

Ismail bin Sukardi v Kamal bin Ikhwan and Another
[2008] SGHC 191

Case Number : Suit 212/2008, RA 334/2008, 408/2008, SUM 4700/2008
Decision Date : 31 October 2008
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Niru Pillai (Niru & Co) for the plaintiff; Lynette Chew (Harry Elias Partnership) for the defendants
Parties : Ismail bin Sukardi — Kamal bin Ikhwan; Transtar Express Liner Sdn Bhd

Civil Procedure

Conflict of Laws

31 October 2008

Tay Yong Kwang J:

1 On 13 August 2008, an Assistant Registrar ("the AR") of the Supreme Court ordered a stay of all further proceedings in this action upon the second defendant's application under O 12 r 7(1)(g) and/or O 12 r 7(2) of the Rules of Court (Cap 322, R5, 2006 Ed). Upon the plaintiff's appeal to a Judge in Chambers (RA No. 334 of 2008), I allowed the appeal.

The facts

2 This action results from a road accident in Malaysia. On the night of 14 June 2006, the plaintiff, his wife and their five children boarded bus number AFG 5555 ("the bus") in Penang, Malaysia. The bus was driven by the first defendant who was at the material time an employee of the second defendant, the operator of the bus, and it was supposed to take the plaintiff and his family from Penang to Singapore.

3 At about 6.20am on 15 June 2006, near the 73.4km mark of the North-South Highway in Malaysia, the bus collided into the rear of a lorry number JGX 3074 which had a trailer number TJ 7520 (collectively referred to as "the lorry"). The plaintiff's wife passed away as a result of this accident.

4 Consequently, the plaintiff, on behalf of his children and himself, commenced this action against the defendants, alleging negligence on the part of the first defendant and vicarious liability on the part of the second defendant. The plaintiff's claim is for loss of dependency under the following heads of damages:

- (a) loss of support under s 20 of the Civil Law Act (Cap 43, 1999 Rev Ed);
- (b) damages for bereavement under s 21 of the Civil Law Act; and
- (c) funeral expenses.

5 The second defendant took the view that Malaysia and not Singapore is the more appropriate forum to try this action and therefore applied by way of summons 2471 of 2008 for the action to be stayed under O 12 r 7(1)(g) and/or O 12 r 7(2) of the Rules of Court which are in the following terms:

7(1) A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in Rule 6 or on any other ground shall enter an appearance and within the time limited for serving a defence apply to the Court for –

...

(g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject-matter of the claim or the relief or remedy sought in the action; or

...

(2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Singapore is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to Court for an order staying the proceedings.

The AR agreed with the second defendant and granted a stay of proceedings. The plaintiff appealed against the stay.

6 At the hearing of this appeal, I was informed that the first defendant is no longer an employee of the second defendant and that he has not been served with the court documents by the plaintiff. The second defendant has not filed its defence yet and is still trying to locate the first defendant.

The plaintiff's submissions

7 The plaintiff has the indisputable right to commence this action in Singapore. The only question is whether this action ought to be stayed in favour of a Malaysian action on the ground of *forum non conveniens*.

8 The important point to note is that the deceased wife was a passenger on the bus and therefore no degree of blame could attach to her where liability for the accident was concerned. The only issue on liability will be whether the defendants can show that the first defendant as the driver of the bus was not liable at all for the accident. It is not, as contended by the second defendant, whether the accident was caused solely by the first defendant. The plaintiff only needs to show that the first defendant was a cause, rather than the sole cause, of the accident.

9 As between the plaintiff and the defendants, there can be no defence in respect of liability for the accident. The second defendant has admitted as much in its affidavit of Lim Yin Mei Sue-Anne of 6 June 2008 where the deponent states at [7] thereof that one of the issues that arises in this action is that of apportionment of liability between the defendants and the driver of the lorry. The only issue is whether the defendants are entitled to seek contribution from the driver/owner of the lorry by commencing third party proceedings but that does not concern the plaintiff at all.

10 The plaintiff will be seeking a consent interlocutory judgment against the defendants for damages to be assessed. Alternatively, the plaintiff will apply for judgment under O 14 or under O 27 of the Rules of Court. The defendants could then decide to sue the driver/owner of the lorry in the Malaysian courts if they wish.

11 The only issue in this action is therefore the amount of damages and this is dealt with

according to the law of the forum. If the assessment of damages takes place in Singapore, Singapore law applies. In considering the factors pointing to one jurisdiction or the other, the court should have regard only to those that relate to quantum of damages and not those pertaining to liability.

12 There is no suggestion that the assessment of damages is more closely connected to Malaysia than to Singapore. The plaintiff, his deceased wife and their children are Singaporeans. The deceased wife lived and worked in Singapore. Evidence relating to her income, expenditure and savings is to be found here. Her family live and will continue to live in Singapore and this is where their expenses are incurred.

The second defendant's submissions

13 As a general rule, the place where the tort occurred is the natural forum for determining the claim arising therefrom. As the collision took place in Malaysia, it follows that Malaysia is the country with the most real and substantial connection to the claim. Liability among the parties (the deceased wife, the second defendant and the driver/owner of the lorry as potential third party) ought to be decided by the law of Malaysia as it is within the ordinary expectation of the parties that the law of the place where the wrong occurred would govern the rights and duties of the parties. In the same vein, the issue of quantum of damages should also be determined in accordance with Malaysian law.

14 There are material differences between the Civil Law Act of Singapore and that of Malaysia where liability and damages are concerned. Given such divergence between the two sets of law, there will be savings in time and costs where a Malaysian court applies the law of its own jurisdiction.

15 Although the plaintiff will be calling a number of witnesses located in Singapore, the location of witnesses is only one of the factors that ought to be taken into consideration. V K Rajah J (as he then was) in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 ("*Peters Roger*") has observed at [26]:

The easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access. ... In other words, the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the "physical convenience" of witnesses as a yardstick in assessing the appropriateness of a forum. ...

This factor ought to be given little weight here because it is unlikely that all the listed witnesses will be called to testify as the substance of their evidence is likely to overlap. Secondly, the plaintiff has not stated that any of the witnesses are unwilling or unable to travel to Malaysia to testify. Many of them are family members of the deceased wife anyway. Thirdly, they could easily testify via video-conference.

16 On the other hand, the second defendant has Malaysian witnesses located in Malaysia. They include the first defendant, the second designated driver of the bus, the driver of the lorry as third party and other independent witnesses who may be located by the Malaysian police. Save for the first defendant, the other witnesses have no obligation to appear on behalf of the second defendant and are unlikely to come to court willingly. They cannot be compelled to come to Singapore to testify. The second defendant does not accept that the defendants have no defence to the plaintiff's claim. It is contending that the first defendant was not negligent and that the accident was caused by

and/or contributed to by the driver of the lorry.

17 While acknowledging that the plaintiff and his family are all Singapore citizens residing here and that the deceased wife worked in Singapore, the second defendant highlights that it is a company incorporated in Malaysia with its assets situated there. Its insurer having conduct of this claim is also a Malaysian company with its assets there. Any judgment obtained by the plaintiff will have to be enforced in Malaysia.

18 Potential third party proceedings should be given their appropriate weight and where a defendant intends to initiate such proceedings, it is generally convenient, in the interests of justice and in saving court time and costs, for such proceedings to be determined at the same time and in the same court as the main action (per Chan Seng Onn J ("Chan J") in *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] SGHC 59). However, Chan J in that case (at [123]) took the view that the issues that would be raised in the third party proceedings would prolong the main action unnecessarily by raising issues that were of no concern to the other parties and would cause it to be more costly and inconvenient overall for all parties involved.

19 The second defendant intends to bring the driver of the lorry in as third party but has held back from doing so pending the determination of the appropriate forum for the plaintiff's action. The issues in the third party proceedings will be directly related to those in the plaintiff's action.

20 The fact that a foreign forum has lower awards of damages will not necessarily deter the court from granting a stay, so long as substantial justice will be done in the foreign forum (see *Spiliada Maritime Corporation v Cansulex Ltd* [1986] AC 460).

My decision

21 At the hearing of the appeal, counsel for the plaintiff sought to introduce two further affidavits filed after the present firm of solicitors took over as solicitors for the plaintiff. One affidavit was by Mr Liew Teck Huat ("Mr Liew"), a solicitor in Niru & Company, the solicitors for the plaintiff and the other was by the plaintiff. As Mr Liew was purporting to give evidence as an expert on Malaysian law without complying with the requirements of O 40A of the Rules of Court, counsel for the second defendant rightly objected to its admissibility. I refused to admit Mr Liew's affidavit on this ground and since the plaintiff's affidavit raised nothing new except for one paragraph relying on Mr Liew's affidavit, I did not admit the second affidavit too.

22 The Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron Von Uxekull* [2007] 1 SLR 377 ("*Rickshaw*") said (at [14] and [15]):

14 ... Under *Spiliada*, the first issue that must be determined is whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"). At this stage, the legal burden is on the defendant. If the court concludes that there is a more appropriate forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

15 Under Stage One, we considered the following factors in order to determine if Singapore is the appropriate forum for the present proceedings:

- (a) general connecting factors;
- (b) the jurisdiction in which the tort occurred;

- (c) choice of law, *ie*, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and
- (d) the effect of the concurrent proceedings in Germany.

Before undertaking the consideration of these factors, we pause to note that the process is not a mechanical one. ...

23 Accepting that the law on liability for the accident should be Malaysian law and that the Malaysian court is therefore best placed to deal with this issue, this factor is nevertheless not a weighty one in this case. The law relating to negligence on the roads in both jurisdictions is essentially the same. Further, as emphasized by the plaintiff, his deceased wife, as a passenger on the bus, could have no liability attached to her whatsoever. On the other hand, the fact that the bus collided into the rear of the lorry's trailer must mean that at least some liability will attach to the first defendant as the driver who was in control of the bus. It is inconceivable that the first defendant will be totally exonerated as the cause or one of the causes of the accident. Whether the first defendant and consequently the second defendant should bear 100% liability or share the blame with the driver of the lorry is really of no concern to the plaintiff, save that the plaintiff's evidence may assist one or the other. The vicarious liability of the second defendant is not in dispute.

24 As mentioned earlier, the first defendant is no longer employed by the second defendant and although he has an address in Kota Tinggi, Johor, the second defendant was unable to locate him. At a hearing this morning (31 October 2008), the second defendant's counsel informed me that the position has not changed. It would appear, therefore, that the second defendant may be left without its crucial witness, the driver of the bus and its defence of the claim on liability will be even weaker. For the same reason, the potential claim against the driver of the lorry as third party may not even take off. Accordingly, it matters not that the first defendant and the potential third party are resident in Malaysia and that they may not be willing to come to Singapore to testify. There is no cogent evidence at any rate about their unwillingness to testify here.

25 The issues that are likely to proceed to trial are those pertaining to quantum of damages. The plaintiff, his children and practically all the material witnesses on such issues are resident in Singapore. The second defendant is appearing in this action through its insurer which is represented by solicitors here. The evidence will cover many aspects of life in Singapore, including the employment history of the deceased wife. These are matters which a Singapore court and Singapore solicitors are best placed to deal with.

26 Malaysia and Singapore are neighbouring states and travel time between the two countries should pose no real challenge for witnesses from either side. However, practically all the witnesses in this action are from Singapore and not all of them are the plaintiff's family members. It would be highly inconvenient for all of them to have to leave their normal routine to travel outside Singapore and to incur hotel and other expenses, even if only for a day or two (although these may be claimed at the conclusion of the action). Where video-link evidence is concerned, V K Rajah J in *Peters Roger* (see [15] above) was of course commenting on the Singapore and English courts' acceptance of evidence via video-conferencing. No evidence was placed before me on whether the Malaysian court would also be amenable to hearing the witnesses via video-link. Even if there is no impediment to having evidence taken via video-link from Singapore, it still makes little sense to me to have a forum outside Singapore hear practically all the evidence via video-link from witnesses within Singapore.

27 The plaintiff had applied for service of the writ of summons outside Singapore on the basis of O 11 r 1(f)(ii) which reads:

1 Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action –

...

(f)(ii) the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring;

...

The plaintiff has chosen Singapore as the forum and he will have to deal with the issue of enforcement of any judgment obtained if and when that becomes necessary. He is obviously aware of the fact that both the defendants are not resident within the jurisdiction and may have no assets here. However, it would be surprising if the insurer of the second defendant should refuse to satisfy a judgment obtained by the plaintiff. In any event, the court considering *forum non conveniens* issues is concerned with the appropriateness of the forum for the trial process rather than the question of post-trial remedies such as enforcement of judgments.

28 For the above reasons, I consider Singapore the more appropriate forum for determining this action. As the second defendant has failed to discharge its burden at Stage One (as defined in *Rickshaw* at [22] above), there is really no need to proceed further to Stage Two. Nonetheless, even at this second stage, the justice of the case mandates that no stay of proceedings be granted. In negligence claims, the tort-feasor takes the victim as she is, with thin skull, brittle bones and all. The deceased wife had been working in Singapore and was earning a salary commensurate with the cost and standard of living here. Likewise, her dependants are living in Singapore with expenses reckoned in Singapore terms. It is therefore only right that the damages they seek be assessed according to local conditions. Where Malaysian law on damages works to their disadvantage as compared with Singapore law, it seems right to me that the defendants, and more particularly, their insurers, should bear the detriment rather than the victims of the negligence.

29 I therefore allowed the plaintiff's appeal and set aside the stay of proceedings ordered by the AR. I also ordered the second defendant to pay the plaintiff costs of \$1,500 for the application before the AR and the appeal therefrom. The second defendant has appealed against this decision.

30 I mentioned at [24] earlier a hearing before me this morning (31 October 2008). An application was taken out by the second defendant for extension of time to file its defence pending its appeal to the Court of Appeal. An assistant registrar heard the application and granted an extension until today, by which time the second defendant must have filed an application for a stay of my order pending appeal. The assistant registrar was apparently of the view that an application for a stay of my order should be taken out before me rather than an application for extension of time before an assistant registrar. The second defendant complied by taking out an application before me (SUM No. 4700 of 2008) for a stay of my order. In addition, the second defendant appealed against the order made by the assistant registrar on the ground that he could have and should have granted the extension of time sought pending appeal to the Court of Appeal (RA No. 408 of 2008).

31 This morning, I heard the second defendant's application and appeal only on the issue of whether an extension of time for the filing of the defence ought to be granted to the second defendant pending its appeal to the Court of Appeal. In my view, there is no impediment to an assistant registrar hearing such an application for extension of time after a Judge has refused a stay

of proceedings on the ground of *forum non conveniens*.

32 The second defendant submitted that it should not be made to file its defence at this stage for the following reasons:

- (a) its appeal will be rendered nugatory;
- (b) there is a *prima facie* chance of success in its appeal;
- (c) it should not have to run two contradictory courses of action by filing a defence while maintaining that Singapore is not the appropriate forum;
- (d) there is no prejudice to the plaintiff that cannot be compensated by costs and an award of interest;
- (e) there are no exceptional circumstances warranting a dismissal of its application for extension of time.

The second defendant relied on the High Court decisions in *Yeoh Poh San & Anor v Won Siok Wan* [2002] 4 SLR 91 and *Australian Timber Products Pte Ltd v Koh Brothers Building & Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 and the recent Court of Appeal decision in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] SGCA 34. Counsel for the second defendant also admitted quite candidly that one of the reasons for seeking an extension of time is the fact that the first defendant still could not be located.

33 The plaintiff argued that no extension of time should be granted:

- (a) an undertaking has already been given that the plaintiff will not argue that the second defendant has submitted to the jurisdiction by filing its defence in this action;
- (b) the second defendant (through its insurer) is taking tactical advantage to prejudice the plaintiff by claiming that it does not act for the first defendant;
- (c) the second defendant has not even written to the potential third party, thus indicating that it may not have any real intention to commence third party proceedings;
- (d) the application for extension of time to file its defence was made at the very last minute;
- (e) it has been two years since the accident happened and three of the deceased wife's children/dependants are very young.

34 Since this matter involves an issue of jurisdiction over an accident that occurred in another country and as my grounds of decision are ready (pending this morning's hearing), I granted the second defendant an extension of time to file its defence pending its appeal to the Court of Appeal. Should the Court of Appeal dismiss the appeal, the second defendant is to file its defence within seven days of the dismissal. This is an appeal on an interlocutory matter and the parties should be able to proceed quite expeditiously to a final resolution on the issue of jurisdiction. Any prejudice to the plaintiff caused by the extension of time can be easily compensated by an order on costs and an award of interest. I also ordered costs of the application for extension of time before the assistant registrar and of RA No. 408 of 2008 and SUM 4700 of 2008 to abide by the decision of the Court of Appeal. If the second defendant fails in its appeal, it will have to bear the costs of these three matters.

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