IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION) CIVIL APPEAL NO: 01(f)-18-07/2020(K)

(Court of Appeal Civil Appeal No.: K-01(NCVC)(W)-205-03/2018
High Court of Alor Setar Civil Suit No.: 22NCVC-22-03/2015)

BETWEEN

ABD GHANI GOLAMDIN … APPELLANT

AND

1. **UNIVERSITI UTARA MALAYSIA**
2. **UNIUTAMA MANAGEMENT HOLDINGS SDN BHD**
3. **UNIUTAMA SOLUTION SDN BHD … RESPONDENTS**

Coram:

Tengku Maimun binti Tuan Mat, CJ
Zabariah binti Mohd Yusof, FCJ
Hasnah binti Dato' Mohammed Hashim, FCJ

JUDGMENT OF THE COURT

Introduction

[1] This appeal arose out of the dismissal of the appellant's claim against the respondents for inter alia arrears of salary, commissions,

compensation and bonus pursuant to a purported oral agreement made in 2002 and a purported written agreement dated 1.7.2004.

[2] The appellant was a full-time employee of the Universiti Utara Malaysia (the first respondent), a higher educational institution. Uniutama Management Holdings Sdn Bhd (the second respondent) is a company wholly owned by the first respondent while Uniutama Solution Sdn Bhd (the third respondent) is a company wholly owned by the second respondent.

Background Facts

[3] To develop its Information and Technology (ICT) system, the first respondent employed the appellant in 1989 as its Senior System Analyst. In 1992, the appellant was elevated as the Chief System Analyst and in 1999, was appointed as the 'Pengarah Pusat Komputer' in the first respondent.

[4] During the appellant's tenure as the Pengarah Pusat Komputer, the appellant played a major role in developing the ICT within the first respondent which led to the creation of a computer known as "SerindIT". And this made the first respondent the first local university to create its own computer. In view of this development, the first respondent structured a plan to commercialise the "SerindIT" computer.

[5] On 16.2.2002, the appellant was seconded to the second respondent. As per the letter dated 28.1.2002, the first respondent will continue to pay the appellant's salary and allowances and the second

respondent will pay a special allowance to the appellant as its seconded staff. On 2.4.2002, the Board of Directors of the second respondent approved payment of a special allowance of RM650.00 per month for all staff of the second respondent including the appellant. The appellant received a total sum of RM6764.20 comprising the following:

Basic salary paid by the first respondent	RM4864.20
Usual allowance paid by the first respondent	RM1250.00
Special allowance paid by the second respondent	RM 650.00
Total	RM6764.20

[6] After the third respondent was incorporated on 17.10.2002 the appellant's secondment at the second respondent ended and the appellant was seconded to the third respondent as its Managing Director. The secondment of the appellant at the third respondent was extended several times until 31.12.2011.

[7] Apart from receiving the remuneration referred to in paragraph [5] above, during the whole period of secondment at the third respondent from 2002 to 2011, the appellant twice received a "one off" allowance of RM100,368.00 and RM19,237.14 respectively, as part of an incentive payment scheme that was given to all staff of the first respondent seconded to the third respondent. The appellant also had his special allowance increased and he also received bonus.

[8] After his secondment with the third respondent ended in December 2011, the appellant returned to serve the first respondent. For the whole

duration of the secondment at the second and the third respondents, the appellant remained an employee of the first respondent.

Proceedings in the High Court

[9] In December 2014, the appellant filed an action against the respondents, claiming for a sum of RM15,619,916.09. The appellant contended that the respondents breached the oral agreement in 2002 entered into between him and the late Dato' Dr. Ahmad Fawzi bin Mohd Basri ("Dato' Fawzi"), the then Vice-Chancellor of the first respondent, which was witnessed by Syed Soffian bin Syed Ismail (PW4), the Chief Executive Officer of the second respondent. The appellant contended that vide the oral agreement, he was promised additional remuneration during the term of his secondment. The appellant further contended that upon oral instructions of Dato Fawzi, the oral agreement was reduced into a written agreement dated 1.7.2004 (exhibit P22).

[10] According to the appellant, in return for his service, the oral agreement provided that the appellant's starting salary is in the range of RM15,000.00 with a yearly increment and allowances as well as other incentives. On top of that, the appellant is also entitled to be paid the sales commission of at least 10% to 15% for projects secured through the first respondent's companies, bonus and other incentives depending on the company's profits, insurances, and gratuity and compensation if the appellant is terminated for service.

[11] The respondents denied entering into such oral agreement and denied authorising the execution of P22. It was further the case of the respondents that exhibit P22 was unknown to them. The respondents

explained that the appellant was not paid the alleged additional remuneration for the simple reason that the terms were never offered to the appellant.

[12] The primary issue for determination by the learned trial judge was whether the additional remuneration terms were indeed offered to the appellant. Since the appellant claimed that the purported oral agreement had been reduced to a written form vide exhibit P22, the learned judge proceeded to consider the validity of exhibit P22. In this regard, her Ladyship directed her mind to the following issues, namely whether or not the appellant has shown that the agreement dated 1.7.2004 is authentic and if the answer is in the affirmative, whether the respondents are bound by the said agreement.

[13] Having considered exhibit P22, the documentary evidence, the oral evidence of the witnesses and the parties' rivalling contentions, her Ladyship dismissed the appellant's claim. The findings of the learned trial judge may be summarised thus:

(i) the appellant and PW4 were unable to prove that there was in fact an offer made to the appellant on the alleged remuneration and there was also no evidence to prove the purported authorisation by Dr Fawzi for PW 4 to execute the agreement;

(ii) the appellant has conscientiously and persistently pursued his claim. He had written numerous letters, prepared working papers and attended meetings in the hope of securing the alleged remuneration. However, nowhere in his

correspondence did the appellant mention the agreement dated 1.7.2004. The working paper also did not refer to exhibit P22;

(iii) There was a special Board of Directors meeting held on 11.3.2007 and one of the issues was to find a solution to the appellant's remuneration claim. The minutes of the meeting shows that PW4 was present. PW4 could but made no mention of the agreement dated 1.7.2004 let alone produced it;

(iv) Exhibit P22 shows that both the appellant and PW4 were the signatories to the agreement and exhibit P22 does not bear any witness. As such it was safe to assume that only the appellant and PW4 were privy to the agreement and it was manifestly clear that the agreement was crucial to the appellant's claim. Yet both the appellant and PW4 did not see it fit to mention the agreement. If the agreement did exist, the reasonable thing for the appellant and PW4 to do was to inform the paymaster(s) to pay up as the remuneration terms were encased in the agreement; and

(v) In light of PW4's doubtful authorisation and the appellant's and PW4's conduct, exhibit P22 was an afterthought and that the appellant has failed to show that the agreement dated 1.7.2004 is authentic.

[14] The learned trial judge had also observed that the appellant was unable to enforce the agreement exhibit P22 against the respondents due to the doctrine of privity of contract. Her Ladyship stated that the

agreement dated 1.7.2004 appeared to be entered into between the appellant and Syarikat UUM, not between the appellant and any of the respondents herein. If indeed the agreement is enforceable, it can only be enforced against Syarikat UUM.

[15] Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal. The appeal was unanimously dismissed.

Proceedings in the Federal Court

[16] The appellant obtained leave to appeal to this Court on the following questions of law:

(i) Whether the authenticity and validity of an agreement can be challenged and/or disputed in the absence of any vitiating factor(s) such as fraud, forgery, misrepresentation or conspiracy to defraud?

(ii) Whether an agreement which had been properly adduced and admitted as evidence pursuant to section 91 and 92 of the Evidence Act 1950 can be regarded as the best evidence in proving one's claim against another?

(iii) If the answer to the 2nd Question is in the affirmative, whether the agreement is still open to being challenged on the basis that the agreement does not exist and accordingly unenforceable?

(iv) Whether it is a pre-requisite for a claimant to prove (in writing or otherwise) that the person who executed an agreement on behalf of a company has the requisite authority to do so before the claimant can be entitled to rely on the indoor management rule as propounded in *Royal British Bank v Turquand* [1843-60] All ER Rep 435'?

(v) Whether the concealment principle as established by the Supreme Court of the United Kingdom in *Prest v Prest and Others* [2013] 4 All ER 673 in making a third party liable and accountable under an agreement without having to pierce the veil of incorporation is applicable in Malaysia and if so under what circumstances?

Our Analysis/Decision

[17] For the reasons that follow, we had unanimously dismissed the appeal without answering the leave Questions.

[18] Learned counsel for the appellant argued that exhibit P22 is deemed to be an authentic and a valid agreement in the absence of any vitiating factors such as fraud, forgery, and conspiracy to defraud. Put differently, the appellant took the view that all written documents purporting to be agreements are automatically deemed to be valid and enforceable unless the vitiating factors aforementioned are proven.

[19] With respect, the validity and enforceability of an agreement or a contract are two different and separate issues which are to be dealt with separately. The validity of a contract is governed by section 2(e) of the Contracts Act 1950 which provides that every promise and every set of promises, forming the consideration for each other, is an agreement.

[20] For there to be a valid agreement, basically there must be an offer, acceptance, consideration and an intention to create legal relations. In relation to agreements made on behalf of corporations, there is the issue of whether the parties have due authority to enter into the agreement and whether internal procedures, for example Board approvals or resolutions have been obtained; and if internal procedures were not adhered to, whether the *Turquand Rule* would apply to save the agreement.

[21] Only where there is a valid agreement in existence, does the enforceability of the agreement comes into play. And it is at this stage that the vitiating factors alluded to by learned counsel for the appellant, if at all, would be considered by the court.

[22] In the instant appeal, the agreement dated 1.7.2004 although was admitted as an exhibit by the High Court, was found to be not an authentic agreement. This finding of fact was made upon consideration of the factual circumstances, particularly due to the absence of authority and non-compliance with internal procedures of the respective respondent companies, and not due to the presence of any vitiating factors (*see G.H. Trietel on The Law of Contract; John Lo Thau Fah v Face Resort Berhads [2007] 8 CLJ 484; KL Engineering Sdn Bhd & Anor v Arab Malaysia Finance Bhd [1994] 2 CLJ 480; Kang Hai Holdings Sdn Bhd & Anor v Lee Lai Ban [2018] 2 CLJ 550; Letchumanan Chettiar Alagappan (as Executor*

to SL Alameloo Achi (deceased) & Anor v Secure Plantation Sdn Bhd [2017] 5 CLJ 418).

[23] On the facts of the present appeal, we agreed with the courts below that the appellant failed to prove his claim. He failed to prove that the terms of the alleged remuneration were in fact offered to him and/or that the second and the third respondents had authorised or approved the execution of exhibit P22. The findings of the High Court were not perverse given the testimony of the respondents' witnesses who were former directors of the second and the third respondents that they never approved and had no knowledge of document exhibit P22. Their testimonies were supported by the fact that there was absent of any contemporaneous document in the form of the Board of Director's resolution or approval to pay the amount claimed by the appellant. In other words, the appellant failed to prove the contents of exhibit P22.

[24] The appellant attempted to overcome the respondents' case by invoking the *Turquand Rule*, where by this rule, an outsider contracting with a company in good faith is entitled to assume that the internal requirements and procedures of the company have been complied with. In this regard, we noted that the appellant initially had pleaded that exhibit P22 was a contract between the appellant and the third respondent. The appellant then amended his statement of claim to plead that exhibit P22 was a contract between him and the second respondent.

[25] However, in their testimonies, the appellant and his witnesses, PW4 and PW2 stated that it was at the third respondent's Board of Director's meetings held on 19.6.2003 and on 29.6.2004 that the terms contained in P22 were approved by the third respondent's Board. It was also the evidence of PW4 that he was authorised to execute exhibit P22 by the

third respondent's Board of Directors. At the risk of repetition, those minutes however do not contain any such discussion or approval of the terms of exhibit P22 and neither do they contain any authorisation of PW4 to execute exhibit P22.

[26] In light of the above, we find that the appellant's reliance on the *Turquand Rule* is misplaced as the facts clearly show that the appellant is not an outsider but an insider to the third respondent, being its Managing Director from 2003 to 2011 (see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 CLJ 793*).

[27] It was also contended by learned counsel for the appellant that since exhibit P22 has been properly adduced and admitted as evidence pursuant to sections 91 and 92 of the Evidence Act 1950, it is not open to the respondents to challenge the validity of P22.

[28] We found that the written agreement exhibit P22 was all along denied by the respondents. The document was placed in Part C of the Common Agreed Bundle of Documents, which means that its authenticity, existence and contents are disputed. During trial, the appellant produced in court what he claimed to be the original copy of the said document. Learned counsel for the appellant sought to mark it as an exhibit which was objected to by learned counsel for the respondents. The ground of objection was that its existence was never known to and was never authorised by the respondents. The learned trial judge took the view that since the appellant had produced what he claimed to be the original document, the document could be marked as an exhibit and the respondent's counsel could later cross examine the appellant on the existence and validity of the document.

[29] Without reproducing the provision, it is trite that section 92 of the Evidence Act 1950 only excludes oral evidence as to contradict the terms of the agreement. When there is a plea denying the agreement, oral evidence is admissible in support of that plea. Here, the respondents were not seeking to admit evidence to contradict the terms of the agreement but to show the court that there was never an agreement in the first place. That section is not attracted when the existence and validity of the agreement is in question (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd v Arab Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779; Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 CLJ 1*).

[30] Granted that the learned trial judge admitted the document and marked it as exhibit P22, her Ladyship ultimately found that the document was an afterthought. On the totality of the evidence, it could not be said that her finding was wrong or against the weight of evidence. For completeness, we wish to state that quite apart from the issue of admissibility of exhibit P22, there was also the issue of probative value of the document. On our part, we found that exhibit P22 had no probative value.

[31] As for the issue of concealment raised by learned counsel for the appellant, with respect we found that the issue was not pleaded and no evidence was led to show that the second and the third respondents' companies which are owned by the first respondent were being set up solely as a façade to conceal or to deprive the appellant of his claim for the purported additional remuneration. *Prest v Prest* which was adverted to by the appellant in leave Question 5 has no relevance to this appeal.

Conclusion

[32] We found that the decision of the trial judge in dismissing the appellant's claim, which was affirmed by the Court of Appeal was not plainly wrong. There was thus no reason for our appellate intervention. The appeal was accordingly dismissed with costs. And we did not consider it necessary to answer the leave questions.

Dated: 4th September 2023

(**TENGKU MAIMUN BINTI TUAN MAT)**
Chief Justice
Federal Court of Malaysia

Solicitors/Counsel:

For the appellant

Harjinder Kaur (Mohd Farhan bin Abdul Ghani with her)

(Messrs Shahrizat Rashid & Lee)

For the respondent

Kanesh Sundrum (Nurul Jannah Zakariah with him)

(Messrs Kanesh Sundrum & Co).