Pankaj s/o Dhirajlal v Donald McArthy Trading Pte Ltd and Others
[2006] SGHC 131

Case Number : Suit 221/2005

Decision Date : 26 July 2006

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Mahtani Bhagwandas and Letchamanan Devadason (Harpal Mahtani Partnership) for the plaintiff; P Jeya Putra and Wendy Leong (AsiaLegal LLC) for the defendants

Parties : Pankaj s/o Dhirajlal — Donald McArthy Trading Pte Ltd; Vinod Kumar Ramgopal Didwania; Nidhi Vinod Didwania

Credit and Security – Money and moneylenders – Illegal money-lending – Plaintiff making arrangement with own bankers to issue letters of credit to be used to pay for goods purchased by defendant – Defendant paying plaintiff commission and interest in addition to principal sum under letters of credit for provision of such service – Whether such arrangement amounting to moneylending – Whether plaintiff illegal moneylender – Whether agreement for such arrangement illegal and unenforceable – Section 2, 3 Moneylenders Act (Cap 188, 1985 Rev Ed)

26 July 2006 *Judgment reserved.*

Kan Ting Chiu J:

1 The parties in this case had an arrangement whereby the plaintiff would get his bankers to issue letters of credit which were used to pay for goods the first defendant purchased. When the letter of credit is issued and the goods are paid for, they would be taken by the first defendant. For the benefit of the service, the first defendant agreed to pay the plaintiff the principal sum of the letter of credit, a commission charge, and interest.

2 The plaintiff, Pankaj s/o Dhilrajlal, is the sole proprietor of a business known as Topbottom Impex. The first defendant is a limited company, Donald McArthy Trading Pte Ltd. The second and third defendants who are husband and wife are described by the plaintiff to be the controlling minds and wills of the first defendant. The plaintiff seeks to lift the corporate veil of the first defendant to make the second and third defendants liable for the debts the first defendant owes to him.

3 The arrangement was described in paras 6 and 7 of the statement of claim:

> 6. In or about 1998, the 2nd Defendant approached the Plaintiff for assistance to help him finance the purchase of metals from his overseas suppliers. The 2nd Defendant informed the Plaintiff that his own letter of credit facilities with his bankers were already fully utilized, but he needed additional funds to take advantage of business opportunities. The 2nd Defendant proposed to the Plaintiff an agreement whereby the Plaintiff was to open letters of credit for him in the name of the 1st Defendants [*sic*] or any of his nominated companies, in exchange for which the 2nd Defendants [*sic*] would reimburse the Plaintiffs [*sic*] all principal amounts used and interests charged by the banks, costs and disbursements charged by the bank, a 1.5% commission charge to the Plaintiffs [*sic*], as well as interest to compensate the Plaintiff for the loss of use of his funds. The 2nd Defendant proposed for convenience that the bank interest which was at the time between 10% and 10.5% per annum, and the interest payable to the

Plaintiff, would be calculated jointly and fixed at a flat rate of 12% per annum in total. The 2nd Defendant further proposed that if he or the 1st Defendants [*sic*] or any of his nominated company fail to make payments on time and this resulted in penalty interest by the bank to the Plaintiffs [*sic*], the Plaintiffs [*sic*] would be entitled to charge an additional 2% interest per annum to him and/or the 1st Defendant, as per the bank's method of computing interest.

7. As the Plaintiff had existing facilities with his bankers, the Plaintiff accepted the 2nd Defendant's proposal that the Plaintiff open Letters of Credit on his behalf to enable the 1st Defendants [*sic*] and/or other of his nominated companies to purchase metals or other goods from its suppliers, in consideration of the 1.5% commission and 12% per annum interest charge, and a full indemnity for, and prompt payment of the amounts under the letter of credit, bank costs and disbursements. The Plaintiff also accepted the 2nd Defendant's offer that if the payments became overdue and the bank imposed late payment penalty interest, the Plaintiff would be entitled to charge another 2% per annum in interest. These are the principal terms of the oral agreement (hereinafter "the Agreement") between the Plaintiff and the 2nd Defendant acting in his personal capacity and on behalf of the 1st Defendant, jointly.

4 The plaintiff quantified the total amount due as at 14 January 2005 as comprising US$361,459.66 as principal, and US$239,441 interest, and he claimed from the defendants those amounts, continuing contractual interest, and alternatively, damages.

5 The defendants did not deny that there was an agreement, but they claimed in their defence that it was made at the initiative of the plaintiff:

6. The Defendants say that the Plaintiff approached the 2nd Defendant to offer his credit facilities for the 2nd Defendant's companies' use in 1996 and in 1997. The Plaintiff informed the 2nd Defendant that he had obtained large credit lines which were over and above his business requirements and that in order to maintain his large credit lines, he was willing to open Letters of Credit ("LC") for use by any of the 2nd Defendant's companies for a commission. The 2nd Defendant did not accept any of the Plaintiff's offer in 1996 and in early 1997. Save as aforesaid, paragraph 6 of the Statement of Claim is denied

7. The Defendants further say that in spite of the 2nd Defendant's rejection of the Plaintiff's offers, the Plaintiff continued to make several calls to the 2nd Defendant to offer the use of his LC facilities. Sometime in mid 1997, the 2nd Defendant agreed to give the Plaintiff some business through one of the 2nd Defendant's companies, Donald & McArthy Pte Ltd, which was subsequently wound up n 2000. The terms of the oral agreement between the Plaintiff and the 2nd Defendant was that the Plaintiff would receive 1.5% commission of the total purchase value of goods bought by the 2nd Defendant's companies, with a 45-day interest-free credit period (hereinafter referred to as the "LC Agreement")

6 The defence pleaded was that the arrangement was terminated in October 2000 and all outstanding sums had been paid to the plaintiff, and that the plaintiff had applied rates of interest charges in the invoices in excess of the rates which were agreed to.

7 After filing that defence, the defendants changed solicitors and enlarged their defence. By an

amendment to the defence, it was pleaded that the agreement was unenforceable as it infringed the Moneylenders Act (Cap 188, 1985 Rev Ed) ("the Act"). The defendants pleaded that:

> 22A … even if the LC Agreement persisted beyond October 2000, which is denied, it is illegal and thus, unenforceable as it infringes [the Act].
>
> The Defendants aver that the Plaintiff had used the LCs as a cover for lending money to the 1st Defendants which was allegedly repayable with interest. By the Plaintiff's own admission in Paragraph 10 of the Statement of Claim, interest was to be charged at the rate of 12% per annum for on time payments and 14% per annum for late payments.
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> The Plaintiff also admitted in Paragraph 11 of the Statement of Claim that he had kept a general ledger in respect of the interest payments which was calculated as "per the banks method of computation". Clearly, the Plaintiff had treated himself like a bank and had intended to lend money which was to be repaid with interest.
>
> The fact that these interest payments were not indicated in the commercial invoices as stated in Paragraph 10 of the Statement of Claim, demonstrates that the LC transactions were carefully structured and deliberately disguised by the Plaintiff with a view to evading [the Act].
>
> The Defendants aver that there was a system and continuity in the Plaintiff's moneylending activities as evidenced by the high volume of LC transactions which had in fact been made from 1997 to 2002 … Since the Plaintiff is an unlicensed moneylender, his claims for outstanding sums due under the LC Agreement against the Defendants, which includes interest, would be unenforceable.

8 The plaintiff responded in his reply that:

> 9. The Plaintiff denies that the transactions were structured or disguised to evade [the Act]. The Plaintiff avers that the transactions did not fall within [the Act] but was a pure business transaction for the use of the Plaintiffs' [*sic*] banking facilities, for good consideration.

9 After pleadings closed, the defendants applied for and obtained an order under O 33, rr 2 and 3(2) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) for the trial of the following preliminary issues:

> (a) Whether the Plaintiff is a moneylender within [the Act]?
>
> (b) If the issue (a) above is answered in the affirmative, whether the Plaintiff is an unlicensed moneylender?
>
> (c) If the issues (a) and (b) above are both answered in the affirmative, whether the Agreement (as pleaded by the Plaintiff in the Statement of Claim) and the transactions made thereunder and pursuant to which the Plaintiff is claiming for sums allegedly due from the Defendants (including interest payments), are in fact loans made by an unlicensed moneylender (the Plaintiff), and are illegal and thus unenforceable and/or void as they infringe [the Act], and affords the Defendants a complete defence to the Plaintiff's alleged claims under the Agreement (which are in fact claims for repayments of loans made by the Plaintiffs).

10 Subsequent to that, directions were given for the parties to exchange affidavits of evidence-in-chief. The plaintiff filed one affidavit, and the second defendant filed one on behalf of the defendants. In his affidavit, the plaintiff deposed that:

7. Mr Vinod Kumar Ramgopal Didwania ("Vinod") [the second defendant] was a casual friend of my family. I have been acquainted with him for over twenty years since we first met each other at community dinners and functions. In the early 1990s, through his company Donald Mcarthy Pte Ltd (D&M) he had asked me to quote for commodities and we had an informal, on and off, business relationship. This acquaintanceship and business relationship became a friendship in or around 1995 or 1996 through more frequent social meetings. We visited each other's homes and our wives got along well with each other.

8. … Vinod approached me with a business proposal. As stated I already had an informal business relationship with him through D&M on an on-off basis at this time and he did not give me any reason to doubt his credibility at the time.

9. He said he was in need of assistance as he was unable to capitalize on opportunities for his company due to the fact that his LC facilities were already fully utilized. At the time I did not know that it was untrue. I believe now that his companies did not have facilities as he would not have passed a credit risk assessment by the banks due to his previous conviction in court and disqualification.

10. Vinod proposed that I allow him to use my banking facilities to open LCs for him. This was to enable him to purchase goods from overseas sellers. He would reimburse me the amounts under the LCs promptly together with all interest, fees and late payment penalties which the bank charged me. In return for the use of my facilities he proposed paying me a 1.5% commission on the LC sum, and a small uplift over the banks' trust receipt interest.

11. At the time the interest rate charged by the banks for LC trust receipt facilities was approximately 9%-10% per annum, for accounts paid on due dates and another 2% or so over and above the stipulated rate for overdue accounts.

12. For convenience Vinod proposed to compensate me at a fixed flat 12% per annum interest rate for on-time payments and 14% per annum for overdue payments as per the bank method of interest calculation to me.

…

16. … I agreed to the proposal. I made it clear to him that I was doing this only for him because he appeared to be a sincere and trustworthy person who needed assistance for his company to grow. He was a friend and his wife and my wife were friends. He was grateful and assured me that he would make payment to the last cent.

17. Shortly thereafter in 1997 he began faxing and e-mailing to me, initially using D&M's letterhead and subsequently the 1st Defendants [*sic*] letterhead, the shipment and other details of the contracts which he required me to open LCs for. They were for a variety of goods in which he was trading. …

18. I would then arrange with my bankers to open the necessary L/Cs. My bankers issued the LCs under my account.

19. As a term of the L/C, the beneficiary seller would have to fax the required documents (which include the commercial invoice) to Topbottom within 5 days after shipment. Once this is received my staff or I would prepare my own invoice to the 1st Defendant and to certain other companies which Vinod instructed me to issue to, for payment of the LC principal amount, bank's

usual postage and foreign currency handling charges (which I marked as Bank's commission in lieu) and my own 1.5% commission.

11 The second defendant described the events differently. He deposed that:

> 6. I recall that sometime in 1996 and early 1997, the Plaintiff approached me and offered his credit facilities for the use of my companies (including subsequently, the 1st Defendants when it was incorporated in 1997). The Plaintiff was an acquaintance of mine and I was introduced to him by a mutual friend sometime in 1986. The Plaintiff informed me that he had obtained large credit lines which were over and above his business requirements and that in order for him to maintain these large credit lines, he was willing to open Letters of Credit ("LC") for use by any of my companies, for a commission or fee. I had no use of such facilities then and I declined the Plaintiff's offers in 1996 and in early 1997.
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> 7. In spite of my rejection of the Plaintiff's offers, the Plaintiff continued to call me on several occasions thereafter, to offer the use of his LC facilities. The Plaintiff assured me that there would be no problems in using his LC facilities and that many other persons and companies were already using his LC facilities and credit lines without any problems, and that it would not hurt for me and my companies to have extra credit facilities.
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> 8. Sometime in mid 1997, I agreed to give the Plaintiff some business through one of my companies, Donald & McArthy Pte Ltd, which was subsequently wound up in 2000. The terms of the oral agreement between the Plaintiff and myself was that the Plaintiff would receive 1.5% commission of the total purchase value of goods bought by my companies (including the bank charges and any other charges), with a 45-day interest-free credit period (hereinafter referred to as the "LC Agreement"). As stated by the Plaintiff in his Statement of Claim (paragraph 10), interest was to be charged at a rate of 12% per annum for on-time payments, and 14% for late payments.
>
> 9. Pursuant to the said LC Agreement referred to in paragraph 7 above, the Plaintiff provided Donald & McArthy Pte Ltd with various LCs from mid-1998 onwards. …
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> …
>
> 15. I believe that the undisputed facts show that the Plaintiff had used the LCs as a cover for lending money to the 1st Defendants which was repayable with interest (that is, a higher amount than the principle amount lent was repayable).
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> 16. By the Plaintiff's own admission in Paragraph 10 of the Statement of Claim, in addition to a 1.5% "commission charge", the Plaintiff charged the 1st Defendants interest at the rate of 12% per annum for on time payments and 14% per annum for late payments. The Plaintiff had also admitted and confirmed … that the bank interest at the material time was only between 10% to 10.5% per annum. Yet, the Plaintiff, in the course of his business, sought to make a further profit of some 1.5% to 2% from the LC Agreement (for on-time payments) from the 1st Defendants (in addition to a 1.5% "commission charge"), when it was the Plaintiff who had offered the use of his credit lines so that he could maintain these lines (which were over and above his business requirements).

12 The action came on for hearing before me. It was a short hearing. It went on in the morning, when the plaintiff was cross-examined by counsel for the defendants. When the hearing was due to

resume in the afternoon, counsel asked for time for them to reach agreement on certain matters. Counsel subsequently reported that they had agreed that the ongoing cross-examination of the plaintiff would not continue, and the second defendant would not be cross-examined. Instead, the parties would proceed to make their written submissions on the basis of the affidavits of evidence-in-chief and the cross-examination that had taken place. On that note, the hearing in court came to an end, and counsel went on to file their respective submissions and submissions in reply.

13 On reflection, I have reservations whether it was helpful to have the cross-examination of the witnesses shortened or dispensed with when there was a dispute over a basic fact as to which party had proposed the course of dealings entered into. It would have been difficult to decide which version is more credible as neither version was supported by documentary evidence or corroborated by evidence from any other witness, and cross-examination would have assisted the process.

14 When they made their submissions, the parties took different approaches on the facts. The defendants framed their closing submissions on the basis of undisputed and admitted facts, *inter alia*:

> (a) There were numerous transactions under the L/C Agreement (as defined in paragraph 7 of the Amended Defence) between the Plaintiffs and the 1st Defendants from mid-1998 to October 2000 (and further transactions, albeit disputed, after October 2000);
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> (b) The Plaintiff made similar "L/C arrangements" with at leasttwo (2) other parties;
>
> (c) It was a term of the L/C Agreement that the 1st Defendants would repay the Plaintiffs a larger amount than the actual L/C amount (and actual bank charges and costs), including:—
>
> > (i) a 1.5% "commission" on the actual drawdown or principal amount plus the actual bank charges costs and disbursements, and
> >
> > (ii) "interest" at 12% per annum for**on-time payments**, or 14% per annum for late payments.
>
> …
>
> (g) The Plaintiff is not a licensed moneylender under the Moneylenders' Act.

without going into the disputed facts. The plaintiff, on the other hand, made his submissions on his version of the disputed facts.

15 After reading the submissions, I find that it is possible and preferable in the circumstances to deal with the preliminary issues against the undisputed facts and the admissions made by the parties.

16 The general law on moneylending was discussed recently in *City Hardware Pte Ltd v Kenrich Electronics Pte Ltd* [2005] 1 SLR 733 ("*City Hardware*") by V K Rajah J. With that judgment as a backdrop, I will deal directly with the three issues.

Whether the plaintiff is a moneylender

17 This is the main issue. But before attempting to answer the question, a basic question must be addressed – was the plaintiff lending money? In a typical case of moneylending, *A*, a borrower gets a loan of money from *B*, a lender. *A* may receive the money in cash or he may receive a cheque for that amount, but it does not matter as that is readily convertible into cash. The purpose for the loan,

say to pay a hospital bill, may be made known to *B*, , or it may not. Again, it does not matter if the purpose is disclosed or approved as money is undoubtedly lent in either event. V K Rajah J stated in *City Hardware* (at [24]) that a loan need not be given directly to the borrower, and that it suffices that the borrower gives directions on the disbursement of the money. That must be so, for in the example I use, it cannot make a difference if *A* had requested *B* to send a cheque directly to the hospital.

18 The illegal moneylending defence has been raised against a variety of underlying transactions in which one party offers financial assistance to another party. The lending of money is a common form of financial assistance, but it is by no means the only form of financial assistance, and not all forms of financial assistance involves the lending of money.

19 To cite two leading cases as examples, in *Litchfield v Dreyfus* [1906] 1 KB 584, Farwell J held that financing by taking and discounting bills is not moneylending, and in *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275, Branson J held that the purchase of book debts is not moneylending.

20 There is a decision which is more directly relevant to the present case. This is *Nissho Iwai International (Singapore) Pte Ltd v Kohinoor Impex Pte Ltd* [1995] 3 SLR 268 ("*Nissho*"). In this case, the plaintiff agreed with the first defendant to arrange for the plaintiff's bankers to issue letters of credit and performance bonds for the first defendant to enable the first defendant to purchase timber and the first defendant agreed to pay the plaintiff a commission, interest and the bank charges and the debits made against the plaintiff's accounts with its bankers for the letters of credit and performance bonds issued.

21 This is essentially the same arrangement between the present plaintiff and the first defendant. Some businessmen who do not have their own funds or banking facilities to pay for their purchases to rely on such arrangements to finance the purchases, and businessmen with ready facilities offer the service for a profit.

22 Is this moneylending? As far as I know, the authorities administering the Act have not prosecuted any such operators for any offence under the Act. In *Nissho*, Lim Teong Qwee JC stated at 274, [18]:

> This is a practice well known to those concerned with the import and export trade and I think not a few importers who use the available letter of credit lines of banking facilities of their business associates from time to time would be surprised if they were told that they were borrowing money by doing that and that their business associates would require a licence under the Moneylenders Act … In my judgment there is no loan here at all … [Such] transactions are not loans in nature or in form.

23 I agree with his conclusion. Like the purchase of book debts and the discounting of bills, the provision of letters of credit facilities is distinct from moneylending. It is a form of financial assistance that one party offers to another, usually for a profit, but unless we take all forms of financial assistance for a profit as moneylending, the arrangement between the plaintiff and the first defendant is not moneylending because no money is lent.

24 Upon the finding that the plaintiff is not a moneylender, there is no strict necessity to determine the second preliminary issue. I will, however, deal with it just in case I am wrong that there was no moneylending.

Whether the plaintiff is an unlicensed moneylender

25 Not everyone who carries on the business of moneylending is a moneylender for the purpose of the Act.

26 "Moneylender" is defined in s 2 of the Act thus:

> "moneylender" includes every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include —
>
> (a) any body corporate, incorporated or empowered by a special Act of Parliament or by any other Act to lend money in accordance with that Act;
>
> (b) any society registered under the Cooperative Societies Act;
>
> (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money;
>
> (d) any pawnbroker licensed under the provisions of any written law in force in Singapore relating to the licensing of pawnbrokers;
>
> (e) any finance company licensed under the Finance Companies Act; and
>
> (f) any person licensed under the Securities and Futures Act 2001.

27 The Act assists the borrower on this issue. Section 3 provides that any person who lends a sum of money in consideration of a larger sum being repaid is presumed, until the contrary is proved, to be a moneylender.

28 As it was not disputed that the first defendant had to pay the plaintiff sums higher than the amounts of the letters of credit, the plaintiff comes within the presumption.

29 When a person comes within the presumption, he has to show that he is not in the business of moneylending in order to rebut the presumption. One way for that to be done is to show that loans were not offered to anyone who wants to borrow. This form of rebuttal is related to the thinking reflected in Farwell J's judgment in *Litchfield v Dreyfus* (*supra* [19]), where he stated at 589:

> Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible.

30 The presumption may also be rebutted by showing that there is no system and continuity in the lending, as indicated in *Subramaniam Dhanapakiam v Ghaanthimathi* [1991] SLR 432, where Chan Sek Keong J (as he then was) held at 434, [10]:

> The settled law is that what is prohibited by the Act was not moneylending but the business of moneylending. This is a question of fact. It is also settled law that the giving of a number of loans to friends does not constitute the business of moneylending, unless there is a system and continuity about the transactions.

31 While one can readily understand that someone who is prepared to lend to everyone is in the business of moneylending, one may ask whether that is a requisite element of the business of moneylending. A person may not be prepared to lend to everyone, and may be selective of his clients, and be content with lending on a commercial basis to a few or even only one regular borrower whom he trusts. This person is nevertheless carrying on moneylending as a business.

32 On the facts of this case, the plaintiff was dealing with the first defendant from mid 1998 to October 2000 at the earliest (the plaintiff's case was that the transactions carried on till February 2002, but the defendants denied this).

33 The plaintiff pleaded in his reply that the transactions with the first defendant were business transactions. In his affidavit of evidence-in-chief he stated that he issued invoices and maintained an accounting ledger. The invoices would be for the principal amounts of the letters of credit issued, the 1.5% commission and the bank commission. The interest would not be payable until the principal sum was paid, and the period and the applicable rate of the interest are ascertained. He repeated that the transactions were "pure business transactions where an agreed fee is charged for the risk and exposure I undertook with my bank to allow [the second defendant] to use my credit facilities for [his] business". On the evidence there was system and continuity in the transactions.

34 However, not everyone who carries on the business of moneylending is a moneylender for the purposes of the Act. There are five classes which are expressly stated in the definition of "moneylender" to be excluded, the third of which has to be considered in this case:

> (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

35 If loans were made under the arrangement, were they made in the course of and for the purpose of carrying on the plaintiff's business?

36 The plaintiff had pleaded that Topbottom Impex was dealing primarily in the import and export of textiles, and that the first defendant was a trader and manufacturer of basic precious and non-ferrous metal.

37 As it was not the plaintiff's case that he made the arrangement with the first defendant in the course of and for the purpose of Topbottom Impex's business, that exception does not apply.

38 Consequently, if the arrangement constituted moneylending, the plaintiff was an unlicensed moneylender.

Whether the defendants have a complete defence

39 In the manner the issue was framed, there was no uncertainty over the third issue. If the plaintiff was a moneylender who did not hold a moneylending licence, then s 15 of the Act which provides that "[n]o contract for the repayment of money lent by an unlicensed moneylender shall be enforceable" must apply; and the defendants would have a defence.

40 However, as I have found that the plaintiff was not engaged in moneylending and was not an unlicensed moneylender, this issue must be answered in the negative.