Bayerische Landesbank Girozentrale v Teh Li Li
[2000] SGHC 203

Case Number : Suit 957/1998

Decision Date : 02 October 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Suresh Nair and Vikhna Raj (Allen & Gledhill) for the plaintiffs; Lai Swee Fung and Nicholas J Narayanan (Toh Tan & Partners) for the defendant

Parties : Bayerische Landesbank Girozentrale — Teh Li Li

Contract – Illegality and public policy – Banking facility – Whether contract illegal under Malaysian law

Agency – Evidence of agency – Defendant denying liability on ground that she acts as agent for named principal – Whether defendant liable under contract

Tort – Negligence – Bank disposing of or holding over shares at its discretion – Whether negligent in not selling all shares

: The plaintiff bank granted banking facility by way of a facility letter dated 1 November 1996 to the defendant. The letter was signed by the parties and it stated that an attached set of Standard terms and Conditions applied to the contract. There was a clause in the standard terms stipulating that the choice of law in the event of dispute shall be Singapore law. The defendant claimed that the standard terms were not attached as stipulated.

The facility granted was up to RM$16,000,000. The defendant also deposited 100,000 shares in Mercury Industries Bhd as security for the facility. Loans were extended from time to time under the said facility on instructions by the defendant to purchase shares. The shares would be deposited as further security and paid for from the facility.

By 25 August 1997 the value of the defendant`s security fell to RM$9,555,520 while her outstanding loan was RM$15,416,000. The plaintiff demanded payment by letter dated 2 September 1997 to the defendant at her home address. The defendant was informed that if payment was not made by 10 September 1997 the plaintiff would proceed to sell some of the security. No payment was made. Another letter was sent on 26 September 1997 but the defendant did not pay. The plaintiff sold various parcels of the security on various dates, leaving presently about 1,300,00 share unsold and an outstanding debt of about RM$13,169,951.19. The facility was cancelled on 20 February 1998.

The defendant disputed liability. She raised three defences. First, a defence in law in that the contract was illegal under Malaysian law. Her counsel Mr Lai submitted that the choice of law clause does not apply because the standard terms were not given to the defendant and in any event, the transactions took place in Malaysia. Since no evidence was adduced as to the law in Malaysia which rendered such contracts illegal, this defence failed at the start. Mr Lai for the defendant urged me to consider the Malaysian statute which created the offence he complained of and make the appropriate finding. I am loathe to do so; the plaintiff was not charged, let alone convicted, of any offence relating to the said statute. A finding of fact of the nature that Mr Lai wishes me to make requires a thorough investigation into facts which were not pleaded. In my view, this is not the appropriate place to find whether the plaintiff had committed an offence under Malaysian law.

The second defence was that the defendant contracted as a nominee for one Dato Peh Teck Quee. The case submitted by Mr Lai bore little resemblance to that pleaded. In the defence, the defendant

averred that it was Richard Yong, the plaintiff`s then head of private banking, who `represented to the defendant that she would only be her boss`s (Dato Peh) nominee in accordance with the plaintiff`s internal policies and the inclusion of her name was just a formality`.

The case as pleaded was not one in which the defendant did not know what she signed, or that she signed it as agent for a named principal. The way it was pleaded suggested that the plaintiff knew and accepted that she was not the principal; and further led her to believe that she would not be liable under the contract. A pleading in this vein normally concludes with an averment of estoppel. But not so in this case. The pleading ended abruptly in that one paragraph. In the midst of the defence case at trial Mr Lai sought leave to re-amend that paragraph. Mr Nair for the plaintiff did not object. The defence was then re-amended to state that the facility agreement was made by the defendant as agent for Dato Peh. The defence of estoppel was not raised. It was an outright denial of liability on the ground that the defendant was an agent for a named principal.

Even so, this defence is not supported by the evidence. The facility letter was signed by the defendant with no reference to any principal. The accompanying memorandum of deposit was executed by the defendant in her own capacity. She warranted in writing that she was the beneficial owner of the shares in Mercury Industries Bhd which were deposited as security. Letters were written and signed by her giving instructions to the plaintiff to appoint the chairman for meetings of Mercury Industries Bhd on the defendant`s behalf `as beneficial owner` of the shares.

The defendant and Dato Peh testified in court to the effect that the defendant was only Dato Peh`s secretary and she was holding all the shares on Dato Peh`s behalf. Dato Peh is a qualified architect with diverse business interests. The defendant stated her occupation to be that of a company director (of about four companies) and also a personal assistant. She also declared her net worth to be RM$50,000,000 and an annual income of RM$120,000. Their testimonies in court were contradicted by the express warranties in the documents executed by the defendant.

It may be that the defendant was indeed an agent acting for Dato Peh who was prepared to lend her name to be used in opening an account with the plaintiff. The fact that she worked for him as his assistant may give rise to this suspicion; but suspicion is short of proof. The point, however, which the defendant failed to appreciate is that in law, if she puts her signature to a commercial document agreeing to be bound by it then she will be so bound. In the absence of any proven estoppel there is no defence in such cases. Here the defendant failed to establish any estoppel in fact or in her pleadings. The law is simply but explicitly stated by Scrutton LJ in **HO Brandt & Co Ltd v HN Morris & Co Ltd** [1917] 2 KB 784 as follows:

> *The fact that a person is agent and is known so to be does not of itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. Where he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability unless a contrary intention appears; and similarly where he signs in his own name without qualification.*

Considering all the evidence, I am unable to conclude that any representation had been made by the plaintiff or their employees to the defendant which led her to believe that she was only a nominee. I am of the view that the defendant held herself out as the principal person responsible for the account by signing the facility letter without qualification.

Business cannot be carried on with confidence if parties to an agreement can repudiate liability merely

by alleging that they signed only as an agent. If the so-called principal wishes to acknowledge liability, he must do so when the contract is made, not after a breach has occurred. The plaintiff is entitled to pursue the person they contracted with.

The last defence here was based on negligence. There was, however, no plea for damages in a counterclaim nor was the defence of set-off pleaded. Nonetheless, the defence as it was put forward was that the plaintiff ought to have sold all the security in its possession because it would then clear the defendant`s debt with more to spare. This defence failed for lack of evidence. On the contrary, the evidence shows that by the time the plaintiff called on the loan (about September 1997) the value of the security deposited had fallen much below the debt. The agreement had, furthermore, given the plaintiff the discretion to sell, and therefore, the discretion to hold back if they think it inappropriate to do so. Mr Nair for the plaintiff also referred the defendant and her witness, Dato Peh, to letters which they wrote requesting the plaintiff not to sell the shares and to give them time. It was incumbent upon the defendant, having raised the allegation of negligence, to adduce proof as to how the security was disposed of (or held over) recklessly or negligently. Mere evidence that the plaintiff sold the security at their discretion is woefully inadequate because that was precisely what the contract permitted them to do. In the circumstances, this defence had no merit whatsoever. Accordingly, the plaintiffs` claim is allowed.

Outcome:

Plaintiffs` claim allowed.