Mak Chik Lun and Others v Loh Kim Her and Others and Another Action
[2003] SGHC 220

Case Number : Suit 203/2002/H, 249/2002/F

Decision Date : 25 September 2003

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : K Shanmugam SC, Christopher Anand Daniel and Esther Ling (Allen and Gledhill) for plaintiffs in Suit No 203 of 2002/H and plaintiff in Suit No 249 of 2002/F; Hri Kumar and Wilson Wong (Drew and Napier) for first and second defendants in Suit No 203 of 2002/H and first defendant in Suit No 249 of 2002/F; Low Woon Ming (W M Low and Partners) for third and fourth defendants in Suit No 203 of 2002/H and second and third defendants in Suit No 249 of 2002/F; Randhir Ram Chandra and Nicole Tan (Haridass Ho and Partners) for fourth defendant in Suit No 249 of 2002/F

Parties : Mak Chik Lun; Lo Pui Ling; Katell Investment Co Pte Ltd — Loh Kim Her; Goh Lan Kiaw; Harley Investments Pte Ltd; Ivory Investments Pte Ltd

Credit and Security – Money and moneylenders – Loans of money – Loans outside Singapore – Scope of Moneylenders Act (Cap 188, 1985 Rev Ed)

Statutory Interpretation – Construction of statute – Mischief – Moneylenders Act (Cap 188, 1985 Rev Ed)

Statutory Interpretation – Definitions – "Moneylender" – "Business of moneylending" -Whether overseas transactions relevant – Moneylenders Act (Cap 188, 1985 Rev Ed) ss 2, 3

1 The Plaintiffs in suit no. 203 of 2002 are suing the Defendants for breach of a Deed of Settlement dated 4 April 2001. The Defendants say the Deed of Settlement is unenforceable as the subject matter of the Deed of Settlement relates to a loan transaction made in December 1998 that contravenes the Moneylenders Act (Cap.188). It is alleged that the 1st Plaintiff, Mak Chik Lun ("Mak"), carries on business as a moneylender without holding a licence. Consequently, by virtue of s15 of the Act, no contract for the repayment of money lent by an unlicensed moneylender shall be enforceable.

2 The Defendants have filed several affidavit of evidence-in-chief to show that Mak is in the business of moneylending. In brief, they are in respect of loans purportedly made:

(a) on or about 25 January 1996 through Mak's Hong Kong company Tai Ping Yeung to Huaiji County, Guangdong Province a sum of HK $10 million;

(b) on or about 19 March 1996 through Mak's Company in China, Zhong Yue Resources (Heshan City) Limited Company to Marine Product Board of Heshan City a sum of 800,000 Renminbi;

(c) on or about 6 March 1998 by Mak to Loh Nee Peng a sum of 5 million Renminbi;

(d) in or about August 1999, Mak through his wife Lo Pui Ling, the 2nd Plaintiff, to Marubeni Auto (China & Asia) Ltd a sum of DM 250,000; and

(e) in or about November 1999, by Mak to the 1st Defendant, Loh Kim Her a sum of S$1.5 million.

3 On the 8th day of trial, an application was made by Counsel for the Plaintiffs, Mr. K. Shanmugam SC, to exclude the affidavits of Tam Wo Ping, Wu De Liang, Feng Gua Qi and Chen Gua Biao on the ground that they are not relevant as a matter of law and hence should not be admitted in evidence. The affidavits deal with three loans extended by Mak in China.

4 Mr. Shanmugam's contention is that the Moneylenders Act applies to moneylending activities in Singapore. When a Court is considering if a lender comes within the definition of "moneylender", and in showing that there was a system and continuity in the "carrying on the business of moneylending" only the alleged moneylending activities within Singapore should be taken into consideration. In addition, only transactions existing at the date of the transaction to be impugned could be looked at. In the context of the foreign loans, two were before and one came after the loan in these proceedings.

5 Mr. Shanmugma referred me to *Tozer Kemsley & Millbourn (A/Asia) Pty Ltd v Point* [1961] NSWR 466, *Walton v Regent Insurance Ltd* [1962] 79 WN 644 and *The Law of Money Lenders in Australia and New Zealand by Clifford L. Pannam* (1965) p45 to support his argument that evidence of transactions entered outside the jurisdiction should be disregarded. The rationale for this is founded on the presumption that statutes have no extraterritorial effect unless expressly provided by Parliament to have such a reach. See *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410; *Public Prosecutor v Pong Tek Yin* [1990] SLR 575 and *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579. The Court of Appeal in *Taw Cheng Kong* at 432 approved the general rule of construction referred to in the speech of Lord Russell CJ in *R v Jameson* [1896] 2QB 425 at 430 where his Lordship stated:

> "…One other general canon of construction is this – …an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."

6 As a general rule, a domestic legislation is to be interpreted as limited to the regulation for the activities (in this case moneylending activities) taking place within the jurisdiction. The Moneylenders Act falls into this category. The scheme of the Moneylenders Act is to regulate moneylending transactions in Singapore, the licensing of moneylenders and their activities as a licensed moneylender. The Act imposes criminal sanctions on those who carry on the business of moneylending without licence. Apart from a criminal sanctions, the law would not assist the unlicensed moneylender in the recovery of a loan made in contravention of the Act.

7 It is not disputed that the Act is concerned with moneylending activities in Singapore and that the residence of the moneylender is immaterial. See *Brooks Exim Pte Ltd v Bhagwandas* [1995] 2 SLR 13 at 19. However, Counsel for the Defendants, Mr. Hri Kumar, contends that s2 of the Act which defines "moneylender" is not restricted to a person whose business is moneylending in Singapore. If it were to be so restricted, the Act would say so. The focus is on the status of the person as a moneylender and not the nature of the transaction. In considering his status as a moneylender, his activities outside the jurisdiction are relevant. His patterns of lending and modus operandi are relevant to determining his status as a moneylender.

8 Mr. Kumar argues that the Australian cases are distinguishable and do not assist Mr. Shanmugam. They have nothing to do with foreign loans and there was no evidence of loans made outside the jurisdiction. He further contends that to determine if the exception in s2(c) of the Act is applicable, it is necessary to look at all the business activities of the lender to see if moneylending is ancillary to his whole business. And that would include his business outside the country. Hence, evidence of foreign loan transactions is relevant.

9 As for the relevance of loan transactions made before or after the loan in question, he referred me to *Chellappah v Official Assignee* [1970] 1 MLJ 220, a decision of Raja Azlan Shah J who held that the court is not prevented from taking into consideration loans made after the date of the relevant transaction in order to establish the required regularity, continuity and system in moneylending business.

10 It is quite clear that it is the business of moneylending and not the act of moneylending that the Act prohibits: *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] SLR 432 at 434. Neither should the focus be on the status of the individual concerned as argued for by Mr. Kumar. On his point that Parliament will say so if the intention is to restrict the meaning of "moneylender" to a person whose business is moneylending in Singapore, I was not referred to any particular rule of interpretation. Suffice it to say that there are accepted guides to legislative intention to find by implication the restriction. And there could be such a restriction having regard to the contextual sense of the definition of "moneylender" in s2 and the specific exceptions laid down. I need say no more since it is settled law that it is the business of moneylending that the Court is concerned with and not his status as a lender.

11 To prove that a person is in the business of moneylending, the easiest way is to show that the rebuttal presumption in s3 of the Act is applicable to the facts of the case. If the borrower can show that a person lends a sum of money in consideration of a larger sum being repaid, the person is presumed to be a moneylender. Once a prima facie presumption is raised, it is for the lender to rebut the presumption by showing that it does not apply. He has to bring himself within one of the exceptions in s2 or show that he is not a moneylender within the terms of the definition in s2. In rebutting the presumption, the claimant, for instance, has to show that there was neither system nor continuity in moneylending. The local test of whether there is a business of moneylending is whether there was a system and continuity in the transactions. If no system or continuity is displayed, the alternative test (the *Litchfield* test) of whether the alleged moneylender is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible is used. See *Ang Eng Thong v Lee Kiam Hong* (High Court, 1998, unreported); *Brooks Exim Pte Ltd v Bhagwandas* [1995] 2 SLR 13 where *Litchfield v Dreyfus* [1906] 1 KB 584 was followed.

12 In the case where the borrower is unable to raise the presumption in s3, the burden is then on him to prove the business of moneylending through the two tests mentioned.

13 The mischief the Act seeks to arrest is the business of moneylending in Singapore. It follows that in the context of the two tests mentioned, consideration must necessarily be given to factors pertaining to moneylending activities in Singapore. Therefore, evidence for example of regularity, continuity and system that go to the question of carrying on business of moneylender must as a matter of satisfying the legal burden be in respect of regularity, continuity and system of transactions that happened in Singapore. It seems to me that the affidavits of evidence-in-chief setting out the purported loans in China are not relevant in that they would not assist in either of the two tests mentioned. The point may also be illustrated thus. If a foreigner is in the business of moneylending outside Singapore and ventures to make even one loan in Singapore he may in a proper case be caught by the Act. To ascertain whether he has *extended* his moneylending business to Singapore, of relevance is evidence of moneylending activity in Singapore and his activities outside are irrelevant and disregarded. Factors to be taken into consideration could, to name a few, include setting up of operations in Singapore and spreading the word around through the network in Singapore that he is approachable for that purpose. As an aside, the Act may still apply where a loan was made abroad to disguise the lender's moneylending business in order to circumvent the operation of the Act.

14 On the point whether transactions after the date of transaction to be impugned could be looked at, the answer is in the affirmative so long as loans made before or after the date of the relevant transaction are connected to the lender's moneylending activities in Singapore and introduced in evidence in order to establish the required regularity, continuity and system in moneylending business. In this case, the three loans were foreign loans and had nothing to do with Singapore.

15 For all these reasons, I allowed the Plaintiffs' application to exclude the affidavits of evidence-in-chief of Tam Wo Ping, Wu De Liang, Feng Gua Qi and Chen Guo Biao. This ruling applies equally to the proceedings in Suit No. 249 of 2002.

16 The Defendants were not told until Tuesday 23 September 2003 that the affidavits of these four persons would be subject to a challenge of this kind. By then, the witnesses had travelled to Singapore. They have been waiting their turn to take the stand. In the circumstances, I ordered the wasted costs and expenses of these four witnesses to be borne by the Plaintiffs on an indemnity basis.

17 The Defendants have indicated that they intend to file an appeal against my decision and I have accordingly published my Grounds of Decision in anticipation of an expedited appeal to the Court of Appeal.