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51/1961

IN THE PRIVY COUNCIL

No. 53 of 1960

63586

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

B E T W E E N:

CHOW YOONG HONG (Plaintiff) Appellant

- and -

CHOONG FAH RUBBER MANUFACTORY (Defendants) Respondents

C A S E FOR THE RESPONDENTS

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1. This is an Appeal from a Judgment of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur. The Court consisted of Hill Ag C.J., Good and Rigby J.J. The principal Judgment was delivered by Hill Ag C.J. on 1st August 1959 who allowed with costs the appeal by the Defendants from the decision of the Supreme Court of the Federation of Malaya in the High Court at Kuala Lumpur of Ong J. of 31st March 1959. Good and Rigby J.J. delivered concurring judgments on 3rd August 1959 and 22nd August 1959 respectively. p.70 l.34 p.74 p.75

2. By a specially indorsed Writ, dated 11th April 1958, the Plaintiff sued the Defendants in respect of 16 dishonoured cheques.

3. On 4th September 1958 the Plaintiff furnished Further and Better Particulars of his Statement of Claim and in respect of eight of the cheques he averred that they had been given by the Defendants in exchange for cheques given to them by the Plaintiff. As regards the remaining eight cheques the Plaintiff averred that each had been given by the Defendants for goods sold and delivered to them by the Plaintiff. pp.5-6

4. The Plaintiff in his Statement of Claim also alleged that the Defendants had fully admitted p.3 l.11

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liability by virtue of a letter written by their solicitor.

5. By their Defence dated 25th September 1958, the Defendants admitted having a series of money-lending transactions with the Plaintiff over a period of three years but denied particulars of the cheques as to date and amount as pleaded. The Defendants also denied that they had given any cheques to the Plaintiff in respect of goods sold and delivered.

6. Further, the Defendants alleged that the Plaintiff was an unlicensed moneylender and that the claim was unenforceable by virtue of the provisions of Section 15 of the Moneylenders Ordinance 1951. The said Section reads as follows:-

> "No contract for the repayment of money lent after the coming into force of this Ordinance by an unlicensed moneylender shall be enforceable".

7. Alternatively the Defendants alleged that if the Plaintiff was held to be a licensed moneylender the claim was unenforceable by virtue of section 16 of the Moneylenders Ordinance 1951 which provides that a written note or memorandum of any contract entered into by a moneylender is to be given to the borrower.

8. The hearing commenced on 13th January 1959 when after argument the learned trial judge held
p.7 l.32 that the "onus rests on Defendants". Accordingly the Managing Partner of the Defendant Company, one
p.8 Lee Chin Kong gave evidence. He deposed that the Defendants had dealings with the Plaintiff since 1954. He explained the cheque transactions in the following terms:-

p.8 l.16-22 > "Our factory sometimes received post-dated cheques from customers and when we received cash, we would take the cheques to Plaintiff and ask him for cash. He deducted a small sum for interest. Interest was 8 cents per $100 per day".

9. The learned trial Judge summarized the remainder of the evidence of Lee Chin Kong as follows:-

p.56 l.11-21 > "This witness also spoke of certain transactions which to my mind were of an anomalous or abnormal character: 'Plaintiff would use my

firm's name to order goods from Singapore and when the goods were delivered at my factory, Plaintiff would pay first for the goods and we would repay the Plaintiff.' This was said a propus of purchases of goods by Defendants from the Plaintiff, which this witness said had taken place 2 or 3 times only since 1954, the value of each purchase being about $100 only." Record

10. The principal witness for the Defendants was Chow Sek Kim who was the cashier of the Defendant Company which position he had held since 1954. He stated he had had many cheque transactions with the Plaintiff and that he recorded the interest charged in note books which he produced. He contended that the entries he made were transferred into the account books of the Company which had been destroyed by fire. He gave explanations of each cheque relating to the proceedings but was unable to show from his notebooks any entries relating to payment of interest. p.20-31

11. The Defendants also called Wey Yu Hsin, an accountant in the Bank of China, Kuala Lumpur who produced 9 cheques drawn by the Defendants; B. Meenachisundram a civil clerk in the Selangor Registry, Supreme Court who produced the files in six civil suits: further, the Defendants called Chow Fan Seong and Hew Len Fah who were both textile dealers and they stated that they had had cheque transactions with the Plaintiff upon which they were charged interest. Both these witnesses produced documents in support of their oral evidence. p.19 p.31 p.32 p.35

12. At the conclusion of the evidence of the Defendants' witnesses the Plaintiff gave evidence. He admitted that he exchanged cheques with the Defendants through the cashier Chow Sek Kim. He stated the Defendants' cheques would be post-dated and the Defendants would have advantage of having ready cash for use. The Plaintiff denied that he charged any interest or that any interest was paid to him. The Plaintiff also gave evidence regarding the cheques given by the Defendants for goods sold and delivered and produced his receipt book, "Local and East Coast A/C Book" and Cash Book. p.40 p.40 l.25-26 p.41

13. In cross-examination the Plaintiff admitted that as regards the cheques alleged to be in respect of goods sold and delivered he had "filed suits against other people for the identical amount as in those cheques". When referred to these other suits p.46 l.23 et seq.

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the Plaintiff described the similarity of the amounts claimed with the dishonoured cheques of the Defendants as "coincidence". No other witness was called to support the Plaintiff's case.

p.55 l.42 14. The learned trial judge after recalling that he held "that on the pleadings the onus rested on the Defendants", reviewed the evidence called by both sides. He referred to the Moneylenders Ordinance 1951 and then stated as follows :-

p.60 l.2-20 "But before proceeding to deal with this question, there are certain preliminary observations I wish to make. In the first place, there is no question that Defendants had received from the Plaintiff the moneys which is now claimed, and that they are now refusing repayment merely on the ground of his failure to comply with the technical requirements of the Ordinance. In the second place I am not impressed by the demeanour of the Plaintiff nor that of the persons in charge of the Defendants' business. I have no doubt in my mind that both the manager and the cashier of the Defendant firmhad no compunction about departing from the truth whenever it suited them to do so. As to the Plaintiff, I am unable to accept his evidence as to the alleged sales in the case of cheques Ex. D11-D18. I do not believe in coincidences occurring quite fortuitously eight times in less than a month".

p.60 l.20 15. The learned trial judge expressly refrained from commenting upon the evidence of Chow Fan Seong in view of other litigation in which he was involved and he appeared to discount the evidence of Hew Len Fah on the ground of estoppel.

p.60 l.48 16. The learned trial judge summarised the onus he cast upon the Defendants as follows:-

"Since the Plaintiff has denied receipt of any interest from Defendants, it is for them to prove (in the sense that the word bears in Section 3 of the Evidence Ordinance) that Plaintiff was, in the course of the cheque transactions, getting back more money than he laid out".

The relevant part of Section 3 of the Evidence Ordinance of the Federation of Malaya No.11 of 1950 reads:-

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"A fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".

20. The order of the High Court drawn up on 31st March 1959 awarded the Plaintiff "interest at the rate of 6% per annum from the date of judgment until realisation". p.66 l.19

21. On 8th December 1959 the Defendants filed a Memorandum of Appeal in the Court of Appeal at Kuala Lumpur containing a number of complaints of misdirection on the evidence and also included:- p.67

"3. The learned Judge misdirected himself as to the burden of proof and should have directed himself as follows:- p.68 l.41

(1) That the burden of proof that the Plaintiff was a moneylender rested on the Defendants.

(2) That after the Defendants had adduced evidence which established a prima facie case the burden of proof shifted to the Plaintiff.

(3) That the presumption under Section 3 of the Moneylenders Ordinance applied.

(4) That the burden of proving that the cheques D11 - D18 were given by the Defendants to the Plaintiff in payment of goods sold and delivered was on the Plaintiff.

(5) That Section 3 of the Evidence Ordinance applied only when both parties had adduced evidence.

"5. The learned Judge after considering the evidence adduced by the Defendant should have held that a prima facie case had been established". p.69 l.38

22. In the course of the principal judgment of the Court of Appeal, Hill Ag.C.J. stated:-

"Very properly in my view the Appellants were put to the proof of their assertion and commenced the proceedings before the learned trial Judge. p.71 l.13

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" At the conclusion of the Appellant's case the Respondent gave affirmed evidence. No submission was made that the Appellants had not made out a prima facie case and that therefore no onus was on the Respondents to prove that he had not acted as a moneylender and so rebut the presumption in Section 3 of the Ordinance.

It does not appear from the record that at this stage any test was applied to the Appellant's case and a decision arrived at as to whether they had made out a prima facie or any kind of case for the Respondents to answer".

23. The learned judge recalled that the learned trial judge did not believe the evidence on either side and quoted the relevant passages set out in paragraphs 14 & 17 above. The learned judge then asked what were the conclusions at which the learned trial judge arrived and referred to the fiscal matters mentioned in paragraph 18 above about which he observed:-

p.72 l.47 to p.73 l.8.

"It is quite possible that these conclusions are correct and based on the learned trial Judge's wide knowledge of local business affairs, but neither in the evidence nor in the pleadings can I find anything to support them, and I am compelled to regard them as mere suppositions. I am full of admiration for the learned Judge's ingenuity and penetration, but I must disagree, however regretfully, with findings of fact that are not based on the evidence".

24. The learned judge then dealt with the extent of the onus that had been placed upon the Defendants and stated that he formed the view -

"... that the Appellants had made out, not necessarily a case proved in accordance with Section 3 of the Evidence Ordinance, but a prima facie case in respect of the cheques sued on by the Respondent".

"The Respondent was not believed and his case in answer to that prima facie case was rejected in toto by the learned trial Judge.

It follows therefore, if I am correct in my view of the Appellant's case, that the legal position was that the Respondent had not discharged the onus placed on him by Section 3 of

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"the Moneylenders Ordinance and was accordingly not entitled to recover.

I find myself entirely in agreement with all the grounds set out in the memorandum of appeal".

25. Following the two concurring judgments referred to in paragraph 1 above the Court of Appeal thus allowed the Appeal with costs.

26. On 18th April 1960 the Plaintiff upon Motion obtained an Order from the Court of Appeal granting Final Leave to Appeal to Her Majesty in Council.

27. The Respondents respectfully submit that the Judgment of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur was right and ought to be affirmed and this appeal ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the Court of Appeal was correct in holding that the onus of proof which had been cast upon the Defendants was to establish a prima facie case in respect of the cheques sued on by the Plaintiff as opposed to making out a case proved in accordance with Section 3 of the Evidence Ordinance 1950.

2. BECAUSE the Court of Appeal was correct in holding that the Defendants had discharged the onus of proof that was properly upon them and was further correct in leaving undisturbed the finding of the learned trial judge in wholly rejecting the case put forward by the Plaintiff.

3. BECAUSE the Court of Appeal was correct in holding that the Plaintiff had not discharged the onus placed upon him by Section 3 of the Moneylenders Ordinance 1951 and that accordingly he was not entitled to recover.

4. BECAUSE the Court of Appeal was correct in refusing to follow and rely upon the conclusions of the learned trial judge as to the reasons for the transactions between the parties because such conclusions were not supported by any evidence adduced at the hearing of the action.

5. BECAUSE the judgment of Ong J. was wrong.

6. BECAUSE the reasons given in the principal judgment of the Court of Appeal were right.

E.F.N. GRATIAEN.

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Appellant

- and -

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C A S E

FOR THE RESPONDENTS

T.L. WILSON & CO.,
6, Westminster Palace Garden
London, S.W.1.

Solicitors for the Respondents.