

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN SIVIL)

GUAMAN NO: S4-22-231-2007

ANTARA

VIJAYAN S/O SOMASUNDRAM ... PLAINTIF

DAN

BAYU GAMITAN SDN BHD & 2 LAGI ... DEFENDAN-DEFENDAN

ALASAN PENGHAKIMAN

OLEH YANG ARIF HAKIM

DATO' TENGKU MAIMUN BINTI TUAN MAT

The plaintiff (Mr. Vijayan) and the second defendant (Mr. Anand) are first cousins. The third defendant (Madam Sivagambikai) is Mr. Anand's mother and Mr. Vijayan's maternal aunt. All three of them were the directors and shareholders of the first defendant (Bayu Gamitan). Differences arose between them which led to the signing of a settlement agreement dated 20.8.2004. Among the terms of the settlement agreement is for the sale and purchase of Mr. Vijayan's shares in Bayu Gamitan to Mr. Anand and Madam Sivagambikai for the consideration of RM208,333.00 and for Mr. Vijayan to resign as a director of Bayu Gamitan. In relation to the shares, Mr. Vijayan shall, upon execution of the agreement, deposit the share certificates and the transfer forms duly signed by him with Messrs. Senthe & Co as stakeholders. The stakeholders will deliver the share certificates and the transfer forms to Mr. Anand and Madam Sivagambikai upon payment of the full purchase price of the shares. It was further provided in the settlement agreement that until he receives the sale consideration in full, Mr. Vijayan shall remain the legal and beneficial owner of the said shares.

The obligation of the defendants under the settlement agreement is for the settlement of the loan owed by Bayu Gamitan to Mr. Vijayan in kind and cash. The settlement in kind would entail the transfer of several properties to Mr. Vijayan. Mr. Anand and Madam Sivagambikai's obligation are to guarantee the due performance of Bayu Gamitan under the settlement agreement.

The share certificates and the transfer forms were in fact not deposited at the time when the settlement agreement was entered into. In fact Mr. Vijayan never deposited it with Messrs Senthe and Co. as the share certificates had been misplaced. In the meantime the company secretary was changed to Messrs. Yasmin Management.

Mr. Vijayan had received RM105,000.00 for the share consideration leaving a balance of RM103,330.00. Some of the obligations under the settlement agreement had been performed by the defendants. Mr. Vijayan is now claiming for the balance of the share price and for specific performance of the unfulfilled obligations of the defendants under the settlement agreement.

The defence essentially is that since Mr. Vijayan had failed to deposit the share certificates upon execution of the settlement agreement which is the fundamental term of the settlement agreement, Mr. Vijayan had himself committed a breach which discharged the defendants from further performance of the agreement. The defendants are counter claiming for the return of all monies paid to Mr. Vijayan and for general damages for the loss and damage suffered as a result of Mr. Vijayan's breach.

THE EVIDENCE

Mr. Vijayan in his evidence said that he could not locate the share certificates and he informed Senthe & Co and Mr. Anand about it. He further said that it was agreed that new share

certificates would be prepared and he would sign all the relevant documents required for the issuance of the new share certificates. Mr. Vijayan further testified that he resigned as the director of Bayu Gamitan after the settlement agreement. He further testified that the defendants have not raised any issue regarding the loss and damage suffered by them as a result of his failure to deposit the share certificates with Senthe & Co until after this action is filed. The defendants' refusal to fulfill their obligation, said Mr. Vijayan, had caused him to suffer loss and damage and he had incurred legal fees and expenses in instituting this action.

For the defendants, Mr. Anand gave evidence that he decided not to carry on with his part of the settlement agreement when he discovered that the plaintiff was not in possession of the share certificates. He testified that six (6) out of the nine (9) properties listed in the settlement agreement had been transferred to Mr. Vijayan. It was also his evidence that Mr. Vijayan had no role in Bayu Gamitan since the settlement agreement was signed; that there had been no Board meetings since then; that he was managing Bayu Gamitan; that he and his mother formed the majority of the Board of Directors; that substantial assets of Bayu Gamitan had been disposed off without consulting or obtaining the consent of Mr. Vijayan; that no accounts had been prepared and filed with the Companies Commission of Malaysia since August 2004; that he was the sole signatory of Bayu Gamitan and he was given the mandate to issue cheques and disburse money; that he and his mother have been in full control and managing the affairs of

Bayu Gamitan and making the decisions for Bayu Gamitan without the plaintiff's involvement and approval.

THE SUBMISSIONS

Learned counsel for the defendants submitted inter alia that a breach of the fundamental terms goes to the root of the settlement agreement and as such, the defendants are not liable to further perform the terms of the settlement agreement; that the defendants are free to treat the settlement agreement as at an end; that Mr. Vijayan had induced the defendants into believing that at the date of the settlement agreement, he was in possession of the share certificates and was able and willing to deposit the same with the stakeholder when he was not; that the representation induced the defendants into entering the settlement agreement; that Mr. Vijayan's entire claim is premised on specific performance which is an equitable remedy and the conduct of Mr. Vijayan should be sufficient for this court to deny him of his claim.

The submission of learned counsel for Mr. Vijayan in essence is that the defendants are responsible for the new share certificates not to be issued; that the non-deposit of the share certificates cannot be viewed in isolation and must be considered in its proper perspective; that the issue of the fundamental term was an afterthought; that the defendants have not pleaded inducement or representation; that a breach of the fundamental term of the settlement agreement would have attracted serious and irreparable loss and damage to the defendants which is not the case here and

that the defendants have not suffered any damages due to the non deposit of the share certificates.

FINDING

Looking at the evidence in totality, I am of the view that the deposit of the share certificates by Mr. Vijayan is not the fundamental term but it is only one of the terms representing the global settlement between the parties. The defendants knew from the beginning that Mr. Vijayan had not deposited the share certificates as per the settlement agreement. This is evident from the letter dated 13.3.2006 wherein Mr. Anand informed Mr. Vijayan of the steps that had been taken by the defendants under the settlement agreement and requested Mr. Vijayan to deposit the share certificates together with the transfer forms to the company secretary.

Further, when the said letter was issued by Mr. Anand to Mr. Vijayan, more than one year had lapsed after the settlement agreement and Mr. Vijayan had not deposited the share certificates although he should have done that on the execution of the agreement. In the circumstances, the defendants should have given notice to Mr. Vijayan of his breach of the fundamental term and of the defendants' stand that they are now discharged from their obligations. Instead of giving such notice, Mr. Anand was merely updating Mr. Vijayan of the status of the defendants' performance under the settlement agreement and was requesting Mr. Vijayan to deposit the share certificates. In my view, the conduct of the

defendants is consistent with the fact that the defendant never treated the deposit of the share certificates as a fundamental term that goes to the root of the settlement agreement.

I do not find any evidence to show that Mr. Vijayan had induced the defendants into entering the settlement agreement. In any event I agree with the learned counsel for Mr. Vijayan that these issues were not pleaded by the defendants.

Mr. Vijayan had given evidence that he did not realize at first that the share certificates were misplaced. Vide his letter dated 1.7.2006 to Mr. Anand, Mr. Vijayan had stated among others that "The Agreement stipulates that the transfer forms and said shares are to be released only when full sale consideration is paid. The share certificates seem to have been misplaced when I moved out of the Kemuja office. I will prepare whatever documentation necessary for the replacement of the lost share certificate and instruct Senthe & Co to liaise with Messrs Yasmin Management to handover the transfer forms etc when the balance sum is paid. The resignation letter as a director of BGSB ...(dated June 1, 2006) is attached." I do not see any inequitable conduct on the part of Mr. Vijayan in the light of his admission that the share certificates were misplaced and his willingness to facilitate the issuance of new certificate. If Mr. Vijayan had no intention to keep his part of his obligation under the settlement agreement as submitted by learned counsel for the defendants, Mr. Vijayan would not have informed Mr. Anand of the misplaced shares and would not have offered to facilitate for the issuance of the replacement shares.

Mr. Anand admitted that the company secretary is responsible to prepare the new share certificates and that the company secretary acts on his instructions. Having knowledge that the share certificates were misplaced, and given the fact Mr. Vijayan was prepared to sign the necessary documents, Mr. Anand could have instructed the company secretary to prepare the necessary documentation for the replacement of the share certificates for Mr. Vijayan to sign. This was not done.

Learned counsel for the defendants argued that Mr. Vijayan failed to fulfill the requirements stated in section 102 of the Companies Act and as such Bayu Gamitan need not have taken any steps to issue the replacement share certificates. If it had been the position of the defendants that they could not proceed to arrange for the issuance of the new share certificates without Mr. Vijayan first taking certain steps, it is only reasonable that the same was requested of Mr. Vijayan considering the fact that the purpose of the settlement agreement was for the amicable resolution of all outstanding matters between the parties. There was however no evidence of any response from the defendants to Mr. Vijayan's letter dated 1.7.2006. Contrary to the submission of learned counsel for the defendants, it is the conduct of the defendant that speaks volume and supports the submission of learned counsel for Mr. Vijayan that the issue of fundamental term of the settlement agreement is an afterthought.

Mr. Anand agrees that the share certificates and the transfer forms will only be handed over to him and his mother upon the full payment of the shares and that full payment has not been made. There was no evidence that Mr. Vijayan was attempting to sell the said shares. What is in evidence is that the shares remain under the name of Mr. Vijayan. The defendants however claimed that the non deposit of the share certificates by Mr. Vijayan on the execution of the agreement had caused them to suffer substantial loss and damage. No evidence had been led by Mr. Anand of the loss and damage suffered. On the contrary, the evidence showed that the defendants were able to function without any hindrance.

It is therefore clear that the defendants have not been prejudiced or affected by the non deposit of the share certificates or by the fact that the share certificates were not in the possession of Mr. Vijayan at the time the settlement agreement was entered into. I find that the defendants have failed to prove their counter claim and that the insistence of the defendants that the share certificates must be deposited upon the execution of the settlement agreement, as submitted by learned counsel for Mr. Vijayan, serves no purpose and is merely a ruse to avoid their obligation.

In my view Mr. Vijayan is entitled to specific performance of the settlement agreement as had been clearly intended by the parties pursuant to clause 6.1(b) which provides that “in the event Bayu Gamitan fails or defaults in fulfilling its obligations, Vijayan shall be entitled to appropriate reliefs and remedies, including but not limited to specific performance, against them jointly and severally.” Mr. Vijayan’s claim is

therefore allowed and the defendants' counterclaim dismissed, with costs respectively.

**(DATO' TENGKU MAIMUN BINTI TUAN MAT)
HAKIM
MAHKAMAH TINGGI MALAYA
BAHAGIAN SIVIL
KUALA LUMPUR**

3rd June 2009

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