
DARSHAN RAMAKRISHNA
v.
AFFIN BANK BERHAD

High Court Malaya, Kuala Lumpur
Lau Bee Lan J
[Civil Appeal No: 11BNCC-6-03/2015]
29 April 2016

Case(s) referred to:

Bong Nyi Moi v. Narayanasamy & Anor [1973] 1 MLRA 620; [1973] 1 MLJ 250 (refd)
Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd v. Metalco Industries (M) Sdn Bhd [1995] 1 MLRA 641; [1995] 2 MLJ 153; [1995] 3 CLJ 9; [1995] 2 AMR 1353 (refd)
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 1 MLRA 95; [2003] 2 MLJ 97; [2003] 2 CLJ 19; [2003] 2 AMR 357 (refd)
Rajasthan v. Hanuman AIR [2001] SC 282 (refd)
Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy [1995] 1 MLRA 188; [1995] 1 MLJ 817; [1995] 2 CLJ 374; [1995] 2 AMR 1097 (refd)
Tek Chand v. Dile Ram AIR [2001] SC 905 (refd)
Wong Swee Chin v. Public Prosecutor [1980] 1 MLRA 125; [1981] 1 MLJ 212 (refd)

Legislation referred to:

Contracts Act 1950, s 75

Counsel:

For the appellant/defendant: V Rajadevan; M/s Rajadevan & Associates
For the respondent/plaintiff: Sunitha Ruthram (Delia DJ Kitingan with her); M/s Sunitha Ruthram & Co

[No merits in the grounds of appeal submitted by the Defendant.]

GROUND(S) OF DECISION

Lau Bee Lan J:

[1] This is an appeal by the Appellant/Defendant against the whole of the decision of the learned Magistrate given on 4 March 2015 allowing the Respondent/Plaintiff's claim whereby the Appellant/Defendant is ordered to pay the Respondent/Plaintiff the sum of RM45,092.05 together with interest and costs as per scale.

[1.1] For ease of reference I shall refer to the parties as they were referred to in the Magistrate's Court.



[2] The factual matrix of the case has been set out by the Plaintiff. The Defendant was an employee with the Plaintiff who was offered to work with the Plaintiff as a 'Management Trainee' vide a Fixed Term Employment contract dated 18 December 2012 ('the Fixed Term Employment Contract') and was placed on the Affin Management Programme ('AMP') for a period of 12 months (exh.P1 pp.127-131 Appeal Record ('AR')).

[2.1] The salient terms and conditions of the said Fixed Term Employment Contract are as follows:

- (a) The AMP program is for a period of 12 months effectively from 1 January 2013 to 31 December 2013.
- (b) The Defendant's monthly salary is RM2,800.00 per month (clause 1).
- (c) Clause 3 provides:-

"3 PERMANENT EMPLOYMENT AND BONDING

Upon completion of this Programme, Affin Bank reserves the right at its absolute discretion to offer you a permanent employment and, you will be bonded for a period of two (2) years (Bond), effective 1 January 2013 to 31 December 2014. If you fail to fulfill this condition, you shall then be required to pay Affin Bank an amount of RM45,000.00 being expenses/fee incurred".

- (d) Clause 7 provides:-

"7 NOTICE OF TERMINATION

Notice of termination shall be 24 hours by either party during the Affin Management Programme. In the event if you wish to discontinue this Programme, you are required to refund to Affin Bank all the expenses incurred (internship allowance, training fees, medical expenses, among others) during your participation in this Programme".

[2.2] The Plaintiff acknowledged and accepted the terms and conditions of the Fixed Term Employment Contract after attending an interview on 6 December 2012 conducted by Mr Krishna Naidu s/o D Suppiah (SP1).

[2.3] The Plaintiff carried out a briefing on 19 December 2012 (Briefing session on 19 December 2012) with the Defendant and 18 other management trainees who commenced employment with the Bank via similar Fixed Term Employment Contracts dated 18 December 2012 on 19 December 2012 after receipt of their curricular vitae and an interview session with PW1.

[2.4] SP1 and SP2 were present during the time a formal session was conducted by the Human Resource Department whereby one Puan Rozita



was present. Collectively, PW1, PW2 and Puan Rozita took the initiative to explain the terms and conditions of the management trainees' individual Fixed Term Employment Contracts with specific references to the clauses stipulated in the same as detailed in paras (a) to (d) above.

[2.5] The Defendant thereafter conducted an induction session/ programme organised by the Recruitment Department of the Bank whereby all management trainees were informed of the potential liability to pay compensation in the amount of RM45,000.00 ('Fixed Compensation Sum') in the event of premature termination of the Fixed Term Employment Contract.

[2.6] The Plaintiff signed on every page of his Fixed Term Employment Contract.

[2.7] The Defendant resigned on 12 July 2013 (p 132 AR) (just after 6 months into the Fixed Term Employment Contract) vide letter dated the same by giving one week notice from 12 July 2013 without paying the Fixed Compensation Sum of RM45,000.00.

[2.8] The Plaintiff vide letter dated 17 July 2013 (p 133 AR) had informed the Defendant that the Plaintiff accepted the Defendant's resignation with his last day of service being 18 July 2013 and that the Defendant had to pay the Fixed Compensation Sum of RM45,000.00 to reimburse or indemnify the Plaintiff for the premature termination of the Fixed Term Employment Contract and/or being the fee incurred for the training as stipulated in the Agreement and for the breach of the AMP Bond.

[2.9] The Defendant failed to pay RM45,000.00.

[2.10] The Plaintiff vide their previous solicitors, Tetuan Azlina Abdul Aziz & Associates sent Letters of Demand to the Defendant dated 6 August 2013 (pp 134-135 AR) and 3 September 2013 (pp 136-137 AR) claiming for RM45,092.50.

[2.11] The Defendant's solicitors vide letter dated 10 October 2013 (p 147 AR) responded on the Defendant's behalf by giving an interpretation to cl 3 and/or the said Fixed Term Contract of Employment and refused to pay the RM45,000.00.

[2.12] The Plaintiff then commenced the suit at the Magistrate's Court (Suit No A72NCC-52186-07/2014) that was decided in the Plaintiff's favour ('Magistrate's Court Suit').

[2.13] The Defendant filed a suit at the Sessions Court vide suit no B54-40-07/2014 that was eventually withdrawn by the Defendant whereby in gist, the Defendant sought for a declaration.

[2.14] The Defendant filed an interlocutory application for a summary disposal of Magistrate Court's Suit pursuant to Order 14A that was dismissed by the learned Magistrate.



[2.15] The Defendant appealed to the High Court and the Defendant subsequently withdrew the Appeal with an order of costs being made against him.

[3] Having heard the appeal and after considering the Written cum Oral Submissions of the parties, I had dismissed the Defendant's appeal on 30 July 2015 with costs of RM4,000.00. Hence the appeal by the Defendant after having obtained leave of the Court of Appeal to appeal on 4 December 2015. The reasons for the decision are as follows.

Findings

[4] I am mindful of the applicable principles of law when dealing with appeals: (i) that the appellate court would be slow in disturbing findings of facts made by the trial judge who has heard and seen the witnesses and made his findings thereon unless there is a manifest error of law or fact (see *Bong Nyi Moi v. Narayanasamy & Anor* [1973] 1 MLRA 620; [1973] 1 MLJ 250 (FC) at 254H left column, *Heller Factoring (M) Sdn Bhd (Formerly Known As Matang Factoring Sdn Bhd v. Metalco Industries (M) Sdn Bhd* [1995] 1 MLRA 641; [1995] 2 MLJ 153; [1995] 3 CLJ 9; [1995] 2 AMR 1353 (CA) at 34f-g); (ii) that an appellate Court will be slow in disturbing a finding of fact recorded by a trial Court based on proper appreciation of evidence but would readily intervene in cases where there has been no or insufficient judicial appreciation of the evidence (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95; [2003] 2 MLJ 97; [2003] 2 CLJ 19; [2003] 2 AMR 357 (CA) at 37d-i after referring to 2 Indian Supreme Court cases, *State of Rajasthan v. Hanuman AIR* [2001] SC 282, 284 and *Tek Chand v. Dile Ram AIR* [2001] SC 905 at 916).

[5] There are altogether 5 grounds of appeal raised in the Memorandum of Appeal. However it seems to me based on the Defendant's Written Submission, the thrust of the Defendant's appeal is focused on the following 2 grounds of appeal namely that the learned Magistrate erred in law and in fact:

(i) "[D]alam menafsirkan maksud Klausa 3 di dalam Perjanjian Kontrak Perkhidmatan yang bertarikh 18 December 12 yang mana jelas menunjukkan Perayu tidak terikat kepada Klausa 3 tersebut kerana Klausa 3 itu terpakai setelah tamat program latihan."

(ii) "[K]erana memutuskan Klausa 7 Perjanjian Tersebut hendaklah dibaca bersama dengan Klausa 3".

Essentially the Defendant contends the learned Magistrate erred in her decision as she failed to interpret the Fixed Term Employment Contract properly.

[6] The Defendant argues as follows:

(a) the Plaintiff's pleaded case is the Defendant breached the Fixed



Term Employment Contract when he tendered his resignation;

(b) the Plaintiff's claim is for RM45,000.00 which is breach of clause 3 of the Fixed Term Employment contract;

(c) breach of clause 7 was not the Plaintiff's pleaded case;

(d) the learned Magistrate correctly held that under cl 7 the Defendant's notice of resignation was valid. However she erred when she went on to hold that the Defendant knew about cl 3, therefore the Defendant was bound to pay the sum referred to in cl 3 ie RM45,000.00;

(e) the learned Magistrate interprets the words "all expenses" in cl 7 as referring to RM45,000.00 in clause 3; this warrants appellate interference as she decided the case on a matter not pleaded by the Plaintiff;

(f) the learned Magistrate erred when she relied on clause 7 and misinterpreted clause 3;

(g) Clause 3 ought to be interpreted in this manner:

"Clause 3 refers to "Upon Completion of this Programme, Affin Bank reserves the right at its absolute discretion to offer you permanent employment and you will be bonded for a period of two (2) years (Bond), effective 1 January 2013 to 31 December 2014. If you fail to fulfill this condition, you shall then be required to pay Affin Bank an amount of RM45,000.00 being expenses/fee incurred.

.....

The operative words in Cl 3 whereby the Defendant will be bonded only kicks-in upon "completion of the programme" and "this programme" in Cl 3 refers to the one (01) year Management Training period (1 January 13 to 31 December 13). It is only "upon completion of this programme" which is 31 December 13 that the Plaintiff has the absolute discretion to offer a permanent employment up to 31 December 14".

(h) Clause 7 is the only relevant clause to the case in that:

"It says "Notice of termination shall be 24 hours by either party during the Affin Management Programme". This is the programme that runs from 1 January 13 to 31 December 13. The Defendant resigned on 12 July 13, during this programme".

(i) under cl 7 the Plaintiff must prove the expenses incurred and no



evidence was led on this;

(j) even if the Plaintiff had breached cl 3, the Plaintiff must still prove its loss: s 75 of the Contracts Act 1950 and *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 1 MLRA 188; [1995] 1 MLJ 817; [1995] 2 CLJ 374; [1995] 2 AMR 1097 for the proposition that the party who seeks damages must prove it and the Plaintiff cannot rely on the sum named in the Fixed Term Employment Contract as such sum is a penalty and not recoverable; and

(k) if there is ambiguity in the Fixed Term Employment Contract between cl 3 and 7, the contra proferentum rule applies and it is to be construed against the Plaintiff.

[7] With respect I find there is no merit in the aforesaid arguments of the Defendant. First, it is incorrect for the Defendant to say the learned Magistrate erred in her finding of the words "all expenses" as referring to the RM45,000.00 in cl 3 because it was never pleaded. On the contrary, the pleadings of the Respondent disclose:-

"5 Defendan walaubagaimanapun telah meletakkan jawatan pada 12 July 2013 melalui surat bertarikh 12 July 2013 dengan memberikan notis selama seminggu berkuatkuasa 12 July 2013 tanpa membuat apa-apa pampasan iaitu sebanyak RM45,000.00 sepertimana yang termaktub dalam Perjanjian tersebut."

(para 5 of the Statement of Claim)

It is important to note that immediately preceding para 5, the Respondent has in para 4 of the Statement of Claim pleaded the salient terms of the Fixed Term Employment Contract as follows:

"4 Antara lain terma-terma perjanjian tersebut adalah bahawa:-

4.1 Defendan bersetuju memulakan perkhidmatan beliau pada 1 January 2013 sebagai "Management Trainee" dalam Affin Management Programme (AMP) Bond sehingga 31 December 2014.

4.2 Defendan telah bersetuju bahawa beliau akan terikat (bonded) dengan Plaintiff selama 2 tahun bermula dari 1 January 2013 hingga 31 December 2014.

4.3 Defendan telah bersetuju bahawa sekiranya beliau ingin menamatkan perkhidmatan beliau dengan Plaintiff dalam tempoh 1 January 2013 hingga 31 December 2014, beliau akan membayar Plaintiff sebanyak RM45,000.00 sebagai pampasan".

(Emphases added)



Thereafter in response to para 5 of the Statement of Claim, the Defendant, amongst others, pleaded-

"Defendan menyatakan Defendan memang telah meletakkan jawatan pada 12 July 2013 melalui surat bertarikh 12 July 2013 dengan memberikan notis selama seminggu seperti yang tertakluk kepada Perjanjian Perkhidmatan Tetap bertarikh 18 December 2012 namun Defendan tidak bertanggung untuk membayar pampasan sebanyak RM45,000.00 kepada Plaintiff".

(para 3 of the Statement of Defence)

In response to para 3 of the Statement of Defence, the Plaintiff amongst others, pleaded:-

".... dan mengakui pengataan di dalamnya hanya setakat dimana Defendan meletak jawatan pada 12 Julai 2013 dengan memberi notis bertarikh 12 Julai 2013 seperti yang tertakluk dalam Perjanjian tersebut tetapi Defendan gagal membuat apa-apa pampasan seperti yang termaktub di dalam Perjanjian tersebut".

(para 3 of the Reply to Defence)

Hence from the aforesaid pleadings, it is clear that the Plaintiff's cause of action is the Defendant has breached the terms and conditions of the Fixed Term Employment Contract in that whilst the Defendant's resignation was in accordance with cl 7 but he failed to pay compensation of RM45,000.00 as stipulated in cl 3 of the Fixed Term Employment Contract (see para 4.3 of the Statement of Claim highlighted in para 7 above).

[8] Secondly, I am of the view that one cannot approach this case by merely interpreting the material clauses of the Fixed Term Employment Contract, cls 3 and 7 inclusive in a vacuum without deliberating on the evidence of the witnesses. Hence I find the learned Magistrate has approached the case correctly and clearly stated what the respective positions of the Plaintiff and Defendant were at paras 5 and 6 of Grounds of Decision pp 110-111 AR. She considered and weighed the evidence of the Plaintiff's witnesses at paras 7-12 of Grounds of Decision pp 111-113 AR. Thereafter having found that the Notice of Termination given by the Defendant was valid (para 15 of the Grounds of Decision at p 114 AR), the learned Magistrate considered the issue of *"Samada penamatan Defendan sebelum habis tempoh program/latihan tersebut adalah bertentangan dengan perjanjian tersebut menyebabkan Defendan bertanggung untuk membayar balik Plaintiff jumlah RM45,000 dan atau perbelanjaan lain yang dikeluarkan oleh Plaintiff. Persoalan ini membawa kepada isu kedua iaitu samada Defendan mempunyai pengetahuan tentang bayaran balik berjumlah RM45,000 tersebut sekiranya Defendan menamatkan perkhidmatan beliau ketika program tersebut masih berjalan."* The learned Magistrate answered the question in the affirmative by saying *"Ya, maka isu berkenaan pengetahuan*



Defendan perlu ditentukan." (para 16 of the Grounds of Decision p.115 AR).

[8.1] In determining whether the Defendant had the requisite knowledge that he was liable to pay compensation of RM45,000.00 if a Management Trainee leave prematurely before the AMP Bond period (in the Defendant's case, 2 years from 1 January 2013 till 31 December 2014), I find the learned Magistrate has carefully considered and weighed:-

(a) the evidence of SP1 (Head of Recruitment, Human Resource Department of Plaintiff) and SP2 (Head of Learning & Organisation Development) and the evidence of SD1 (the Defendant himself) as elaborated at paras 17 and 18 of her Grounds of Decision; and

(b) the supporting documentary evidence wherein the Defendant has signed the Fixed Term Employment Contract on 18 December 2012 (p.131 AR) and received the same on 19 December 2012 and also the '*borang senarai semak*' dated 1 January 2013 which clearly showed that the briefing on terms and conditions was made to the Defendant on 19 December 2012 (p 146 AR).

[8.2] I find the learned Magistrate has taken into account 2 other critical factors in arriving at her decision that the Defendant has the knowledge that he is required pay compensation of RM45,000. One matter is the learned Magistrate took into account the fact that the Defendant failed to cross-examine SP2 when she testified "*Bahawa Defendan telah juga diterangkan berkenaan efek dan kesan klausa 3 dan 7 berkenaan bayaran balik berjumlah RM45,000 tersebut apabila Defendan bertemu beliau selepas memberikan notis penamatan tersebut.*" and resting on the authority of *Wong Swee Chin v. Public Prosecutor* [1980] 1 MLRA 125; [1981] 1 MLJ 212 (FC) at 213D-E right column:-

"... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony",

the learned Magistrate made a correct finding "*Maka ianya dianggap terima oleh Defendan.*" In this regard, I noticed the Defendant appears to have abandoned this ground of appeal as the Defendant did not raise this issue any more in the Defendant's Written Submission dated 20 April 2015 and neither was it pursued in oral submission. To reiterate the learned Counsel for the Plaintiff was zeroing only on the interpretation of the Fixed Term Employment Contract, particularly, cls 3 and 7.

[8.3] The other factor is when the learned Magistrate assessed the evidence of SD1 at para 18 of the Grounds of Decision p.116 AR:-

"Sementara itu, keterangan SD1 yang mengakui bahawa terma-terma perjanjian tersebut telah diterangkan kepada beliau ketika sesi induksi kecuali klausa 3 sahaja adalah tidak munasabah. Saya berpendapat, adalah pelik sekiranya SP1 menerangkan klausa-klausa lain sahaja



tanpa klausa 3 sedangkan klausa 3 adalah antara terma utama perjanjian tersebut. Oleh yang demikian, saya bersetuju dengan saksi-saksi Plaintiff dan peguam Plaintiff bahawa Defendan mempunyai pengetahuan penuh tentang bayaran balik sebanyak RM45,000 tersebut dari awal lagi".

For the reasons given above in my judgment the learned Magistrate has not erred in her findings that the Defendant was fully aware as to the intention of the Plaintiff and the meaning to be accorded to the salient clauses there in and therefore there is no reason for the Court to disturb the findings of the learned Magistrate.

[8.4] Consequently it follows that there is no ambiguity between cls 3 and 7 of the Fixed Term Employment Contract as to warrant the Court to invoke the contra proferentum rule against the Plaintiff. In the circumstances it is my respectful view neither is it necessary for this Court to consider whether the Plaintiff must prove its loss or the question of cl 3 being a penalty clause as submitted by the Defendant.

Conclusion

[9] For all the foregoing reasons I find there are no merits in the grounds of appeal submitted by the Defendant which warrant this Court to interfere with the findings of the learned Magistrate. Accordingly I made the Order stated in para 3 above.

