RAJA SEGARAN S KRISHNAN

v.

BAR COUNCIL MALAYSIA & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[CIVIL APPEAL NO: S2-23-93-1999]
2 NOVEMBER 2000

CIVIL PROCEDURE: *Trial - Preliminary issue to be tried - Power of the court - Rules of the High Court 1980, O. 33 r. 2*

The plaintiff obtained an interim injunction against the defendants to restrain the defendants from holding an EGM to discuss issues relating to the judiciary. The plaintiff now filed this application pursuant to O. 33 r. 2 of the Rules of the High Court 1980 ('RHC') for leave that the court ought to determine the question of whether the resolution and the proposed EGM were *ultra vires* the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 as a preliminary issue before the trial of the action based on three specific grounds of being *ultra vires*, in contempt of court and seditious.

The defendants, having agreed to a set of facts to be used for the hearing, indicated their objection to this mode of trial.

Held:

[1] The defendants contended that their reasons for the resolution and the EGM were matters of evidence to be adduced at trial. They should have realised that the law required them to satisfy the judge in their affidavit itself with evidence instead of saying that they would adduce such evidence at trial, especially when the plaintiff had put in this application for leave to decide the issue on affidavit evidence.

[2] The court had ruled that the parties could adduce oral evidence if need be, and therefore the court could not accept the complaint that this order would deprive the defendant of the right to adduce oral evidence.

[3] The plaintiff was perfectly right to move this court under O. 33 r. 2 of the RHC. The issues and the grounds to back up the application were matters of law and if the defendants contended that they need to call witnesses, the court had made an order allowing them to do so.

[4] Where the court was of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O. 33 r. 2 to be read with r. 5 of the RHC.

[5] Where contempt and sedition were concerned, intention or motive was irrelevant and defendant's arguments that evidence must be led to show intention and motive for calling the EGM and moving the resolution was no longer meritorious.

[Plaintiff's application allowed; costs in the cause ordered.]

Case(s) referred to:
Chan Kum Loong v. Hii Sui Eng [1980] 1 MLJ 313 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33 rr. 2, 5, O. 34

For the plaintiff - DP Vijandran; M/s Raja Segaran & Assoc
For the 1st & 3rd defendants - Robert Lazar; M/s Shearn Delamore & Co
For the 2nd defendant - Malik Imtiaz Ahmed Ghulam Sarwar; M/s Malik Imtiaz Sarwar

Reported by Yow Ting Fong

JUDGMENT

RK Nathan J:

Facts

The facts leading to the filing of this case have been narrated fully in my earlier judgment which dealt with the plaintiff's application for an interim injunction to restrain the defendants from holding an EGM to discuss issues relating to the judiciary (see [2000] 1 MLJ 1). The defendants' application to strike out the writ was also similarly dismissed. The defendants appealed to the Court of Appeal against both my decisions. I had fixed this case for case management on 29 December 1999 when I directed the plaintiff to comply with O. 34 of the Rules of the High Court 1980 (the RHC). On 17 January 2000 when the case next came up for case management, parties informed me that they had not been able to comply with my earlier directions but agreed to do so together with the filing of the affidavits verifying list of documents by 10 February 2000, being the next case management date. On 10 February 2000 since parties had complied with the earlier directions I then directed parties with regard to the filing of the Common Agreed Bundle of Documents. I then fixed the trial of this case to commence from 29 May 2000 to completion. Since the defendants had in the meantime filed an appeal to the Court of Appeal against my decision granting the plaintiff the interim injunction, I vacated the hearing date fixed for 29 May 2000. The Court of Appeal then on 12 July 2000 orally dismissed the defendants' appeal against both my decisions. The written judgment of the Court of Appeal was then not as yet available.

The Application (Encl 61)

The plaintiff then filed an application on 26 July 2000 pursuant to O. 33 r. 2 of the RHC which allowed the court to order any question or issue arising in a cause or matter, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter and which also permitted the court to give directions as to the manner in which the question or issue was to be stated. The plaintiff's application was that I ought to determine as a preliminary issue before the trial of the action, the following question:

> Whether the Resolution dated 12.10.99 and the proposed Extraordinary General Meeting of the Malaysian Bar on 20.11.99 were *ultra vires* the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 (the LPA)?

The grounds for the said application as stated by the plaintiff were as follows:

(a) The Resolution and Extraordinary General Meeting are not within the powers and/or objects of the Malaysian Bar under the LPA.

(b) The Resolution and Meeting and the participation of both Council and ordinary members therein constitute contempt of Court and/or sedition.

This application was initially fixed by the registry to be heard on 10 August 2000. Since the plaintiff's solicitor had written in for a postponement on the basis that on that date he was before another judge in Ipoh on a continued hearing, I directed both parties to appear before me on 9 August 2000. Both parties were represented on 9 August 2000 when I fixed the hearing of encl. 61 to 5 September 2000.

Findings Of The Court

The plaintiff in his affidavit in support stated that all relevant and material facts pertaining to the issues were not in dispute and were as stated in the pleadings and the affidavits filed in respect of the interim injunction. It is not in dispute that the plaintiff is a member of the Malaysian Bar as of 4 November 1995 and that he has been paying his mandatory subscriptions, that he had received the notice dated 12 October 1999 from the 1st defendant informing him of the EGM to be held on 20 November 1999, that there was no requisition from the members for the said EGM, that on 2 November 1999 the plaintiff wrote to the 1st defendant asking that the EGM be called off and giving the 1st defendant 72 hours to comply, that the cost of holding of the proposed EGM would cost approximately RM75,000 which would have to be paid from the funds belonging to the Malaysian Bar.

In his reply Mr. Roy Rajasingam who affirmed an affidavit in reply on behalf of all three defendants averred that, since the plaintiff's action against the defendants is premised on three different causes of action, that is, that the resolution and the proposed EGM are, (a) *ultra vires* the LPA, and/or (b) constitute contempt of court, and/or (c) constitute offences under the Sedition Act 1948 and since the plaintiff's application (encl. 61) is only to try one of the three different causes of action, unless the plaintiff was prepared to abandon the other two causes of action, the plaintiff could not contend that the determination of the proposed issue would dispose of the plaintiff's case without the necessity of a trial. He also contended that whether the matter is *ultra vires* or not is a matter of evidence which ought to be determined at the full trial of this action and also for the court to know the reasons behind the resolution of the EGM. There were only two affidavits, one for and one against this application.

Before I commenced hearing encl. 61 parties had by consent agreed to a set of facts to be used for the hearing and determination of this application. I then marked the set of facts entitled "Agreed Facts for O. 33 Application" as "B". In "B", the parties had by consent agreed to delete para. 10 which referred to the plaintiff being notified by a member of the Bar Council that the proposed resolution was partly because of the allegations made in an affidavit filed in a civil suit referred to as the *Raphael Pura* case.

Having agreed to a set of facts to be used for the determination of encl. 61, I was taken aback by Mr. Robert Lazar's opening statement whereby he signalled his clients' objection "to this mode of trial". I would have thought and indeed the correct approach would have been to apply to strike out encl. 61. Further, by agreeing to a set of facts to be used for the purposes of this application, it is my judgment that the defendants' conduct was nothing more than an act of approbation and reprobation. Neither was "B" agreed to be used for the hearing of this application without prejudice to the defendants' right to object "to this mode of trial". Surely the defendants cannot blow hot and cold. They must take a stand. The purpose of filing an application to strike out a particular application or writ is to my mind to indicate to the court that from the outset the party applying to strike out, holds the view that either that mode or procedure is wrong or that factually or based on legal principles, such an application or writ ought to be struck out.

Looking into the application itself, I find that all the facts necessary are in "B" and that there are only two agreed documents, namely:

(a) Notice of the EGM dated 12 October 1999.

(b) Letter sent by the plaintiff to the Bar dated 2 November 1999.

(See the reported judgment [2000] 5 CLJ 136 at pp. 140-143 where the said notice and the letter have been reproduced in full.)

Having considered the only affidavit of the defendants affirmed by Mr. Roy Rajasingam it is only too plain that the defendants have failed to see the difference between the cause of action and the grounds on which the cause of action is to be founded. It is obvious that the cause of action is that the notice of the EGM with the resolution and the proposed meeting, are all *ultra vires* the powers and objects of the Malaysian Bar under the LPA. Having stated this as the cause of action, the plaintiff argues that it is *ultra vires* because it is:

(a) contemptuous;

(b) seditious;

(c) unconstitutional.

In his submission, Mr. Robert Lazar stated that he did not wish to submit on the *mala fides* issue. However, he urged this court to reject this application because to decide on the issues of contempt and sedition would require proof of intention and therefore oral evidence would have to be adduced as the defendants must be given the opportunity to explain why they had decided to convene the EGM.

From their submission I gather that the defendants contend that their reasons for the resolution and the EGM are matters of evidence to be adduced at the trial. This is precisely what is basically wrong with the defendants' case. Whilst I had already held, in deciding the earlier matter that there is a possibility of the defendants being guilty of contempt and sedition and that the holding of the meeting and the resolution are both *ultra vires* the LPA, for the purposes of deciding the interim injunction issue, I would have thought that the defendants would have realised that it is a requirement of the law to satisfy me in their affidavit itself, with evidence, instead of saying that they would adduce such evidence at trial. This is more so when the plaintiff had put in this application for leave to decide the issue on affidavit evidence. In any case in spite of the defendants' obvious error in judgment, this court indeed gave the defendants a second bite at the cherry, in that I had ruled that if parties see the need to, they can adduce oral evidence. It was solely on this score that I made that order. I therefore cannot accept the defendants' complaint that making this order would deprive them of the right to adduce oral evidence. As for *mala fides* the plaintiff was perfectly entitled to argue that the very fact the defendants were going against the LPA, in spite of the plaintiff's letter urging them not to do so, was sufficient for the plaintiff to argue that there was *mala fides* on the part of the defendants.

I am of the view that the plaintiff was perfectly right to move this court under O. 33 r. 2 of the RHC. The issues and the grounds to back up the application are matters of law and if the defendants contend that they need to call witnesses, I had made an order allowing them to do so. After all since notice to cross-examine on the affidavit can be served to allow for oral evidence to be admitted, I did not see anything wrong in allowing the defendants the right to call any witness in support, instead of filing an affidavit. In *Chan Kum Loong v. Hii Sui Eng* [1980] 1 MLJ 313 the then Federal Court said at p. 314 in respect of trial of preliminary issues as follows:

> We think it should be said with some emphasis that counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily. They must therefore so conduct their case as to enable the court to come to a quick and early decision. The court must also be chary of short-cuts and not be tempted to undertake any course except the one for a proper, expeditious and economical trial on the issues raised in the action.

It is important to note that O. 33 r. 2 must be read with r. 5 which reads as follows:

> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

Therefore where the court is of the view that the issues could be decided without the need for a prolonged trial, the court ought to move under O. 33 r. 2 to be read with r. 5. In respect of the defendants' submission, I hold that where contempt and sedition are concerned, intention or motive is irrelevant and immaterial. Therefore, the defendants' argument that evidence must be led to show intention and the motive for calling the EGM and moving the resolution, is no longer meritorious.

Before I could make a decision, counsel for the 2nd defendant then suggested that the proposed question should be as follows:

> That whether the said EGM and the said proposed Resolution constitute contempt of court and whether the said EGM and the said proposed Resolution constitute offences under the Sedition Act 1948 and if the answers to the said two questions are yes then whether the said EGM and the said proposed Resolution are *ultra vires* the LPA 1976?

I took this to mean that the 2nd defendant at least was conceding to the approach taken by the plaintiff in proceeding under O. 33 r. 2 of the RHC, except that he wished the question to be rephrased as suggested by the 2nd defendant. It was indeed a surprise when I received notification of the appeal.

In any case, I was completely satisfied that this case should proceed under O. 33 r. 2 read together with r. 5. I therefore rephrased the question to read as follows:

> Whether the proposed Resolution dated 12.10.99 as contained in the Notice dated 12.10.99 and the proposed Extraordinary General Meeting of the Malaysian Bar on 20.11.99 were *ultra vires* the powers and objects of the Malaysian Bar under the Legal Profession Act 1976 in that:
>
> (a) The Resolution and Extraordinary General Meeting are not within the powers and/or objects of the Malaysian Bar under the Legal Profession Act 1976;
>
> (b) The Resolution and the Meeting and the participation of both Council and ordinary members therein constitute contempt of Court and/or are seditious and/or are unconstitutional.

I also ordered that parties, if they wished, be permitted to adduce oral evidence; otherwise the case to proceed based on the pleadings, the affidavits filed, and the Agreed Statement of Facts ("B").

I was also of the view that this was a proper case to order costs in the cause.

The defendants then applied for a stay of proceedings until after the Court of Appeal delivered its written judgment on my earlier decision which it had orally dismissed with costs. I refused the stay on the basis that since my earlier decision was on an interim injunction, I was at liberty to change my views at the trial if the defendants were able to persuade me to do so. Incidentally the day before I began hearing the case under O. 33 r. 2 read together with r. 5, the Court of Appeal delivered its written judgment.