Kitnasamy s/o Marudapan v Nagatheran s/o Manogar and Another
[2000] SGCA 16

Case Number : CA 13/2000

Decision Date : 22 March 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Sarbjit Singh and Leong Kit Wan (Lim & Lim) for the appellant; B Ganeshamoorthy and Jayapalan (Ganesha & Partners) for the respondents

Parties : Kitnasamy s/o Marudapan — Nagatheran s/o Manogar; Another

Civil Procedure – Injunctions – Issue of interlocutory injunction – Test of "serious question to be tried" – Balance of convenience

Civil Procedure – Originating processes – Claiming relief under s 216 Companies Act (Cap 50) – Sufficient particulars to identify cause of action – O 7 r 3 Rules of Court (1997 Rev Ed)

Companies – Oppression – Relief under s 216 – Locus standi – Appellant's name not on register of members – Whether appellant can petition under s 216 – Whether respondents can oppose petition – s 216 Companies Act (Cap 50, 1994 Rev Ed)

Companies – Oppression – Relief under s 216 – Breach of express or implied understanding to allow appellant to participate in management of company – Whether appellant entitled to relief under s 216 – s 216 Companies Act (Cap 50, 1994 Rev Ed)

Companies – Oppression – Relief under s 216 – Need for sufficient particulars of facts – Whether necessary to identify one or more of grounds in s 216 – s 216 Companies Act (Cap 50, 1994 Rev Ed)

(delivering the grounds of judgment of the court): This was an expedited appeal from a decision of the High Court given in chambers on 13 January 2000 refusing the appellant`s application for an interlocutory injunction to restrain the respondents from proceeding with a proposed resolution at an extraordinary general meeting (EGM) to remove the appellant as a director of a company, JASP Construction Pte Ltd (the `company`). At the conclusion of the hearing, we allowed the appeal and granted to the appellant the interlocutory injunction prayed for. We now give our reasons.

The facts

The facts as appeared from the affidavit filed by the appellant are as follows. The appellant and the first respondent, Nagatheran s/o Manogar (`Nagan`) were friends for about some ten years. Nagan was apparently a labour supplier. The second respondent herein, Sivaprakasam s/o Petha Perumal (`Siva`), was known to be Nagan`s `Uncle`. The appellant had met Siva before.

The appellant has been a piling and civil engineering contractor since 1983 and is experienced in track laying works, having been involved in the construction of the first phase of the Singapore MRT line. Because of the appellant`s contacts and expertise, in December 1998/January 1999, Nagan approached the appellant and informed him about a project for track laying works for the new North-East MRT Line (the `project`). According to Nagan, there was a joint venture consisting of Tekken Corporation (`Tekken`), Union Construction Co Ltd and Singapore Piling and Civil Engineering Pte Ltd (the joint venture is hereinafter referred to as `TUS`), which was seeking to secure the project. Nagan asked the appellant if the latter was interested in working with TUS to carry out the project.

Thereafter, the appellant contacted his brother-in-law, one Guna, who also had the expertise in track

laying work. The appellant, together with Nagan and Nagan`s brother Dave, Siva and Guna, met TUS`s Track Works Manager, David Cotterell (`Cotterell`) in Tekken`s office. The appellant and Cotterell were familiar with each other from their previous involvement in the first phase of the MRT line. Cotterell was aware of the appellant`s and Guna`s record in track laying works and mentioned to Tekken`s Senior Project Manager that the appellant and Guna were known to be experienced labour suppliers for track laying work.

After the meeting with Tekken`s personnel, Nagan, Siva and the appellant agreed that they would be equal partners if they should succeed in obtaining a sub-contract from TUS in relation to the project. Following the agreement, the appellant was made a director and shareholder in the company, which was to be used as a vehicle for carrying out the project. The company, which was then basically dormant, had 100,000 paid-up shares in the name of Siva. It was agreed that Siva would transfer 33,333 (one-third) shares to the appellant. The appellant was made to understand that the shares were so transferred to him.

We ought to state that a search done at the Registry of Companies on 11 January 2000 showed that the appellant was a director of the company but not a shareholder. The search showed that 99,999 shares were held by Siva and the remaining one share by the estate of RK Manogar (Nagan`s deceased father who first set up the company with Siva). When the appellant called the company`s auditor, one Subramaniam, he was told that the Registry of Companies would update the records after the annual returns were filed, that 33,333 shares had been issued and registered in the appellant`s name and that the share certificates were with Subramaniam for safe-keeping.

With Guna`s assistance, the appellant prepared the quotation for the project. TUS accepted the quotation and appointed the company as a sub-contractor for the project. A letter of intent was given to them in February 1999. Thereafter, further discussions on the details of the project was undertaken by the appellant with TUS. Eventually, everything was agreed with TUS and the appellant signed the sub-contract agreement on behalf of the company with TUS for the supply of labour.

In the meantime, after the letter of intent was received, the appellant proposed to Nagan and Siva that they should inject capital into the company to enable the latter to recruit persons with expertise, thereby establishing the company as a track laying company and helping it to secure future projects of this nature. The company could then also provide design and build services in addition to the supply of labour. However, Nagan and Siva were not in favour of the idea, as they were satisfied with providing only labour services.

The project was originally scheduled to commence in July 1999. The appellant, however, managed to convince TUS to delay the commencement of the project to the advantage of the company.

In June 1999, while the appellant was at a restaurant in the company of some friends, including one N Kinian (`Kinian`), Cotterell approached the appellant and asked for his assistance in sourcing for used rails. Kinian, who was a director of Estag (S) Pte Ltd (`Estag`) and had been in the aviation field for some 42 years, mentioned that he knew of certain parties who might possess such used rails. Kinian introduced a rail supplier from Malaysia to Cotterell. As a result, TUS obtained used rail cheaply and made substantial savings and thereafter used Kinian`s company, Estag, in sourcing for design and build rail equipment and materials. Kinian recruited the appellant`s brother, Thanikumaran, to help him in the company`s business. Thanikumaran became a director and minority shareholder of Estag.

Since May 1999, Kinian had approached the appellant for his assistance in relation to various projects. Even though the appellant had no beneficial interest in Estag, whatever projects were secured would benefit the appellant`s brother. Kinian also printed his company`s calling cards with the appellant`s

name in order to establish the latter`s authority to negotiate with third parties.

In October 1999, Nagan, Siva and Dave asked the appellant to obtain a commission from Kinian for the materials that Estag was supplying to TUS. The appellant told them to approach Kinian directly. Apparently, Kinian declined to give them any commission.

On 1 November 1999, the appellant entered into an agreement (the `agreement`) pertaining to the project with Nagan, Siva and the company. There were discussions among the appellant, Nagan and Siva regarding the distribution of moneys which would be received by the company. Both Nagan and Siva were keen on drawing such moneys out. The appellant, however, expressed concern at this as he felt that in the circumstances, with the company having no funds and Nagan facing financial difficulties, the burden of securing the mandatory insurance bonds of $5,000 for each foreign worker was likely to fall on him. In his mind, this would be a heavy burden. The main part of the project was to begin only on 1 March 2000 requiring an estimated 184 workers, which number would later go up to 400 workers. If the company should breach the insurance bonds, the appellant would have to pay on the bonds and he would face the risk of the company being unable to reimburse him. He was thus anxious to ensure that the moneys earned by the company were kept by the company and only distributed to the shareholders at a later time.

From 3 January 2000, after the Christmas/New Year festivities, the appellant tried without success to contact Nagan. Messages left for Nagan to return the appellant`s calls were ignored. On 10 January 2000, the appellant received by post a notice dated 29 December 1999 calling for an EGM for the purpose of considering and passing an ordinary resolution to remove the appellant as a director of the company. Prior to this, neither Nagan nor Siva had intimated to the appellant that they wished to remove him nor did they indicate that he had in any way breached the agreement.

The appellant alleged that the respondents` action in seeking to remove him as a director of the company was in breach of the agreement. He claimed that he was instrumental in securing the project for the company and that he had put in a year`s effort and provided moneys on entertainment and other expenses amounting to about $50,000. He was concerned that if he were removed as director of the company, the latter`s contract with TUS would be jeopardised and he would not be able to monitor the financial position of the company and the revenue from agency fees paid by the foreign workers recruited by the company. He also alleged that the respondents` action in attempting to remove him was oppressive.

The decision below

The appellant commenced OS 57/2000 to restrain the respondents from proceeding with the proposed resolution to remove him as a director of the company. He realised that since Nagan and Siva held the majority shareholding in the company, they were in a position to so remove him. Thus, on 13 January 2000, the appellant applied ex parte in chambers for an injunction to restrain the respondents from proceeding with the EGM scheduled for 14 January 2000. Even though the application for the injunction was made ex parte, the respondents were informed and they were heard through counsel.

The learned judge made no order on the application for an injunction because he felt that the EGM was properly called and, in the absence of fraud, a court should not interfere with the running of a private company. Even if the appellant had a legitimate grievance, the learned judge was of the opinion that he was in no position to assess such a subject via the pleadings. However, to meet the appellant`s concerns about the agency fees which the company would be receiving from the foreign workers, the learned judge ordered the respondents to permit the appellant to observe the collection

of agency fees.

The learned judge also found that neither the originating summons nor the summons-in-chambers indicated whether the application was founded on s 216 of the Companies Act (Cap 50) (the `Act`). No other cause of action was pleaded. Furthermore, only a member of the company could invoke s 216 and there was no sufficient proof that he was a member. This latter point was raised by counsel for the respondents at the court below.

Appellant`s removal

Following the court`s refusal to grant the interim injunction, the EGM was held on 14 January 2000 and the appellant was removed as a director of the company.

The appeal

This appeal was brought only against the learned judge`s refusal to grant the interlocutory injunction. Counsel for the respondents argued in support of the decision below. Three issues were raised for consideration in this appeal:

(i) whether the pleading was adequate;

(ii) whether the appellant had the locus standi to invoke s 216 of the Act; and

(iii) whether the learned judge was correct to refuse to issue the injunction.

The pleading point

The learned judge noted that a claim under s 216 of the Act must be clearly pleaded together with specific allegations and in this case, neither the originating summons nor the summons-in-chambers indicated whether the application for the interim injunction was founded on s 216. In any event, no other cause of action was pleaded.

Order 7 r 3 of the Rules of Court provides that an originating summons must state the relief claimed and sufficient particulars to identify the cause of action. In our judgment, both these requirements of O 7 r 3 were satisfied. The headings of the originating summons and the summons-in-chambers read: `In the Matter of Section 216 of the Companies Act, Chapter 50 Singapore Statutes, 1994 Edition and In the Matter of an agreement dated 1 November.` It was therefore clear that the appellant was founding a cause of action under s 216 of the Act based on the agreement.

As for the question whether sufficient particulars had been furnished, it is necessary to look at the provisions of s 216(1) of the Act:

> *Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground -*
>
> *(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the*

members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

It is true that under this subsection, a member can ask for relief based on various grounds, namely, `oppression`, `in disregard of his interest as shareholder`, `unfairly discriminates against (him)` or `prejudicial` to him. But what is required of the applicant is that he should give sufficient particulars, namely, the facts. We do not think it is necessary that he must identify one or more of the specific grounds spelt out in s 216(1). And if this were necessary, we would have granted him leave to amend. He is entitled to rely upon all of them in the alternative. The Malaysian case, **Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor** [1996] 1 MLJ 113 held that the question whether there is oppression, disregard, unfair discrimination or whether the act complained of is prejudicial is one that must be determined according to the facts of each particular case. In any case, the appellant had stated in his affidavit that the respondents` action in attempting to remove him was oppressive.

The question of `member`

Under s 216 of the Act, only a member or a holder of a debenture of a company is entitled to seek relief. A registered shareholder is a member. Thus, it is essential for this purpose that a shareholder`s name should be on the register. As mentioned above, a Registry of Companies search done on 11 January 2000 did not show that the appellant was a registered shareholder of the company. But that is not conclusive. The appellant alleged that according to the company`s auditor, the appellant was a registered shareholder and the Registry of Companies` records would be updated after the annual returns were filed. There was, therefore, some evidence that he was the registered shareholder.

In ***Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor*** (supra), the Malaysian Federal Court held that under certain circumstances, it would be possible for a person whose name was not on the register of members to petition under s 181 of the Companies Act 1965 (the Malaysian equivalent of our s 216). The basis of this was an estoppel precluding the respondents from raising an objection to the petitioner`s locus standi. In that case, the court held that the requirement that a petitioner under s 181 must be able to demonstrate that his name appears on a company`s register of members at the date of presentation of the petition was only a general, and not a universal, rule. There may be instances where an application of the general rule would be unfair. If it was unjust or inequitable to permit a respondent to a petition under s 181 to assert that a petitioner had no locus standi to move the court, then he would be estopped from so asserting. A respondent who was guilty of unconscionable or inequitable conduct would not be permitted to rely upon the requirement of membership in order to defeat a petitioner`s standing as this would amount to his using the statute as an instrument of fraud. Gopal Sri Ram JCA stated in his judgment at p 134:

Take, for instance, the case of a person who has agreed to become a member, but whose name has been omitted from the register of members. If it transpires that prior to the dispute leading to the presentation of the petition, a company or its board had always treated the complainant as a member, it

would not be open to them to assert that the petitioner lacked locus standi. Examples may be multiplied without any principle emerging from them. ...

The true principle which governs such cases as the present is housed in the doctrine of estoppel. The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him so to do.

On the facts as pleaded by the appellant, even if he was not a registered shareholder, it seemed to us that this was an instance where the appellant had agreed to become a shareholder of the company and had rendered invaluable services to it and due to the default of those responsible for the administration of the company, including the respondents, the appellant`s name as a shareholder was not entered in the register of the company. The belief of the appellant that he was a member was reinforced by the fact that the notice of an EGM scheduled for 14 January 2000, together with a proxy form, were despatched to him. Such documents are only despatched to members. The respondents were thus estopped from asserting that the appellant was not a member.

Should an injunction be granted?

The gist of the appellant`s complaint was that in the light of the understanding between the parties, as evidenced by the agreement of 1 November 1999, the arrangement which the parties entered into was one of partnership, in which all the parties were entitled to be involved in the management of the company and the attempt by the respondents to remove the appellant as a director was in breach of the agreement. Under the agreement, the appellant was appointed the Project Director. We would like to cite the following terms of the agreement which are pertinent:

(2) The first party (first respondent), second party (the appellant) and third party (second respondent) shall be entitled to equal one third portions of the profits arising from the project;

(5) The first party, second party and third party must all agree in writing in order to make decisions relating to the project and no decision shall be made without the consent in writing of all of them;

(6) All the parties, namely, the first party, the second party and the third party agree that all services for the project shall be provided and/or rendered through the fourth party (the company) only and all the parties agree in good faith that the first party, the second party and/or third party shall not directly or indirectly or by way of relatives and/or nominees provide or render such services for the project without using the fourth party and thereby defeat the common intentions of all parties to maximise the profits equally among themselves in respect of the project...

(10) In the event that any party breaches cl 6 of the agreement herein, the party causing such breach shall immediately tender his resignation as a director and shall not henceforth be entitled to any payment of salary and/or profits thereafter.

It is settled law that a limited company is more than a mere legal entity, with a personality in law of its own. In the words of Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd** [1973] AC 360 at 379:

> *... there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure ... (the just and equitable rule) does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*

And how a person becomes a member is important in determining what his legitimate expectations are: **Tay Bok Choon v Tahansan Sdn Bhd** [1987] 1 MLJ 433 , a decision of the Privy Council from Malaysia.

Thus, in granting reliefs, the court would take into account not only a member`s legal rights but also his legitimate expectations: see **Re Posgate & Denby (Agencies) Ltd** [1987] BCLC 8 at 14 per Hoffman J and **Re Ringtower Holdings plc** [1989] 5 BCC 82 at 90 per Gibson J.

The exclusion of a member from the management of a company in breach of an express or implied understanding to allow him to so participate in the management would justify relief under s 216 of the Act: see **Tullio v Maoro** [1994] 2 SLR 489 . In this case, in the light of the provisions of the agreement cited above, there was at least an implied, if not an express, understanding that all parties, the appellant as well as the respondents, would be involved in the management of the company. The appellant had expended much effort and money in relation to the business of the company. He was entitled to expect that all parties would fulfil their respective parts of the bargain. No reason was intimated to the appellant why the respondents would like to have the appellant removed as a director.

With respect to the learned judge below, this aspect of the issue was not addressed by him. The question is more than just whether the EGM had been called in accordance with the articles of association. In the light of all that had been presented by the appellant, the test of a `serious question to be tried` was certainly satisfied, warranting the issue of an interlocutory injunction to restrain the respondents from proceeding with the EGM to remove the appellant. As regards the question of the balance of convenience, that would also favour the appellant as can be seen from the fact that the learned judge permitted him to observe the collection of agency fees. Furthermore, his non-involvement in the company could undermine TUS`s faith in the company.

However, because the court below refused to issue the injunction, the respondents had proceeded with the EGM and had the appellant removed as a director. Accordingly, we ordered, following the approach taken by this court in **Teo Choon Mong Frank v Wilh Schulz Gmbh** [1998] 2 SLR 529 , that the appellant be reinstated as a director of the company. In addition, we granted an injunction restraining the respondents, until the trial of the action or further order, from removing the appellant as a director.

Outcome:

Appeal allowed.