Kraze Entertainment (S) Pte Ltd *v* Marina Bay Sands Pte Ltd [2013] SGHC 39

Case Number	: Suit No 410 of 2011 (Registrar's Appeal No 39 of 2013)
Decision Date	: 18 February 2013
Tribunal/Court	: High Court
Coram	: Choo Han Teck J
Counsel Name(s)	: Mohammed Reza and Jared Kok (Rajah & Tann LLP) for plaintiff; Davinder Singh SC, Pardeep Singh Khosa and Chan Yong Wei (Drew & Napier LLC) for defendant.
Parties	: Kraze Entertainment (S) Pte Ltd — Marina Bay Sands Pte Ltd

Civil Procedure – Extension of time

18 February 2013

Choo Han Teck J:

1 This was an appeal by the plaintiff against Assistant Registrar Shaun Leong's ("AR Leong") order dismissing the plaintiff's application of 5 February 2013 for an extension of 14 days for it to comply with an order made on 15 January 2013 requiring it to furnish $100,000 as security for costs. AR Leong, who also made the order of 15 January 2013, had directed that payment be made within 21 days from 15 January 2013, and the order expressly stated that it was to be made no later than 4 pm of 5 February 2013, "failing which the Plaintiff's claims [would] be struck out" ("the Order").

2 The deadline was thus 4 pm on 5 February 2013. The plaintiff did not appeal against the Order and so on 1 February 2013 it applied by Summons No 621 of 2013 ("SUM 621/2013") for an extension of 14 days from the date of disposal of the summons to furnish the security ordered. On the same day, counsel for the plaintiff obtained an order that SUM 621/2013 be heard on 5 February 2013. The defendant's solicitors were informed of the hearing on 4 February 2013. On 5 February 2013, AR Leong, having no supporting affidavit to consider, and no submission on the grounds for the application for an extension of time, enquired of counsel the grounds for the application. The court's query was answered by counsel as follows:

> The grounds are basic, which is that our clients are unable to comply with the existing order.

I do not think that in the circumstances it was at all surprising or wrong for AR Leong to dismiss SUM 621/2013. It is also not surprising, given the nature and circumstances of this action that the plaintiff appealed against AR Leong's order of 5 February 2013. I should now add that the day after I dismissed the appeal, the solicitors for the plaintiff wrote a letter to court dated 8 February 2013. The key paragraph (paragraph 3) of the letter stated as follows:

> We wish to state for the record that the following submissions were made at the 5 February 2013 hearing before Assistant Registrar Mr Shaun Leong...

The rest of that letter purporting to set out the said grounds is not important at the moment. The plaintiff's appeal was dismissed and the record stands as it stood. The plaintiff has no right to tell the court, especially by letter, how the record should stand. It could, if it wanted to, apply to rectify the

record or to record a further submission. It would be left to the discretion of the court as to whether that application would be heard. As far as I am concerned, the plaintiff's letter of 8 February 2013 is not part of the record.

3 Returning to the appeal before me on 7 February 2013, I am of the view that it is indeed harsh for an action to be struck out without trial, especially when it is struck out for failing to comply with an interlocutory order. Mr Mohammed Reza ("Mr Reza"), counsel for the plaintiff, relied on *Syed Mohamed Abdul Muthaliff and another v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 ("*Syed Mohamed*") and urged me to agree that in exercising its discretion the court ought to consider the prejudice to the defaulter. He submitted that the court should balance the failure to comply with the competing interests, namely, depriving the plaintiff of trial on the merits. Mr Reza argued that the defendant would not suffer "irreparable mischief" if an extension were to be granted and further submitted, relying on *Finnegan v Parkside Health Authority* [1998] 1 All ER 595 at 604, that the absence of a good reason is not in itself sufficient to refuse an extension of time. Praying that justice be done, Mr Reza ended his submission.

4 Mr Davinder Singh SC ("Mr Davinder"), appeared on behalf of the defendant to oppose the plaintiff's appeal, arguing that rules must be obeyed. He showed the true character and extent of the plaintiff's breach by referring to the court's records since November 2012 and the numerous letters written by his firm to the solicitors for the plaintiff. Letter after letter was sent reminding the solicitors for the plaintiff of the court orders that had been made; letter after letter was sent requesting payment of costs. Each of those letters was shown to me accompanied by one remark from Mr Davinder, "no answer" (to the letters).

5 Emphasising that the plaintiff did not appeal against the Order, Mr Davinder submitted that when an extension of time was sought, the onus was on the plaintiff to show why it had not or could not comply with the Order in time and to explain what efforts had been made to comply with the Order. However, no affidavit was filed at all. No explanation was offered before AR Leong and even when the plaintiff filed what appears to be a summons-in-desperation, Summons No 657 of 2013 ("SUM 657/2013") to stay the execution of "the consequences of the decision of the learned Assistant Registrar Mr Shaun Leong" pending appeal, no affidavit was filed either. A brief affidavit was filed later that evening in support of SUM 657/2013. All it stated was that the plaintiff was "committed to providing the security for costs" but needed more time. The deponent, a director of the plaintiff, stated that:

> ... time is required for funds to be transferred and approved. In particular, the Plaintiff is presently in the process of obtaining the requisite funds from its majority shareholder, Kraze Entertainment Co. Ltd based in Korea. Before the requisite funds can be remitted to the Plaintiff in Singapore, the remittance must be approved by the board of Kraze Entertainment Co. Ltd as well as Korea's Central Bank. ...

Mr Davinder first objected to the use of this affidavit to support the application for an extension of time when it was filed in support of a separate application for a stay of execution even though there was no execution in this case to be stayed at all – the failure to comply with the unless order, Mr Davinder submitted, merely meant that the plaintiff's case was struck out. It was contended that the action was not time-barred; the plaintiff could file another suit or apply to restore the action.

6 Mr Davinder is not without authority. He urged me to consider what was said in *Zhong Da Chemical Development Co Ltd v Lanco Industries* [2009] 3 SLR(R) 1017 at [17] regarding the expeditious payment of costs ordered. In the present case before me, the plaintiff filed an appeal without having paid any of the costs ordered on several occasions previously. Mr Davinder, as

Mr Reza before, drew my attention to *Syed Mohamed*. The Court of Appeal in *Syed Mohamed* held (at [14]) that contumelious conduct or intentional breach might not be the main factors in cases concerning the striking out of an action; but the court also observed that the party applying for the indulgence of the court must show that he "had made positive efforts to comply but was prevented from doing so by extraneous circumstances".

7 I would like to begin where Mr Reza ended – on justice; but before justice is the law. The law is explicit on the rules and regulations and the orders of the courts. Here we plainly have an order by the court that the plaintiff was to furnish security for costs by 15 January 2013. That order was not complied with. The plaintiff owes the defendant several sets of costs. Their solicitors did not respond to letters sent by the defendant's solicitors. Thus, when the plaintiff found itself unable to comply with the Order, one would expect it to go cap in hand and explain its predicament to the defendant's solicitors. If the explanation is reasonable, one would expect the defendant to be advised not to raise objections to a formal application to the court. This is not a situation in which the defendant would be prejudiced. Many a door that is shut in the face of haughtiness can be opened by a touch of humility. If lawyers conduct themselves reasonably in their relationship with their opposing side the number of applications and appeals to the court will be greatly reduced. I was mindful that the "unless order" was made in respect of an order for security for costs. There was no record of intentional breaches (other than not paying costs) so it seemed to me that to have the action struck out for non-compliance with the Order was probably too harsh in the first place. Nonetheless, the plaintiff did not appeal and so the Order must be complied with. Then the plaintiff filed an application for an extension of time without setting out its reasons by way of affidavit, as the rules require. When asked for its reasons, counsel for the plaintiff responded to the court below by saying, "[t]he grounds are basic, which is that our clients are unable to comply with the existing order." As Mr Davinder pointed out, even on appeal before me, no evidence of effort or explanation as to why more time was needed was produced. In disputes such as the present action, one can often tell whether the parties have or do not have a reasonable claim or defence. Had the plaintiff been dutifully diligent and acted otherwise than it did, the fact that it has reasonable prospects of success would have been an important factor in the court's consideration; but it had given virtually no basis for AR Leong to grant it the indulgence that it sought. Under present circumstances, if the order of AR Leong dismissing the plaintiff's application for an extension of time were to be set aside, litigants will be encouraged to believe that if they have a big claim they can choose which orders of court they will obey and how they would do so. If that were justice to the plaintiff, it must surely be an injustice to the defendant. This appeal was not about the merits of the original order but in respect of AR Leong's refusal to grant an extension of time for compliance.

8 For the reasons above, the appeal was dismissed.

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