Essar Steel Ltd v Bayerische Landesbank and Others
[2004] SGHC 90

Case Number : Suit 913/2003, RA 410/2003

Decision Date : 04 May 2004

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Damodara Suresh and Sunil S Gill (David Lim and Partners) for plaintiff; Andre Yeap SC and Adrian Wong (Rajah and Tann) for first, second and third defendants

Parties : Essar Steel Ltd — Bayerische Landesbank; Anzef Ltd; The Siam Commercial Bank Public Company Ltd, Singapore Branch; Mashreq Bank PSC; Citigroup Financial Products Inc

Civil Procedure – Appeals – Leave – Principles governing discretion to grant leave to appeal to Court of Appeal

Civil Procedure – Costs – Loan agreement providing for payment of costs where legal fees incurred in enforcing loan – Whether award should be made where rights to payment in dispute

Courts and Jurisdiction – Appeals – Appeal from registrar's decision – Role of appellate judge – Circumstances warranting judge's interference

4 May 2004

Kan Ting Chiu J:

1 I dismissed an appeal by the plaintiff, Essar Steel Limited against an order of costs of an assistant registrar, and refused its application for leave to appeal to the Court of Appeal.

Background

2 The plaintiff borrowed US$40m from a consortium of nine banks including the five defendant banks under a syndicated loan agreement ("the agreement").

3 When the defendant banks transferred their portions of the loan to an entity called the Argo Fund ("Argo"), the disputes leading to this action arose.

4 The plaintiff disputes the validity of the transfers on the grounds that:

(a) Argo is not a bank or financial institution to which the loans can be transferred under the terms of the agreement; and

(b) payment to Argo would render the plaintiff liable to criminal penalties under the laws of India. (The plaintiff is a company in India.)

5 The plaintiff commenced this action against the defendant banks for, *inter alia*, a declaration that the transfers to Argo "are void and of no legal effect and that the Defendants continue to hold the legal and beneficial interest in their respective outstandings".

6 In response to the plaintiff's action, the first, second and third defendants filed a counterclaim that in the event that the transfers are void or ineffective, the defendants remain parties to the agreement and are entitled to the rights and benefits thereof as if the transfers had

not been effected, including the right of repayment.[1]

7 The plaintiff applied to strike out the counterclaim on the grounds that it is premature and contingent. When the application came before the assistant registrar, it was dismissed with costs to the defendants on an indemnity basis fixed at $10,000. The plaintiff did not appeal against the dismissal of the application, but appealed against the order on costs.

8 Clauses 18.1 and 25.3 of the agreement provide for the payment of indemnity costs:

> 18.1 The Borrower [plaintiff] undertakes to indemnify:
>
> (i) each of the Agent, the Arrangers, the Co-Arrangers and the Banks against any cost, claim, loss, expense (including legal fees on a full indemnity basis) or liability together with any service tax thereon, which any of them may sustain or incur as a consequence of the occurrence of any Event of Default or any Potential Event of Default or any other breach or default by the [borrower] in the performance of any of the obligations or covenants expressed to be assumed by it in this Agreement; and
>
> (ii) each Bank against any loss it may sustain or incur as a result of its funding its portion of the Advance requested by the Borrower hereunder but not made by reason of the operation of any one or more of the provisions hereof.
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> 25.3 The Borrower shall, from time to time on demand of the Agent, reimburse the Agent, the Arrangers, the Co-Arrangers and the Banks for all costs and expenses (including, without limitation, legal fees and all out of pocket expenses on a full indemnity basis) together with any service tax thereon incurred in or in connection with (a) the preservation and/or enforcement of any of the rights of the Agent, the Arrangers, the Co-Arrangers and the Banks under this Agreement and (b) any variation, consent, approval, waiver or amendment relating to this Agreement.

9 The plaintiff argued in the appeal before me that the defendants were not entitled to indemnity costs because:

> The 1st to 3rd Defendants … have admitted that they are no longer parties to the [agreement]. The Plaintiffs submit that subsequent to the transfers (which the 1st to 3rd Defendants assert are valid), the 1st to 3rd Defendants are not entitled to the benefit of the entire [agreement] (let alone Clauses 18.1 and 25.3). The Plaintiffs are either contractually obligated to the Argo Fund (as transferee) or the 1st to 3rd Defendants but not to both (an issue that is going to be decided at the trial of this matter).[2]

10 It can be seen that in the developments described above, the agreement is an essential element in:

(a) the plaintiff's claim that the transfers are void and ineffective;

(b) the first, second and third defendants' counterclaim; and

(c) the plaintiff's application to strike out the counterclaim.

Each part of the case relates to and arises from the agreement.

11 The assistant registrar did not strike out the counterclaim. It was not for him to make a final determination on whether it would succeed. He was asked to strike it out on the ground that the first, second and third defendants cannot rely on the agreement to make the counterclaim, but he declined to do that.

12 Against this background it cannot be said that the assistant registrar acted without basis in awarding indemnity costs under cll 18.1 and 25.3 of the agreement because the costs were related to the counterclaim to enforce the repayment of the loan.

13 It can be argued that the assistant registrar could have deferred making the order for indemnity costs until there was a finding that the defendants are entitled to invoke the agreement after executing the transfers. If he exercised his discretion in that manner, it would have delayed the taxation and payment of the costs till after the trial. The uncertainty and delay could have militated against this alternative order. On the other hand, as the claim, counterclaim and the application to strike it out are all connected to the agreement, it would be consistent that the costs be paid according to the terms of the agreement. I do not think that the assistant registrar's order was wrong. I would have made the same order if I had heard the application.

14 When the matter came up on appeal before me, it was even more difficult for the plaintiff to argue against the order for indemnity costs. Counsel for the first, second and third defendants also reminded me that a judge in chambers generally will not allow an appeal from a registrar's costs order unless it is unreasonable or the registrar has erred in law. He referred to *Hoddle v CCF Construction Ltd* [1992] 2 All ER 550 where Morland J held at 550–551:

> [I]t would be highly undesirable as a matter of general principle that a judge [in chambers] should intervene and make different orders as to costs from that made by a master, unless it can be shown by the appellant that the master demonstrably erred in the exercise of his discretion in the order that he made. If it can be shown that the master took into account matters that he should not have taken into account or failed to take into account matters that he should have taken into account, in those circumstances the judge in chambers would be entitled to vary the order made by the master, but in my judgment it would not be in the interests of justice if judges in chambers entered into detailed examination of all the matters that were before the master in order to decide whether they would have come to the same decision as the master. Generally speaking, in my judgment, judges in chambers should not allow appeals against costs orders by masters, unless it can be shown that the order made was unreasonable or erred in law or, as I have indicated, either failed to take into account proper matters or took into account matters that should not have been taken into account.

and this view was reflected in *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 55B/1/3.

15 I therefore dismissed the appeal, with costs of the appeal to be paid by the plaintiff on an indemnity basis fixed at $3,000.

Leave to appeal

16 The plaintiff then applied to me for leave to appeal against my decision under O 56 r 3 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) and s 34 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed).

17 In an affidavit in support of the application, Mr Sunil S Gill, counsel for the plaintiff, deposed

that:

a. The 1st to 3rd Defendants have admitted in their pleadings that they are no longer parties to the [agreement]. The Plaintiffs submit that subsequent to the transfers (which the 1st to 3rd Defendants assert are valid), the 1st to 3rd Defendants are not entitled to the benefit of the entire [agreement] (let alone Clauses 18.1 and 25.3). The Plaintiffs are either contractually obligated to the Argo Fund (as transferee) or the 1st to 3rd Defendants but not to both (an issue that is going to be decided at the trial of this matter);

b. Even if the 1st to 3rd Defendants are entitled to the benefit of the [agreement] (which we say they are not), the import, purport and meaning of Clauses 18.1 and 25.3 of the [agreement] are subject to the Laws of England since English law is the governing law of the [agreement]. Questions of foreign law are questions of fact. In the present case, no evidence was presented by the 1st to 3rd Defendants for the purpose of resolving these issues of fact (more specifically, the import, purport and meaning of Clauses 18.1 and 25.3 of the [agreement]);[3]

and that:

It is essentially the Plaintiffs' position that any interpretation of the [agreement] and its applicability should be a matter for the trial judge to decide since he will have the benefit of evidence from legal experts and proper submissions from Counsel. To do so right now at the interlocutory stage is, with respect, premature.[4]

18 These are repetitions of the arguments made before the assistant registrar and me. The only reference to the merits of the application for leave to appeal to the Court of Appeal is that:

It has become clear to the Plaintiffs that, although the Honourable Judge observed that his decision was limited only to the issue of costs for the Plaintiffs' Striking-Out Application, the Defendants will in all probability refer to his decision in justifying indemnity costs in all other interlocutory applications as well.[5]

19 Section 34(2) of the Supreme Court of Judicature Act stipulates that:

Except with the leave of the Court of Appeal or a Judge, no appeal shall be brought to the Court of Appeal in any of the following cases:

(a) where the amount or value of the subject-matter at the trial is $250,000 or such other amount as may be specified by an order made under subsection (3) or less;

(b) *where the only issue in the appeal relates to costs or fees for hearing dates*;

(c) where a Judge in chambers makes a decision in a summary way on an interpleader summons where the facts are not in dispute; or

(d) an order refusing to strike out an action or a pleading or a part of a pleading.

[emphasis added]

20 The Court of Appeal had in *Lee Kuan Yew v Tang Liang Hong* [1997] 3 SLR 489 held at [16]

that:

> [I]t is apparent that there are at least three limbs which can be relied upon when leave to appeal is sought: (1) *prima facie* case of error; (2) question of general principle decided for the first time; and (3) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

21 The judgment cited and approved Lai Kew Chai J's judgment in *Anthony s/o Savarimiuthu v Soh Chuan Tin* [1989] SLR 607, where he said at 608, [2] that:

> To obtain leave to appeal when the amount involved is below the statutory amount an applicant for leave must show that a serious and important issue of law is involved … The circumstances for granting leave would include (though obviously not limited to) cases where an applicant is able to demonstrate a *prima facie* case of error or if the question is one of general principle upon which further argument and a decision of a higher tribunal would be to public advantage. That was pronounced by Edgar Joseph Jr J in *Pang Hon Chin's* case ([1986] 2 MLJ 145). These propositions have a common thread: that to deny leave may conceivably result in a miscarriage of justice.

22 In *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716 Tay Yong Kwang JC (as he then was) also referred to *Anthony s/o Savarimiuthu* and stated at [30] and [31]:

> 30 I should clarify here the words "a *prima facie* case of error" used in *Anthony Savarimiuthu's* case. In another application of this nature heard by me, the applicant there sought to demonstrate a *prima facie* case of error by referring me to the evidence adduced at the trial and attempting to show that the collision could not have occurred in the way described by the plaintiff there on such evidence. That, in my view, was no more than an attempt to show an erroneous conclusion on the facts of the case for which leave to appeal must be and was denied. If it were otherwise and facts have to be examined in detail in each case to demonstrate the error, the High Court might as well hear the appeal proper.
>
> 31 In my opinion, leave of court to appeal may be granted where the applicant is able:
>
> (a) to demonstrate a *prima facie* case of error of law that has a bearing on the decision of the trial court;
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> (b) to show that there is a question of law decided for the first time or a question of law of importance upon which a decision of a higher tribunal would be to the public advantage;
>
> (c) to show a question of law on which there is a conflict of judicial authority and a pronouncement from a higher court in the judicial hierarchy is desirable.

23 In *Goh Kim Heong v AT & J Co Pte Ltd* [2001] 4 SLR 262, I dealt with another application for leave to appeal. After referring to the three decisions referred to above, I suggested that in determining whether to grant leave, the value of the proposed appeal and the costs and time burdens the appeal would place on the parties and the appellate court should also be taken into account.

24 There appears to be some uncertainty whether a *prima facie* case of error is sufficient basis for granting leave, as suggested in *Anthony s/o Savarimiuthu*, or whether that should be limited to errors of law as stated in *Abdul Rahman*.

25 There is something to be said for both propositions. Where a judgment is the result of an error of fact, it would be a denial of justice to refuse leave to appeal. On the other hand, if any alleged error of fact can be relied on to seek leave to appeal, that would result in the virtual appeal hearings being conducted at the leave stage to establish whether there has been an error of fact.

26 It is possible to accommodate both concerns. We can avoid shutting out all errors of fact and also avoid having virtual appeal hearings in applications for leave by restricting such errors to those that are clear beyond reasonable argument, for example, where undisputed evidence that a notice was served on 1 June was wrongly taken to have been served on 1 July. Where it is demonstrated that a clear error of fact has contributed or led to a judgment, the aggrieved party should be allowed to rely on it to seek leave to appeal. Other complaints, for example, that a judge had erred in accepting the evidence of one witness over that of another, or had erred in drawing an inference or coming to a conclusion, will not be considered.

27 When I heard the application for leave, I examined it against the tests for granting leave:

(a) Is there a *prima facie* error of law or fact? I think the assistant registrar did not make any error of law or fact. He was entitled to exercise his discretion in the way he did.

(b) Does the decision touch on a general principle decided for the first time? It may be that this question is decided for the first time, but it does not involve any question of general principle. The issue is peculiar to the particular facts of the case and is not likely to arise in other cases.

(c) Does it touch on a question of importance on which further argument and the decision of the Court of Appeal would be to the public advantage? I do not think that whether the plaintiff should pay standard or indemnity costs is a question of such importance.

28 Further to that, is further time and expenditure of another appeal justified? The two sets of indemnity costs awarded by the assistant registrar and by me totalled $13,000. The issue has been argued twice already. Further time and expenditure in arguing over the costs are not justified.

29 Having found that the application failed to satisfy any of the tests, I declined to give leave to appeal. The plaintiff has now applied to the Court of Appeal for leave to appeal.

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[1]See Amended Defence and Counterclaim of 1st to 3rd Defendants, para 28

[2]Plaintiffs'/Appellants' submissions dated 8 March 2004, para 12

[3]Affidavit of Sunil S Gill filed 19 March 2004, paras 14(a) and (b)

[4]Affidavit of Sunil S Gill filed 19 March 2004, para 18

[5]Affidavit of Sunil S Gill filed 19 March 2004, para 16

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