Bakery Mart Pte Ltd v Ng Wei Teck Michael and Others
[2004] SGHC 226

Case Number : OS 249/2004

Decision Date : 05 October 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Gabriel Peter, Ismail Atan and Calista Peter (Gabriel Law Corporation) for plaintiff; Ng Yeow Khoon and David Chan (Shook Lin and Bok) for first and second defendants; Philip Ling (Wong Tan and Molly Lim LLC) for third defendant

Parties : Bakery Mart Pte Ltd — Ng Wei Teck Michael; Chay Fook Yuen Peter; Culina Pte Ltd

Civil Procedure – Judgments and orders – Aplication to set aside consent judgment entered into by receivers and managers of plaintiff company – Whether plaintiff's allegation of wrongful conduct or mistake of receivers and managers made out – Whether circumstances justifying setting aside of consent judgment

5 October 2004

Belinda Ang Saw Ean J:

1 In this originating summons, Bakery Mart Pte Ltd ("Bakery Mart"), a company in receivership, sought to set aside the consent judgment entered into on 7 May 2003, following the acceptance by the receivers and managers of the third defendant's claim of $1.7m in Suit No 1305 of 2002. The third defendant is Culina Pte Ltd ("Culina"). The first two defendants, Michael Ng Wei Teck ("D1") and Peter Chay Fook Yuen ("D2"), are the joint and several receivers and managers of Bakery Mart. D1 and D2 are from the firm of KPMG.

2 At the relevant times, Bakery Mart was in the business of distributing baking and confectionery materials. In late 1999, Bakery Mart agreed with Sincere Watch Limited ("Sincere Watch") to each acquire an equal shareholding in Culina, a company that was in the business of supplying and distributing fresh and frozen foods, pastry products and wines. Bakery Mart lacked funds to pay for half of the shares in Culina and an option deed was entered into between the parties. Upon execution of the option deed, Sincere Watch made a pre-payment to Bakery Mart of $500,000, being the option price, as well as extended to it a loan of $100,000. From time to time, Sincere Watch continued to advance moneys to Bakery Mart.

3 On 5 September 2002, Sincere Watch sued Bakery Mart in the High Court in Suit No 1057 of 2002 to recover the option price, various loans and accrued interest due and owing to Sincere Watch. Bakery Mart's defence was that the debts to Sincere Watch were no longer due as they had been extinguished in a restructuring agreement with Sincere Watch. Sincere Watch applied for summary judgment. The assistant registrar granted Bakery Mart conditional leave to defend the action, the condition being the provision of a banker's guarantee for the full amount of the claim in the action.

4 On 20 November 2002, the decision of the assistant registrar was affirmed on appeal to a judge in chambers. The banker's guarantee for the full amount of the claim in the action was to be furnished by 20 December 2002. Bakery Mart appealed on 14 December 2002 against the conditional order. Whilst that appeal was pending and as the condition was not fulfilled, default judgment was entered against Bakery Mart on 21 December 2002. The appeal to the Court of Appeal was heard on 24 July 2003 and the appellate court, in allowing the appeal, granted Bakery Mart unconditional leave to defend Sincere Watch's action.

5 On 30 October 2002, Culina sued Bakery Mart in the High Court in Suit No 1305 of 2002 to recover various loans totalling $1,538,179.19 plus interest. As at 30 September 2002, the total amount due and owing was $1,700,882.57. Bakery Mart entered appearance on 12 November 2002.

6 I pause here in the narration to mention other significant dates in the chronology. On 13 January 2003, Bakery Mart was placed under receivership by United Overseas Bank Limited ("UOB") pursuant to a deed of debenture executed on 15 December 2000 between Bakery Mart and UOB's predecessor in title, the Industrial & Commercial Bank Limited. By the deed of debenture, the receivers and managers so appointed were to be the agents of Bakery Mart. UOB sued Bakery Mart in the High Court in Suit No 1514 of 2002. On 26 March 2003, UOB obtained summary judgment in the sum $4.7m and US$108,297.88 against Bakery Mart and two of its directors.

7 At the time the receivers and managers were appointed, there were four pending suits involving Bakery Mart. They were:

(a) Suit No 887 of 2002

(b) Suit No 1057 of 2002

(c) Suit No 1305 of 2002

(d) Suit No 1514 of 2002

8 M/s Gabriel Peter & Partners (now known as Gabriel Law Corporation) remained on record as solicitors for Bakery Mart in Suit No 1057 of 2002. The receivers and managers appointed M/s Shook Lin & Bok to act for Bakery Mart and the firm took over the conduct of the other three suits. I should in passing mention that Suit No 887 of 2002 was commenced by Bakery Mart against Culina and Avante Investments Pte Ltd, a subsidiary of Sincere Watch. It was later discontinued on the instructions of the receivers and managers. On 10 March 2003, M/s Shook Lin & Bok filed Notice of Change of Solicitors in Suit No 1305 of 2002. A Defence and Counterclaim was filed on behalf of Bakery Mart on 19 March 2003. Thereafter, Culina on 26 March 2003 applied for summary judgment. On 7 May 2003, M/s Shook Lin & Bok attended the hearing of Culina's application for summary judgment and consented to judgment being entered against Bakery Mart. That consent judgment formed the basis of a statutory demand against Bakery Mart.

9 Tan Hwa Heng, a director of Bakery Mart, affirmed the supporting affidavit. Ng Yew Hong, the former managing director of Bakery Mart, affirmed a second affidavit. Their contention, as gathered from the affidavits and the submissions of counsel, Mr Peter Gabriel, was that the company's consent to the judgment was vitiated by mistake, or by the bad faith of the receivers and managers, or by the unfairly prejudicial result of its consent, given the decision of the Court of Appeal in Suit No 1057 of 2002 which granted Bakery Mart unconditional leave to defend the action brought by Sincere Watch. The court was asked to exercise its inherent jurisdiction to set aside the consent judgment in order to provide Bakery Mart with an opportunity to defend the claim in Suit No 1305 of 2002 as its defence was the same as its defence against Sincere Watch.

10 Counsel for Culina, Mr Philip Ling, contended that the issue here was whether or not the plaintiff's consent to judgment could be characterised as something other than a knowing consent. To set aside the consent judgment there must be some wrongful conduct by the party seeking to uphold it, or a common error in expressing the intention of the parties. Mr Ling submitted that none of these circumstances existed.

11 The general principle is that the court will not interfere to set aside a consent judgment or order after it has been made and perfected otherwise than in a fresh action brought to set aside such a judgment on grounds of fraud or on any of the grounds upon which an agreement can be set aside. The exceptions to the general principle are where there has been a slip in drawing up the judgment or order which has been entered and where there has been an error in expressing the manifest intention of the court: see generally *Ainsworth v Wilding* [1896] 1 Ch 673 approved by the Privy Council in *Kinch v Walcott* [1929] AC 482; *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1993] 1 SLR 89; *Wiltopps (Asia) Ltd v Drew & Napier* [2000] 3 SLR 244.

12 In submissions, Mr Gabriel cited the case of *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185. That was a case of a consent order which had been reached outside the door of the Master's room immediately prior to the hearing of the summons. It was concerned with a failure to comply with an "unless" order, and the plaintiffs there applied for an extension of time in respect of that order. Lord Denning MR at 189 said this:

> We have had a discussion about "consent orders." It should be clearly understood by the profession that, when an order is expressed to be made "by consent," it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 KB 321, 324. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?"

13 Whilst it is possible that issues may arise between the parties as to whether the consent judgment of 7 May 2003 was in truth a consent order of a "no objection" kind and not a binding contract type of consent order, I did not see how the distinction was relevant to this originating summons. Bakery Mart was not seeking the court's intervention in an application filed in the original action. Besides, this case was not within the exceptions mentioned in [11] above. If anything, the consent judgment was more than acquiescence in an order that was proposed to be made. Some element of finality was intended as was apparent from the concurrent withdrawal of the Counterclaim by agreement with costs agreed at $500.

14 The court requires a strong case to be established before it will set aside a consent judgment on the ground of fraud. It is significant that Bakery Mart did not allege fraud on the part of Culina. Tan Hwa Heng's bald allegation of bad faith was against the receivers and managers who were acting on behalf of Bakery Mart. It was a half-hearted charge as no particulars of bad faith were given at all.

15 Notably, there was no assertion by Bakery Mart in the affidavits filed on its behalf that Culina had misled the receivers and managers into consenting to the judgment. Culina's position all along was that it was owed money by Bakery Mart and it went ahead to apply for summary judgment after it saw the Defence filed by Bakery Mart.

16 In my judgment, Bakery Mart did in fact consent to the judgment granted and the consent held out to the court was not presented by mistake. The judgment was consistent with what the parties intended. The consent judgment was passed in the terms that the parties had agreed to.

17 The authority of the receivers and managers was not disputed. It was not Bakery Mart's case

that in consenting to judgment the receivers and managers had exceeded their authority, only that they were mistaken that Bakery Mart had no defence to Culina's claim. In short, the mistake was in the receivers and managers' decision to consent to judgment. I found that to be an unarguable proposition on the facts of this case.

18 First, there was no mistake. The evidence was that the receivers and managers had had discussions with Ng Yew Hong, who knew of Culina's action but did not so much as challenge Culina's claim in the way he had tried to do in his affidavit. It was all the more surprising as at the relevant time, Ng Yew Hong was also a director of Culina. Mah Beng Weng ("Mah"), the manager in the Corporate Restructuring Services of KPMG, who filed an affidavit on behalf of himself, D1 and D2 in this originating summons, stated that Ng Yew Hong was aware of Culina's claim but "never made any meaningful statement", nor gave the receivers any "meaningful explanation" as to how or why Bakery Mart had any "meaningful defence" to Culina's claim or that the defence was "similar in form and substance" to Bakery Mart's defence in Suit No 1057 of 2002. The receivers and managers had also independently verified and considered the relevant documents, and concluded with the benefit of legal advice from M/s Shook Lin & Bok that there was no viable defence to Culina's claim. Various documents, such as audit confirmation, general ledger and audited accounts of Bakery Mart for the year ending 31 March 2002, all confirmed the indebtedness to Culina. Mah stated that the documents alluded to showed Culina to be a creditor of Bakery Mart. In my judgment, there was no question that the decision not to contest the application for summary judgment and to consent to judgment was made advisedly. Mr Ng Yeow Khoon, who represented D1 and D2 at the hearing, confirmed for the record that there was no mistake on the part of the receivers and managers. The consent judgment was deliberately made with the full knowledge and agreement of the solicitors on both sides.

19 Second, whether or not Culina's application for summary judgment ought to have been adjourned pending the outcome of the appeal to the Court of Appeal in Suit No 1057 of 2002 since Bakery Mart's defence in Suit No 1057 of 2002 was inextricably linked to the Culina action; or whether or not the receivers and managers had taken proper instructions from Ng Yew Hong or had in some way acted erroneously to the detriment of Bakery Mart, are all questions which were not for this court to determine in this application. However, it was quite clear that if those were the real complaints that Bakery Mart were making, none of them fell within the situation where this court could reopen the judgment by consent. Mr Ling drew my attention to *Chia Sook Lan Maria v Bank of China* [1975‖1977] SLR 9 where the Privy Council refused to set aside a consent order where the lawyer had misunderstood the effect of the exchanges of correspondence which led to the consent judgment. The court held that even if the appellant was imputed with knowledge of the error and the lawyer's error was regarded as her error, there was no evidence that the lawyer's error was shared by the bank. I accepted Mr Ling's submission that even if the receivers and managers had made a mistake, it was a matter entirely between Bakery Mart and the receivers. That would not be a reason to set aside the consent judgment. The recourse which is open to Bakery Mart is against the receivers and managers. I am certainly not suggesting that Bakery Mart should pursue it. It is for Bakery Mart to decide which course it should pursue.

20 The alleged unfairly prejudicial result in itself is not sufficient to justify the setting aside of a judgment to which Bakery Mart knowingly consented in order to avoid further legal costs. It is not for the court to interfere with the consent judgment, to undo that which the parties freely agreed with each other, when the only basis for inviting interference is that after Bakery Mart's success before the Court of Appeal in Suit No 1057 of 2002, the consent judgment turned out to be a bad decision for one side.

21 In the premises, there were no grounds which justified setting aside the consent judgment made on 7 May 2003, and I accordingly dismissed the originating summons with costs to Culina fixed

at $6,000 and costs to D1 and D2 fixed at $3,000.

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