

Kang Chye Huat and Anor v Kang Heng Huat [2009] MLJU 1682

Malayan Law Journal Unreported

HIGH COURT (MUAR)

JEFFRY TANJ

GUAMAN CIVIL NO 23-147-1998

11 December 2009

*Diljit Kaur (Ti-Hazalan & Co) for the plaintiff
H.W.Yip (David Lingam & Co.) for the defendant*

Jeffry Tan,J

JUDGMENT

[1] This was an action by 2 brothers (Plaintiffs) against their elder brother (Defendant) for their share of the sale proceeds paid under agreement dated 5.12.1995 and supplemental agreement dated 6.12.1995 (see agreed bundle pages 1 -65) and entered into between the Plaintiffs and Defendant, as vendors of the one part, and Sunway Nursery & Landscaping Sdn Bhd. (Sunway), as purchaser of the other part.

[1] It was not in dispute that the Plaintiffs and Defendant together, by those agreements, sold 150,000 shares of RM1.00 each, representing 60% of the issue share capital of Kang Soon Seng Nursery Sdn Bhd (company), to Sunway who paid RM4,788,000.00 for those 150,000 shares or RM31.92 for each share. The 2nd Schedule to the agreement dated 5.12.1995 (see AB33) stated that each Plaintiff, as vendor of 30,000 shares, was to receive RM957,600.00. The Defendant, as vendor of 90,000 shares, was to receive RM2,872,800.00. With the consent of the Plaintiffs, the entire purchase consideration was paid over to the Defendant. But each Plaintiff only received RM300,000.00 from the Defendant. The Plaintiffs' claim was for the balance.

[1] It was also not in dispute that each Plaintiff was the holder of those shares sold to Sunway, and that each Plaintiff received RM300,000.00 from the Defendant. It was however contended by the Defendant that the Plaintiffs were bare trustees of those shares in their names, and that the Plaintiffs were not beneficially entitled to the claimed balance, and that the RM300,000.00 was paid as "goodwill". At the onset, it was agreed that the only issue was whether the Plaintiffs were bare trustees of those 60,000 shares, for the Defendant.

[1] It was agreed that the Defendant should begin to lead the evidence. Under examination-in chief, the Defendant testified as follows. From 1988 to 1999, he was a director of the company. When those agreements were executed, he held 190,000 shares in the company. The Plaintiffs held 60,000 shares. He made cash payment of RM250,000.00 into the account of the company for the issuance of those 250,000 shares. He had no proof of his payment, but the company should be able to prove his payment (see page 9 of the notes of proceedings). The original subscribers of the company were he and one other brother, Kang Chai Heng (see AB124 dated 2.7.1988 and AB125 dated 9.7.1988). AB128 - 129, both dated 8.8.1991, were subsequent allotments. On 18.3.1994, he was allotted a further 50,000 shares (see AB133). He "took over" the 30,000 shares of Kang Chai Heng. The Plaintiffs never paid for their shares. He paid RM300,000.00 to each Plaintiff, for their "contribution to the company" (see 9NP).

[1] Under cross-examination, the Defendant stated that he had lost the document which stated that the Plaintiffs held those shares for him (see page 10NP). When confronted with the receipts (see DB247 and 248) that stated that the payment of RM300,000.00 to each Plaintiff "adalah sebagai balasan jualan saham", the Defendant said

"tak boleh ingat" (see 10NP). The Defendant denied that the paid up capital of the company was satisfied by the injection of the assets of one "Sin Kang Soon Seng" into the company, and or that the father of the Plaintiffs and Defendant had given the business and assets of "Sin Kang Soon Seng" to his sons. The Defendant first agreed and then denied that there was a family meeting where it was agreed that each brother would have 20% equity in the said company. The Defendant also denied that the Plaintiffs demanded payment the claimed balance from him, and or that the Plaintiff "menolong menaikkan [syarikat]".

[1] Under re-examination, the Defendant maintained that the company had not taken over the business and or assets of "Sin Kang Soon Seng", which business, he said, was carried on at a different address. The Defendant admitted that the statements in receipts DB247-248 reflected the truth (see 12NP). But when he was recalled, that is, after the Plaintiffs had started their case, the Defendant refuted that the receipts in DB247 - 248 reflected the truth (see 20NP). "Apa yang saya maksudkan ialah saya menjual saham syarikat saya dan saya memberi RM200,000.00 kepada bapak dan RM300,000.00 kepada 2 adik saya" (see 20NP).

[1] The only other witness for the Defendant was the secretary (SD2) of the company who testified as follows. From 1988 - 1995, he was the secretary of the company. The Plaintiffs were not directors but employees of the company. He had no knowledge of the payment for the shares allotted to the Plaintiffs. The company was incorporated to take over the business of Sin Kang Soon Seng, a firm that belonged to the father of the Plaintiffs, and to the Defendant (see DB9). The company took over Sin Kang Soon Seng on 1.1.1992 or 1.1.1993. He could not find any payment receipt in respect of the shares that were allotted. Shares were allotted on the take-over of the fixed assets and stock of Sin Kang Soon Seng. Under cross-examination, DW2 said that the Defendant had not paid any money for the allotment of shares, and that it was a take-over.

[1] The first witness for the Plaintiffs was the patriarch (Kang Peng Hock - PW1) of the family who testified as follows. He was the father of the Plaintiffs and Defendant. In 1973, he registered "Sin Kang Soon Seng" as a sole proprietorship. In 1981, he admitted the Defendant, his eldest son, as a full partner. He gave a half share of "Sin Kang Soon Seng" to the Defendant. He provided all capital for Sin Kang Soon Seng. The Defendant had not come up with any capital to enter Sin Kang Soon Seng. The Defendant incorporated the company and then terminated Sin Kang Soon Seng. All assets of Sin Kang Soon Seng, including the business premises, were taken over by the company. There was no agreement on the equity of the company. "Bahagian saya juga masuk dalam KSS Sdn Bhd" (see 17NP). The Plaintiffs had shares in the company. At inception, all shares of the company belonged to Sin Kang Soon Seng. All four sons had a share in Sin Kang Soon Seng. All four sons had a share in the company. Under cross-examination, PW1 said that he had not given 70% of Sin Kang Soon Seng/company to the Defendant. Sin Kang Soon Seng was not paid any consideration by the company or by the Defendant. He received RM200,000.00 after the execution of the said agreements. That RM200,000.00 was not paid on account of his share in Sin Kang Soon Seng. The Defendant had not given those shares in the company to the Plaintiffs.

[1] The 1st Plaintiff testified as follows. He first worked for Sin Kang Soon Seng, and then for the company. To advance the business of Sin Kang Soon Seng, all brothers agreed to incorporate a limited company. The incorporation of the company was handled by the Defendant. The Defendant agreed to the allotment of 20% equity in the company to each brother. Kang Chai Heng sold his 20% equity to the Defendant. Those 60,000 shares belonged to the Plaintiffs, as that was the Plaintiffs' share in the company that had taken over the assets of Sin Kang Soon Seng. Those 60,000 shares were not held by the Plaintiffs for the Defendant. There was no document that stated that the Plaintiffs held those 60,000 shares for the Defendant. The Plaintiffs gave their consent for the monies payable under the agreements to be made to the Defendant. About 2 or 3 months after the execution of the agreements, each Plaintiff received RM300,000.00, i.e. after the Plaintiffs had asked for payment from the Defendant.

[1] Under cross-examination, the 1st Plaintiff stated that he worked for Sin Kang Soon Seng from 1980 and for the company from 1988. He was the manager of Sin Kang Soon Seng from 1980 to 1988. He was not a partner, but he was not a mere employee of Sin Kang Seng. In 1988, the brothers agreed to incorporate the company. It was not the Defendant alone who mooted the idea to incorporate the company. He left it to the Defendant to incorporate the company, as the Defendant had agreed to allot shares of the company to him (see 31NP). His 30,000 shares were allotted to him. Those shares were not allotted to him "to hold upon trust for the Defendant" (see 33NP). The Defendant agreed to allot 20% equity of the company to each brother. The Defendant had the day to day control of the affairs of Sin Kang Soon Seng. All sale negotiations were conducted by the Defendant alone. The 1st Plaintiff disagreed that he authorised the Defendant to collect the sale proceeds "as those shares did not belong to him" (see 34NP). The 1st Plaintiff disagreed that the RM300,000.00 was paid as "goodwill". Under re-examination, the

Kang Chye Huat and Anor v Kang Heng Huat [2009] MLJU 1682

1st Plaintiff said that he gave his consent to the Defendant to collect the sale proceeds "sebab saya sibuk dan juga percaya Defendant".

[1]The 2nd Plaintiff similarly testified that his 30,000 shares belonged to him, that the company took over Sin Kang Soon Seng, and that the RM300,000.00 paid to him was on account of the sale of his shares and not towards "goodwill". The 2nd Plaintiff maintained that he was entitled to receive RM957,000.00. All brothers contributed to the company and all brothers were entitled to their shares. Under cross-examination, the 2nd Plaintiff agreed that he had not pay for his shares, but denied that his 30,000 shares were held on trust for the Defendant. The 2nd Plaintiff denied that he was not involved in the sale negotiations and that he gave his consent to the Defendant to collect the sale proceeds because he was not the beneficial owner of those shares.

[1]To capitulate, the sole issue was whether the Plaintiffs were bare trustees of those shares in their names. Trust was contended by the Defendant. The burden was on the Defendant to prove the alleged trust, on the balance of probabilities. But the only evidence of the alleged trust that could be discerned from all scrutiny of the evidence was the bare assertion of the Defendant that the Plaintiffs held those shares on trust for him. The Defendant contended that he paid RM250,000.00 to the company for the allotment of those 250,000 shares, and that the company could verify the payment. But it was the testimony of the secretary of the Company who should know, that he could not find any payment receipt for the shares allotted. The Defendant was also unable to produce any independent evidence of his source of funds and the withdrawal thereof, for the payment of the said RM250,000.00, despite the opportunity afforded him to do so even after the Plaintiff had closed their case (see 49NP). The Defendant contended that there was a trust deed, but he was unable to produce that deed. The convenient excuse was that he had lost that deed. The Defendant refuted that the allotment of those 250,000 shares was on account of the injection of the assets and stock of Sin Kang Soon Seng into the company. But it was the testimony of DW2, that the company was incorporated to take over the business of Sin Kang Soon Seng, that the allotment of shares was satisfied by the injection of the assets and stock of Sin Kang Soon Seng into the company, that the Defendant had not paid any money for the allotment of shares, and that it was a take-over of Sin Kang Soon Seng by the company. In short, the Defendant was not supported, even contradicted, by his own witness. The Defendant was also contradicted by his own documents. The Defendant produced DB247 - 248, which were receipts of the payments to the Plaintiffs. But those receipts only stated that the sum was paid on account of the sale of shares of the company. Those receipts refuted that the payments to the Plaintiffs were made as "goodwill". So even on the evidence adduced by the Defendant, it was discerned that the Defendant was contradicted at every twist and turn by his own evidence. The bare assertion of trust could not be credible.

[1]Indeed, the absence of trust was practically confirmed by PW1, who had no reason, it was not so shown, to side any of his sons. It was the firm evidence of PW1 that he started the firm of Sin Kang Soon Seng, and that the assets of Sin Kang Soon Seng, including the business premises, were taken over by the company. That was corroborated by DW1 who confirmed that the company took over the assets and stock of Sin Kang Soon Seng, for which the company allotted those shares. Hence, it was independent evidence from both sides that shares were allotted on account of the injection of the assets and stock of Sin Kang Soon Seng into the company. And the allotment of those shares could not have been to the Defendant alone. Sin Kang Soon Seng had belonged to PW1 and the Defendant. The allotment of shares could not have been to the Defendant alone. By right, the Defendant could not have been beneficially entitled to more than 50% of the shares allotted on account of the injection of the assets and stock of Sin Kang Soon Seng into the company.

[1]The Defendant refuted that shares were allotted on account of the take-over of the assets and stock of Sin Kang Soon Seng. But there was no evidence that the Defendant had paid for the shares allotted to him and or to the Plaintiffs. On the contrary, the clear evidence was that none of the parties had paid for the shares allotted to them, and that shares were allotted solely on account of the take-over of the assets and stock of Sin Kang Soon Seng by the company.

[1]There was no evidence that could support the alleged trust. There were simply no facts that could support any case of a resulting trust as in *Lin Ah Moy v Lee Cheng Hor* [1970] 2 ML) 99. Rather, the evidence was wholly and only consistent with the story of the Plaintiffs that none of the parties had paid any money to the company for the shares allotted to them, and that the Plaintiffs were not trustees of those shares in their names.

[1]Under the sale and purchase agreements, which were further proof against the case of the Defendant, the Plaintiffs were entitled to receive stated sums. That was received but was not released by the Defendant to the Plaintiffs. For the aforesaid reasons, the Plaintiff's claim was allowed with cost. The Defendant was ordered to pay

Kang Chye Huat and Anor v Kang Heng Huat [2009] MLJU 1682

to each Plaintiff the sum of RM657,600.00 together with interest as claimed, and the costs of this action.

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