Procedure – Summary judgment – Application for summary judgment under new O 14 r 1 – Defence not filed – Whether application could be made pending application for stay of proceedings – Order 14 r 1 Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Chao Hick Tin JA

1 This appeal raises the question as to whether it is proper, in the light of the current O 14 r 1, for the court to compel a defendant to file his defence to an action, with the aim of enabling the plaintiff to file an O 14 application for summary judgment, when the defendant has already filed an application for a stay of the proceeding.

2 The present O 14 r 1 reads:-

> "Where a statement of claim has been served on a defendant and that defendant has *served a defence to the statement of claim,* the plaintiff may, on the ground that that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant."

3 The words which we have italicized above, namely, "served a defence to the statement of claim" have replaced the previous words "entered an appearance in the action.". Under the previous rule, even though the defendant had already applied for a stay of the proceeding, there was nothing to stop a plaintiff from applying for summary judgment. This was because it was then not a requirement that the defence must be filed before the O 14 application could be made. It was also then the practice, in the interest of avoiding delay, that both the stay and the O 14 applications would be heard at the same time. While the tests that would be applied in determining the two applications were not the same, there would usually be considerable overlap in the arguments presented. Thus, in a sense, there was some expedience in this approach. An example where such an approach was taken is the case of *Aoki Corp v Lippoland (S) Pte Ltd* [1995] 2 SLR 609.

4 In *Yeoh Poh San & anor v Won Siok Wan* [2002] 4 SLR 91, a case decided under the previous rule, the court took the opportunity to consider whether it was conceptually correct to require a defendant to file his defence while his stay application was pending final resolution. There, an application by the defendant for a stay of proceeding on the grounds of *forum non conveniens* and multiplicity of suits was dismissed by the Assistant Registrar. The defendant appealed against the dismissal. The time prescribed by the Rules of Court for the filing of defence expired before the

appeal was heard. No defence was filed. The plaintiff applied for summary judgment in default of defence. In turn, the defendant applied for an extension of time until after the hearing of the appeal to file his defence. The Deputy Registrar granted the defendant an extension of 14 days to enable her to file her defence with the caveat that the filing of the defence would not be considered to have been a step taken by the defendant in the proceeding. The defendant took the matter to the judge-in-chambers, arguing that she should be given an extension until the stay application had been finally determined before being required to file her defence.

5 Relying on the principles enunciated by this Court in *The Jarguh Sawit* [1998] 1 SLR 648, Woo Bih Li JC (as he then was) was of the view that as the plaintiff was aware that the defendant had filed an appeal against the order refusing a stay, he should not have, pending the hearing of the appeal, insisted on the filing of the defence. The judge felt that the reason why a plaintiff should not insist on the filing of defence before the original stay application was heard was equally applicable to an appeal, as to require the filing of defence would defeat the purpose of the stay application. He did not favour what was essentially a "compromise" approach adopted by the Deputy Registrar of, on the one hand, making the defendant file his defence before the appeal on the stay application had been finally disposed of and, on the other hand, stating that in order not to prejudice the defendant's position, that the filing of the defence should not be considered to be a step taken by the defendant in the proceeding. Strictly, until the stay point was finally disposed of, the court would not be properly seized of the matter. Moreover, in his view, to require the defendant to file a defence while the defendant was still pursuing his contention for a stay would be prejudicial to the defendant. He reasoned (at p. 96-97):-

> "The point is that while a defendant is seeking to stay the proceeding, whether by way of original application or an appeal, the defendant should not be required to meet the plaintiff's claim on the merits. A defendant is entitled to focus his attention on the appeal for a stay and not be distracted by running two contradictory courses of action at the same time."

6 At this juncture it would be appropriate for us to look at the case of *The Jarguh Sawit* which Woo JC relied upon. There, the defendants unsuccessfully applied to set aside the writ under O 12 r 7 of the Rules of Court on the ground that the court had no jurisdiction in the admiralty action instituted by the plaintiffs. In their defence and counterclaim filed, the defendants reiterated the jurisdictional point. The plaintiffs applied for summary judgment and also to strike out the jurisdiction point pleaded in the defence on the ground that the latter issue had already been determined. The Assistant Registrar struck out the jurisdictional issue pleaded in the defence and this decision was upheld by the High Court. As regards the action proper, the defendants were given conditional leave to defend. The defendants were dissatisfied and appealed to the Court of Appeal. This Court upheld the decision below that the defendants were not entitled to raise the jurisdictional issue again, the point having been previously decided. It was *res judicata*. What were considered germane by Woo JC were the views expressed by this Court when dealing with the jurisdictional point:-

> "30. Firstly, whether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties. Unless and until a court is properly seized, it cannot adjudicate on the matter …
>
> 34. The Rules of Court also contemplate that the matter of jurisdiction should be determined once and for all at the interlocutory stage. The Rules clearly suggest that jurisdiction is finally determined at the stage where an application is made under O 12 r 7 ….
>
> 35. A party to an action brought in Singapore may dispute jurisdiction after having first entered an appearance by an application made by summons under O 12 r 7. This does not amount to a

submission to jurisdiction: O 12 r 7(5). Order 12 r 7(2) then prescribes that a defendant may dispute jurisdiction by making an interlocutory application by a summons in chambers. …"

7 It seems to us that as a matter of logic, it makes absolute sense that when the question of stay is put in issue that should first be determined before any further step is taken by either party in the action. In the context of an arbitration clause, it is all the more so as under s 6(1) of the Arbitration Act it is expressly provided that the party who wants a stay of the court proceeding should apply "after appearance and before delivering any pleading or taking any other step in the proceeding." Once the stay question is finally determined, then everything else will follow from that.

The facts

8 We now set out in brief the facts of the present case. The three respondents, the plaintiffs in the action, were the developers of a 30-storey office building right in the heart of town. The appellants, Samsung, were the main contractors of the project. There were apparently delays in the completion of the project as a result of which the Architect of the project ("the Architect") issued a delay certificate in favour of the respondents. The respondents sought payment under the certificate, relying on the temporary finality provisions in clause 31(11) of the Singapore Institute of Architects conditions of contract ("SIA contract"). Because of the appellants' refusal to honour the certificate, the respondents instituted the present action to compel payment. The appellants entered appearance and applied for a stay on the ground that there was an arbitration clause in the SIA contract.

9 Due to the requirement in the current O 14 r 1, the respondents could not apply for summary judgment because no defence had yet been filed. At the hearing of the stay application before the Assistant Registrar, the appellants orally applied for an extension of time to file their defence until after the stay application had been finally decided (including any appeals therefrom). At the same time, the respondents also applied orally for leave to file the O 14 application without waiting for the defence to be filed by the appellants in order to ensure that both the stay application as well as the O 14 application could be heard together, as was the practice under the previous rule.

10 Invoking the inherent powers of the court spelt out in O 92 r 4, the Assistant Registrar granted leave to the respondents to file their O 14 application without the defence having been filed by the appellants. To safeguard the position of the appellants, she also ordered that whatever affidavits filed by the appellants to resist the O 14 application would not be viewed as steps taken in the proceeding. She further granted the appellants' application that they need not file the defence until the stay application had been finally disposed of. She lastly ordered that both the stay application and the O 14 application should be heard together. Pursuant to these orders of the Assistant Registrar, the respondents filed their O 14 application.

11 The orders made by the Assistant Registrar came on appeal to the judge-in-chambers, who ruled that the Assistant Registrar was wrong to have invoked the "inherent power" to override the express provision of O 14 r 1. He held that an O 14 application could only be made after the defence had been filed. However, recognising the desirability of having the stay application being heard together with the O 14 application, the judge went on to require the appellants to file their defence before the stay application was disposed of, with the caveat that in so filing their defence they were not to be construed as having taken a step in the proceeding. The judge noted the comments of Woo JC in *Yeoh Poh San* but seemed to think that the distinguishing feature in that case was that there was "no pressing need for the defence to be filed". The judge felt that, in the circumstances here, a joint hearing would be beneficial as the O 14 application would be more speedily dealt with and that this approach would avoid duplicity in arguments. In the instant case, the difference between the Judge's

orders and those of the Assistant Registrar's is that the approach taken by the judge would not be in direct contravention of O 14 r 1.

Inherent jurisdiction

12 We endorse the views of the judge that generally where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers. No court should arrogate unto itself a power to act contrary to the Rules. The rule making powers are conferred upon the Rules Committee. The court should not usurp the powers and functions of the Rules Committee: see *The Siskina* [1979] AC 210. If, in its opinion, what is clearly provided in a particular rule is undesirable or unjust, the course which the court should take would be to offer its views on it for the consideration of the Rules Committee but not to amend it, or bend it, to reflect what it thinks is just or more desirable.

13 We are conscious that the authorities on the point are not entirely consistent. They were surveyed in the article *"The Inherent Powers of the Court"* written by Prof J Pinsler and published in [1997] SJLS 1 where the author noted (at p.13):-

> "The inherent jurisdiction was based not only on the fact that the court, by virtue of its immediate control of its own process (given that it hears the suit), is in the best position to make orders to effectively resolve disputes, but also on the fact that it must have the standing to protect its own process in the interest of the administration of justice. Over the years, the courts exercised their power in innumerable circumstances as the particular occasion demanded, resulting in an abundance of rulings."

14 While recognising the conflicting views of the courts in *The Siskina,* with Lord Denning MR in the Court of Appeal taking a more flexible approach, and Lord Hailsham in the House of Lords taking a view that there should be compliance with a clear rule, Prof Pinsler opined that there must be circumstances where the court could act beyond the rules. He commented that (at p.48):-

> "… it would be pointless to have a provision such as Order 92, rule 4 (RC) to enable the court to exercise 'powers' beyond the rules (which are stated not 'to limit or affect' those powers), if such a role is not permitted."

15 We certainly do not wish to circumscribe the dynamism of the concept of "inherent jurisdiction of the court". Neither is it possible to lay down any comprehensive test as to its exercise. We had in the case of *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25 at 32 mentioned that one essential touchstone for invoking the inherent jurisdiction of the court was that of "need". In other circumstances, the compelling reason may well be "the justice of the case" or the "prevention of abuse".

16 Reverting to the circumstances of the present case, there is nothing so compelling as to require the court to invoke its inherent powers to vary what is prescribed in O 14 r 1 otherwise there would be "injustice" or "abuse". A defendant is entitled to have the question of stay determined first. And, as stated before, that is only logical.

The issues

17 We now turn to that part of the judge's decision which is the subject of criticism in this appeal. While the parties are not *ad idem* on the issues that have to be addressed by this Court, we would put it under three broad heads:-

(i) whether conceptually it is proper for the court to compel a defendant to file his defence while a stay application is still pending final disposal, particularly bearing in mind the provisions of the present O 14 r 1?

(ii) if the answer to (i) is in the positive, whether the O 14 application should only be heard after the stay application has been finally disposed of?

(iii) Even if the first issue is answered in the positive, whether the court should have required the respondents to file their O 14 application afresh instead of merely ratifying their earlier O 14 application which was made in breach of O 14 r 1?

Issues (i) and (ii)

18 The time frame prescribed in the Rules of Court for the filing of defence is a general rule and should be applied in the normal sort of a case where there is no dispute as to the jurisdiction of the court. Where, in a case, an application has been made for a stay of proceeding on the ground that the dispute ought to be referred to arbitration there is, in our opinion, much force in the contention that this question must first be determined before any further steps be taken in the proceeding. If the stay application should succeed, the dispute will be transferred to a different forum for determination. If it should fail, the court would no doubt make the necessary consequential orders, including setting the time-limit for the filing of defence.

19 A stay application can arise in a variety of situations. Some of the more common ones are: (i) there is an exclusive jurisdiction clause in the contract which gives rise to the dispute between the parties; (ii) under the principle of *forum non conveniens*, there is a more appropriate forum in another country or (iii) there is an arbitration clause to refer all disputes to arbitration.

20 The problem that confronts us in the present case is unlikely to arise where the stay application is made in the situations set out in (i) or (ii) above because of the absence of a temporary finality clause like clause 31(11) (quoted below). But it will arise in the third situation where there exists provisions similar to clause 31(11) and clause 37(1) and (3) found in the SIA contract, which are as follows:-

Clause 31(11)

"No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect (other than a Cost of Termination Certificate or a Termination Delay Certificate under clause 32(8) of these Conditions), whether for payment or otherwise, until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall (save as aforesaid and subject to sub-clause (4) of this condition) be binding on the Employer and the Contractor in relation to any matter which, under the terms of the Contract, the Architect has a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has as a fact ruled, in his certificates or otherwise …" (Emphasis added).

Clause 37

"(1) Any dispute between the Employer and the Contractor as to any matter arising under or out

of or in connection with this Contract ……, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties ……

(3) Such arbitrator shall not in making his final award be bound by any certificate, refusal of certificate, ruling or decision of the Architect under any of the terms of this Contract, but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him and in accordance with the true meaning and terms of the Contract, ….”

21 Without clause 31(11), there would be much less basis for any party to an SIA contract to apply for summary judgment where there is a dispute as to the sum certified. The effect of this clause is that temporary finality is accorded to a certificate of the Architect (except those excepted certificates mentioned therein) upon which summary judgment may be obtained unless it is shown that fraud had been perpetrated or improper pressure or interference brought to bear upon the Architect by either party: see *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 at 617 per Thean J. By virtue of clause 37(3) even though payment is made by one party to the other pursuant to a certificate of the Architect, the party making the payment is entitled to challenge the validity or correctness of the certificate before the arbitrator who may make such order on it as it deems fit: see *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 2 SLR 609 at 619 per Khoo J.

22 It is quite apparent that implicit in the provision of clause 31(11), that interim certificates be honoured notwithstanding any dispute, is the recognition that in the building industry cash flow is vital. It is thus understandable why under the previous O 14 r 1, the O 14 application was heard together with the stay application as the two applications were invariably inter-linked. While the issues or tests may not be identical in the context of an SIA contract, if the defendant should fail in their stay application, the plaintiff would in all probability succeed in the O 14 application.

23 The question that one must ask next is whether the amendment made to O 14 r 1 alters the position. It seems to us that the answer is in the affirmative, because under the current O 14 r 1, the application for summary judgment can only be made after the defence has been filed.

24 The order made by the judge is also a “compromise” order. On the one hand, it requires the defendant to file his defence, which is clearly inconsistent with the rule laid down in s 6(1) of the Arbitration Act that a defendant who applies for a stay on the ground of there being an arbitration clause must not take any step in the proceeding and, on the other hand, it provides that a defence so filed by the defendant would not be taken to mean that the defendant had taken a step in the proceeding. But should the court go to the extent of performing what appears to be a “gymnastic” exercise in order to achieve a result, which as a matter of principle, is far from logical? The defendant is being required to run two contradictory courses of action. The Rules Committee must have been aware of the practice under the previous rule, bearing particularly in mind the views of the court which were expressed in *Yeoh Poh San*. Those views were expressed shortly before the amendment was introduced. In amending O 14 r 1 in the way we now see it, the intention of the Rules Committee is wholly consistent with the standpoint that while a stay application is pending, no O 14 application should be made. Thus we do not think the “compromise” order made by the judge is in line with the object and spirit of s 6(1) and O 14 r 1.

25 It seems to us that the main reason why the court is asked to bend backwards to accommodate a plaintiff in a case like the present is expedience, to avoid any delay in the plaintiff obtaining judgment. Another reason advanced for that approach is that it would avoid inconsistent

judgments. Admittedly, there will be some delay if the O 14 application should only be allowed after the stay application has been disposed of. But we doubt this is a strong enough reason to adopt a compromise which is inconsistent with logic and conceptually wrong. In any case, in the context of clauses 31(11) and 37(3) of the SIA contract, if the defendant should fail to show by credible evidence that there is fraud or undue pressure being brought to bear upon the Architect, and here we must add that mere assertion would not be good enough (see *RB Burden Ltd v Swansea Corporation* [1957] 3 All ER 243 and *Hickman & Co v Roberts* [1913] AC 229), then the stay application is likely to fail. In that circumstance, it would be hard to imagine what further arguments could be raised by the defendant to resist an O 14 application for summary judgment. A sensible defendant, upon failing to secure a stay, would have paid up and chosen to contest later before the arbitrator. He would not be likely to throw good money after bad. While we recognise that not hearing the two applications together could conceivably give rise to inconsistent judgments, in the context of the SIA contract, that is more apparent than real.

26 In the premises, we would answer issue (i) posed in paragraph 17 above in the negative. Thus, issue (ii) does not arise.

Issue (iii)

27 In view of our answer to issue (i), issue (iii), like issue (ii), has become, in a sense, academic. However, we would like to offer some views on it. Clearly, this issue raises essentially a point of procedure. What happened in the present case was that the respondents filed their O 14 application before being properly authorised to do so. This was because, although the Assistant Registrar's order had allowed the respondents to file their O 14 application, without the defence being filed, the judge's order required the defence to be filed first. What the appellants are contending is that when the judge below granted leave to the respondents to file the O 14 application, he should have required the respondents to file a fresh application instead of allowing the earlier application, made pursuant to the order of the Assistant Registrar, to stand and treating it as valid. We are unable to see anything objectionable in principle to the judge's approach of allowing the application filed earlier to stand. We acknowledge that the judge could have required the respondents to make a fresh application, which is a purely clerical exercise, besides also involving the expense of additional stamp fee. But we do not see it being wrong in the judge exercising his discretion in allowing the earlier application to stand. The judge was being practical. All the more so when we bear in mind O 2 r 1(1) which provides that:-

> 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.

28 The judge was entitled to treat the matter as an irregularity within the meaning of the above rule. The judge, in allowing the O 14 application filed earlier to stand, had not caused any real prejudice to the respondents: see *Tan Han Yong v Kwangtung Provincial Bank* [1993] 1 SLR 971. If the judge had ruled otherwise, it would have caused a fruitless waste of time and expense. For these reasons, if the appellants should finally fail in their stay application, we would, in the exercise of our discretion, permit the respondents to continue with the O 14 application already filed and not require them to file a fresh application.

Judgment

29 Accordingly, we would allow the appeal and order that no O 14 application should be brought before the stay application has been finally disposed of.

30 The appellants shall have the costs here and before the Judge-in-Chambers. The costs before the Assistant Registrar shall be in the cause.

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