Carrefour Singapore Pte Ltd v Leong Wai Kay
[2006] SGHC 160

Case Number : Suit 422/2005, RA 95/2006

Decision Date : 06 September 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Sadique Marican and Anand Kumar (Sadique Marican & Z M Amin) for the plaintiff; M Mahendran (Surian & Partners) for the defendant

Parties : Carrefour Singapore Pte Ltd — Leong Wai Kay

Debt and Recovery – Civil debt – Civil action by company under s 14(1) Prevention of Corruption Act to recover gratification accepted by former manager whilst employed by company – Employee convicted of corruption, imprisoned and ordered to pay penalty in the sum of amount of bribes received – Whether civil action to recover gratification barred by penalties and disgorgement ordered under criminal proceedings – Section 14(1) Prevention of Corruption Act (Cap 241, 1993 Rev Ed)

6 September 2006

Belinda Ang Saw Ean J:

1 The plaintiff, Carrefour Singapore Pte Ltd, brought this action against the defendant, Leong Wai Kay, who prior to his conviction was the facilities manager of the plaintiff. This appeal concerns the recovery of bribes as a civil debt under s 14(1) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the Act"). The question which arose at the appeal was whether pursuant to s 14(1) of the Act, the defendant, who had already paid to the State the penalty sum imposed on him following his conviction, remained liable to pay the plaintiff as a civil debt a like amount of the bribes received by him. I allowed the plaintiff's appeal and entered final judgment for the plaintiff in the sum of $292,800. The defendant has appealed against my decision.

2 The defendant joined the plaintiff company on 17 April 1997. His employment was terminated on 28 October 2003. Between April 1998 and July 2003, the defendant as facilities manager received bribes from several companies who provided services to the plaintiff. The bribes were given in return for awarding contracts to those service providers. The defendant was duly charged for offences punishable under s 6(*a*) of the Act. He pleaded guilty on 13 September 2004 to ten charges of receiving bribes. He was convicted and 82 other charges were taken into consideration for the purpose of sentencing. The defendant was sentenced to a total of ten months' imprisonment and ordered to pay a penalty of $292,800, in default 16 months' imprisonment. The defendant paid the penalty of $292,800 being the amount of bribes received by him.

3 The defendant in his defence admitted to receiving $292,800 as gratification corruptly. Essentially, his defence to the plaintiff's application for summary judgment was that having already disgorged all the moneys he had received he could not remain liable to the plaintiff as it would be tantamount to making him pay twice for the same gratification. It was equally unjust since he was no longer enriched. Counsel for the defendant, Mr M Mahendran, referred me to *PP v Teng Cheow Hing* [2005] SGDC 38, a decision of the District Court on s 13 of the Act. Counsel argued that the intention of s 13 was not to penalise the offender twice over but to disgorge the gratification. By analogy, the same reasoning should apply in the present case.

4 In response, counsel for the plaintiff, Mr Sadique Marican, maintained that it was irrelevant and immaterial to the plaintiff's claim that the bribes were disgorged as a result of the penalty

imposed on the defendant in the criminal proceedings. There would be no double payment as alleged. Mr Marican relied on the decision of the Privy Council in *T Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1978] 1 MLJ 149 ("*Mahesan v Malaysian Housing Society*") for the proposition that the imposition of a penalty in the criminal proceedings of an amount equivalent to the bribes received by the defendant is not a defence barring the plaintiff's recovery of the civil debt against the defendant under s 14(1) of the Act. Section 14 reads as follows:

> (1) Where any gratification has, in contravention of this Act, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of that amount or money value.
>
> (2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property

5 In that case, the Privy Council considered s 30 of the Malaysian Prevention of Corruption Act, 1961 (No 42 of 1961) ("the Malaysian Act"), which deals with civil remedies for bribery in Malaysia. Section 30 of the Malaysian Act is *in pari materia* to our s 14. The appellant, Mahesan, was a director and employee of the respondent whose object as housing society was to provide housing for government employees. Mahesan could have purchased land on behalf of the respondent at the time he inspected it and at the price of RM456,000 which one Manickam was given for it, instead of RM944,000 at which the latter sold it on to the respondent. It transpired that from the gross profit of RM488,000, Manickam passed one quarter of it (*ie* RM122,000) to Mahesan as a bribe. Mahesan was convicted under the Malaysian Act and sentenced to seven years' imprisonment and ordered to pay to the respondent a penalty of RM122,000 being the amount of the bribe. I should add that an order to pay the penalty to the respondent was a possible recourse. Section 13 of the Malaysian Act (which is differently worded from our s 13(1)) allows the sentencing court to make such a direction. The respondent later brought a civil action against Mahesan claiming (a) recovery of the bribe Mahesan had received, *ie* RM122,000; and (b) damages for loss sustained by the respondent in connection with the purchase of the land quantified at RM488,000.

6 Their Lordships confirmed the clear delineation of the statutory penalty recoverable as a criminal fine pursuant to the Malaysian Act, which included the court's coercive jurisdiction to imprison a defaulter, and the civil claim, which was not barred by the conviction and was expressly preserved by s 30 of the Malaysian Act (the equivalent of our s 14). Lord Diplock said at 151:

> The order [*ie*, the statutory penalty of RM122,000] made in the criminal proceedings does not affect the rights of the principal against the agent in the civil proceedings. Section 30 of the Prevention of Corruption Act, 1961, so provides.

7 Mahesan paid only RM13,000 of the penalty ordered to be paid to the respondent. That order and part payment was not an issue that troubled the Privy Council whose concern was whether or not in civil proceedings the respondent's claim for the amount of the bribe as well as damages for fraud would result in double recovery against the dishonest agent. Here, counsel for the plaintiff confirmed at the hearing of the appeal that the plaintiff was not pursuing its common law claim for damages, having elected to only claim as a civil debt the amount of bribes received by the defendant under s 14(1) of the Act. By this election, no issue of double recovery by the plaintiff subsists.

8 Section 13 of the Act provides as follows:

(1) Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.

(2) Where a person charged with two or more offences for the acceptance of gratification in contravention of this Act is convicted of one or some of those offences, and the other outstanding offences are taken into consideration by the court under section 178 of the Criminal Procedure Code for the purpose of passing sentence, the court may increase the penalty mentioned in subsection (1) by an amount not exceeding the total amount or value of the gratification specified in the charges for the offences so taken into consideration.

9 The intent of s 13 is to prevent corrupt wrongdoers from keeping or benefiting from the spoils of their crimes (as to which see *Tan Kwang Joo v PP* [1989] SLR 496 at 498, [5]) but that does not mean that the defendant who has disgorged an amount equal to the bribes to the State pursuant to the penalty imposed on him is discharged from further liabilities in respect of civil proceedings brought by his employer under s 14(1) to recover the bribes as a civil debt. In my view, Mr Mahendran's assertion of double payment as a complete defence not only contradicts the clear language of s 14(1), it is also misconceived in that the criminal proceedings are separate and distinct from the civil proceedings which are based on a cause of action given by s 14(1). The plaintiff's right against the defendant remained unfettered by the conviction, which carried with it, apart from a jail term of ten months, a penalty of $292,800. The penalty of $292,800 was recoverable as a fine and it included the court's coercive jurisdiction to imprison a defaulter. The charges were criminal in nature and their existence as criminal charges was dependent on the necessary condition of the statutory requirements being met. The penalty was imposed to disgorge corruptly obtained gratification, which the law would not have allowed him to retain. The penalty recoverable as a fine is deterrent rather than compensatory in nature. Plainly, the civil recovery process in s 14 is separate and distinct from the criminal process. Notably, the taking of bribes is the wrongful conduct which is the foundation of the action for a debt. As such, it is not dependent on any loss suffered by the plaintiff. From this perspective, there can be no double payment. Consequently, I was not persuaded by Mr Mahendran's argument that the facts gave rise to a double payment and that such an assertion of double payment could translate into a valid defence to the claim.

10 In *Mahesan v Malaysian Housing Society* ([4] *supra*), s 30 of the Malaysian Act (*ie*, our s 14) was considered and explained by Lord Diplock at 153 in the following terms:

> Subsection (1) which refers to the principal's right to recover the amount of the gratification as a civil debt either "from the agent or from the person who gave the gratification to the agent" gives statutory recognition to the right of the principal at common law to recover the amount of the bribe from either the briber or the agent, as money had and received. Subsection (2) in their Lordships' view does no more than to preserve the right of the principal to recover from the bribed agent as damages for fraud any loss, in excess of the amount of the bribe, he has actually sustained in consequence of entering into the transaction. In their Lordships' view, the Federal Court was right in its assumption that these statutory provisions do not affect what had previously been the rights of the principal at common law.

11 In my judgment, the defendant remained liable to pay the plaintiff as his principal (in this case his employer) in like amount the bribes received by him as a civil debt, a cause of action given

by s 14(1) which is separate and independent of the penalty imposed under s 13 of the Act. *Mahesan v Malaysian Housing Society* was followed by the High Court in *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 and the Court of Appeal in *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara* [1994] 3 SLR 257. Lai Kew Chai J in the High Court held at 793, [183]–[184] that:

> The giving or taking of the bribe is the wrongful conduct which founds the action. The bribee's enrichment is at the expense of the principal, in the sense that the bribe was obtained by virtue of his position as agent, servant or partner of the principal. Damage is not the gist of the action; it therefore matters not whether the principal has suffered any loss, or that the principal could not have obtained for himself the money which the Defendant received: see *Reading v The King* [[1949] 2 KB 232].
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> In proceedings against the bribed agent, the principal is entitled to recover from him the amount of the bribe. That was decided in *Mahesan v Malaysia Housing Society*.

1 2 *PP v Teng Cheow Hing* ([3] *supra*) cited by the defendant is distinguishable. The case was strictly on s 13 and there was no discussion on s 14 of the Act. The issue there was whether or not the sentencing court should impose a penalty under s 13 if the gratification in the charge had already been disgorged from the accused. The learned district judge held that it was not right for the sentencing court to impose such a penalty where the undisputed facts showed that the gratification in the charge had been earlier disgorged.

13 For all these reasons, I allowed the appeal and entered final judgment in the sum of $292,800 for the plaintiff with costs fixed at $15,000.

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