AM FINANCE BERHAD (PENGGANTI HAKMILIK " ARAB-MALAYSIA FINANCE BERHAD) v ATLANTIC RUBY SDN BHD (454078-V) AND OTHERS [2005] MLJU 350

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

ABDUL WAHAB BIN SAID AHMAD, J

CIVIL SUIT NO D8-22-918-2004

16 August 2005

Andrew Teh with Elizabeth Wong (Wong Lu Peen & Tunku Alina), D. Peramalingam (***Krish Maniam*** & ***Co***)

GROUNDS OF JUDGMENT

The Plaintiff"s claim against the Defendants is for the amount of RM8,054,693.46, which arose out of a Term Loan which was given by the Plaintiff to the 1st Defendant. The 2nd and 3rd Defendant are joint and several guarantors for the loan.

Enclosure 16 is an appeal by the 2nd Defendant against the Senior Assistant Registrar"s decision dated 29 November 2004 dismissing its application under Order 13 Rule 8 Rules of the High Court 1980 to set aside the Judgment Default entered against him on 11 August 2004 by the Plaintiff.

Enclosure 24 is an appeal by the 3rd Defendant against the Senior Assistant Registrar"s decision on 27 January 2005 dismissing its application under Order 13 Rule 8 Rules of the High Court 1980 to set aside the Judgment in Default entered against him on 11 August 2004 by the Plaintiff.

The 2nd Defendant"s grounds for setting aside is that the Writ of Summons and Statement of Claim dated 7 July 2004 was not served personally on him. The 2nd Defendant had been overseas and as soon as he returned to Malaysia in or about early August 2004 he found that the Writ of Summons and Statement of Claim was sent to his address. Without further ado, he instructed his solicitors to act on his behalf. A Memorandum of Appearance was filed on 11 August 2004.

In spite of the Memorandum of Appearance, the Plaintiff"s solicitors wrote to the 2nd Defendant"s solicitors informing him that the Court had entered a Judgment in Default against the 2nd Defendant on 11 August 2004. It was on the very same day that the 2nd Defendant had filed his Memorandum of Appearance.

The 3rd Defendant"s grounds for this application are also that the Plaintiff had never served the Writ of Summons and Statement of claim dated 7 July 2004 personally on him. He therefore did not have a chance to defend himself against this suit, which he said was just a matter of interpreting the documents. He said that he has a prima fade defence.

Having heard counsels on the above appeals, I dismissed both the appeals. I arrived at this conclusion because both appeals have one thing in common. They have not addressed the most pertinent issues in applications of this nature. The issues are whether the judgment is regular and if the answer is in the positive, whether the Defendants have a defence on the merits.

The manner of service of the Writ of Summons and Statement of Claim is clear from the Loan agreement. Clause 22 of the Letter of Guarantee states that inter alia, the service of legal process by way of registered post or ordinary post to the 2nd Defendant to the Addresses stated in the Letter of Guarantee is deemed to be good service. It is deemed to be served on the fifth day that the legal process was posted. That was how the Summons and Statement of Claim were served on the 2nd and 3rd Defendants.

By clause 22, parties had agreed to the mode of service on legal process. Order 10 rule 3 (l)(b) on service of writ in pursuance of contract reads:

> "3 (1)
>
> (a).....
>
> (b) the contract provides that, in the event of any action in respect of a contract being begun, the process by which it is begun may be served on the defendant, or on such other person on his behalf as may be specified in the contract, in such manner or at such place (whether within or out of the jurisdiction) as may be so specified, then if an action in respect of the contract is begun in the High Court and the writ by which it is begun is served in accordance with the contract the writ shall, subject to paragraph (2), be deemed to have been duly served on the defendant."

Under this Order 10 rule 3 (l)(b), if the service had been effected in the manner as provided in the contract, it shall be deemed to have been duly served on the defendants. As to the effect of the meaning of the words "shall be deemed" the Supreme Court in*Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 has held it to mean "shall be regarded as," and once those conditions have been performed, it must be taken as conclusive that the notice had been served and received. The Defendant"s contention that

they had proved that they were overseas when the service was effected and therefore the service was per se irregular and should be set aside is of course as without basis. The effect of the deeming provision is to make the service irrefutable even though the Defendant may be overseas at the said time.

On the irregularity of the judgment in default, the 2nd Defendant pointed out that the Judgment in Default and the Memorandum of Appearance was filed on the same day. A perusal of the court"s record showed that though both were filed on the same day, the Judgment in Default was filed earlier, at 10.54 a.m., whilst the Memorandum of Appearance at 2.26 p.m. Evidently from the records, the Judgment in Default had been obtained first and therefore had been regularly entered.

The Judgment in Default being a regular judgment, would require the 2nd and 3rd Defendants to file a defence on the merits to justify it to be set aside. The 2nd Defendant in paragraph 7 of his affidavit in support merely said he has a defence on the merit without more and likewise 3rd Defendant in paragraph 5 of his affidavit. This clearly would not suffice. I observe that the 2nd and 3rd Defendants have made no attempts to raise a defence on the merits. Unless in a clear case of irregularity of the default judgment the Defendant should also file an affidavit to show they have a defence on the merit. This is the least they could do if the issue of irregularity fails; and indeed it has failed. The 2nd and 3rd Defendants must show the issues that they are raising as defence to the suit in order for the Court to ascertain whether they have a*bona fide* reasonable defence on the merits that ought to be tried.

I am satisfied that the default judgment had been regularly obtained and the 2nd and 3rd Defendants had failed to raise any defence on the merit. In the circumstances both the appeals in Enclosure 16 and 24 are dismissed with cost.
