Privy Council Appeal No. 76 of 1938

S.R.M.S. Chethambaram Chettiar - - - - *Appellant*

v.

Loo Thon Poo - - - - - - - - *Respondent*

S.M.S. Sinniah Chettiar - - - - - - *Appellant*

v.

Puan Ying - - - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE COURT OF APPEAL AT JOHORE BAHRU

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER, 1939

Present at the Hearing:
LORD THANKERTON
LORD FAIRFIELD
LORD SALVESEN

[*Delivered by* LORD FAIRFIELD]

This is a consolidated appeal from the decision of the Court of Appeal at Johore Bahru in the State of Johore reversing the decision of the Trial Judge, Mr. Justice Mills.

It may be convenient to say at once that their Lordships are satisfied that the judgment of the Trial Judge was wrong, that its reversal by the Court of Appeal was right and ought to be affirmed, except in one respect which will be dealt with later in this judgment.

It will save their Lordships the trouble of stating the names of appellants and respondents, where they differ, if they refer to the appellants collectively as the moneylenders and the respondents as the borrowers.

By originating summonses dated 23rd November, 1936, the moneylenders made application to the Court of the Judge at Johore Bahru for an order for the borrowers to show cause why the several rubber estates which had been charged to the moneylenders by certain instruments of charge should not be sold at public auction, subject to the terms stated in each summons.

The borrowers by their affidavit in answer asked the Court to say that the several transactions to which the originating summonses related were usurious and unfair, and that the interest charged was excessive; they also complained that compound interest was charged although there was ample security and they asked for an order that the transactions should be re-opened under the Usurious Loans Enactment.

The borrowers also complained that their signatures to the charges were obtained by undue influence. As this claim was abandoned when the case came before the Court of Appeal it is unnecessary for their Lordships to say anything about it. The loans and charges with which the present appeal is concerned are identified in the evidence by the letters (*e*), (*n*) and (*r*). The borrowers also appealed with regard to loans identified by letters (*o*), (*p*) and (*q*). It was agreed that the loans identified by the letters (*o*), (*p*) and (*q*) should stand or fall by the decision in this appeal with reference to the transactions identified by the letters (*e*), (*n*) and (*r*).

By the Usurious Loans Statute in force at the date of each of the impeached transactions it was provided as follows:—

> "(1) Where, in any proceeding to which this Enactment applies, whether ex parte or otherwise, the Court has reason to believe (*a*) that the interest is excessive and (*b*) that the transaction was between the parties thereto substantially unfair, the Court may exercise all or any of the following powers:—
>
> (1) reopen the transactions, take an account between the parties and relieve the debtor of all liability in respect of excessive interest.
>
> (2) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account already taken between them, and relieve the debtor of all liability in respect of any excessive interest and if anything has been paid or allowed to account in respect of such liability, order the creditor to repay any sum which it considers to be repayable."

In all the transactions of loan and charge which fall to be considered in the present appeal the interest charged was 24 per cent. Such interest charged at that rate was on each transaction capitalised and made payable by monthly instalments.

The only evidence before the Trial Judge which affects the question whether 24 per cent. was or was not excessive and unfair as between the parties consisted of (1) the affidavit of Loo Thon Poo, one of the borrowers, (2) the affidavit of Vaithyalingham, the valuer, which was not contradicted by any affidavit on the part of the moneylenders, and (3) the affidavit of Cheong Hock Chye which also was unchallenged by any affidavit in opposition. In the last-mentioned affidavit it was stated by the deponent that in the case of trust securities where a loan is not permissible if it exceeds two-thirds of the value of the property charged as at the date of the loan, the rate of interest charged varied from 6 to 9 per cent. simple interest, but was never more

than 9 per cent. In the case of other securities it is stated in this affidavit that interest charged had been a little more but not very much more than 9 per cent., both in Singapore and the State of Johore. The facts stated in this affidavit were not challenged by any affidavit in opposition filed by or in behalf of the moneylenders. If this evidence be accepted the inference is plain that where the security is not a trust security the interest usually charged on a fully secured loan in the State of Johore had only been a little in excess of 9 per cent. All the loans and charges with which this appeal is concerned, namely, (*e*), (*n*) and (*r*), were amply secured by charges on rubber estates which had been well looked after and kept in good order.

In their Lordships' opinion the Trial Judge was wrong in concluding that the charge of 24 per cent. interest was not unreasonable and excessive and was not unfair as between the parties. They agree with the Court of Appeal that his decision in this respect was wrong and that the Court of Appeal was right in reversing it. Their Lordships have come to this conclusion for the following reasons:—

(1) The Trial Judge was wrong in treating the reported decisions of the Courts of Johore and India as evidence of the facts and inferences of fact stated in these reports.

(2) The learned Judge failed to give effect to the unchallenged evidence of Cheong Hock Chye as regards the rate of interest usually charged in the State of Johore.

(3) The learned Judge failed to attach sufficient weight to the consideration that in all cases the loans were amply secured.

(4) In considering whether the several transactions with which the proceedings before the Trial Judge were concerned were substantially unfair between the parties the Trial Judge failed to consider and give effect to the fact that in all these transactions the contract contained a very harsh term giving power to the moneylenders to enforce payment of the loan and interest, if any instalment became due and unpaid.

Their Lordships are accordingly of opinion that the judgment of the Court of Appeal was right, except in so far as it required the interest throughout to be reckoned as simple interest.

Their Lordships also think it right to make some observations on one of the passages contained in the judgment of the Court of Appeal. In the second paragraph of page 55 of the record the Acting Chief Justice in delivering the oral judgment of the Court of Appeal said:

> " Before us Counsel agreed that in Johore 18 per cent. was in the past quite a common rate of interest on charges, but now by Enactment No. 4 of 1937, which came into force on the 16th March, 1937, Section 3 of the Usurious Loans Enactment, it is provided that until the contrary is proved, if the interest exceeds 12 per cent. per annum in the case of secured, and 18 per cent

per annum on unsecured loans, the Court shall presume that the interest charged is excessive and the transaction substantially unfair."

Before the Trial Judge the borrowers' Counsel said: "We submit to 18 per cent. because it is the highest allowed but the Court may think it too much." It seems probable that the Counsel for the borrowers in the Court of Appeal meant no more than what he had stated in the argument before the Trial Judge. Even if this be an incorrect interpretation of what Counsel said in the Court of Appeal it does not follow that because 18 per cent. had been in the past quite a common rate of interest on charges it could not be regarded as excessive and unfair, it is not unusual for borrowers to submit to a rate of interest which is excessive and unfair rather than run the risks of litigation, including it may be the risk of having to incur the expense of an appeal to His Majesty in Council. If by the words quoted above the Court of Appeal meant that the enactment of 1937 should be used to construe the earlier enactment they were certainly wrong, but they may merely have meant to use the later statute as some evidence that 24 per cent. was considered excessive by a representative section of the Protectorate, in which case their observations quoted above would not be liable to serious criticism.

Their Lordships ought now to consider the evidence relating to the several loans and charges with which this appeal is concerned in order to determine on which of these transactions the question arises whether the charge of compound interest, that is to say interest on interest, ought to be allowed. In the case of the transaction of loan and charge identified as (*e*) the amount of cash paid to the borrowers by the moneylenders was £3,000, the capitalised interest was £600 payable by monthly instalments. No part of the capital or capitalised interest on this loan was paid by the borrowers. These sums, whether capital or interest, were included in loan (*f*) and again in loan (*g*); and in loan (*n*) a balance of interest on (*e*) was included as still undischarged. The evidence relating to all transactions by way of loan and charge are conveniently summarised in exhibit C, Schedule A, which is to be found on pages 88 and 89 of the record. No. 5 in this schedule relates to transaction (*e*), No. 11 relates to transactions (*l*), (*m*) and (*n*) and No. 12 to transactions (*o*), (*p*), (*q*) and (*r*). It is clear that transactions (*l*), (*m*) and (*n*), and (*o*), (*p*), (*q*) and (*r*) included interest charged on interest.

Their Lordships are of opinion where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. As one member of this Board, when sitting in the Court of Appeal, pointed out in the case of *Lyle* v. *Chappell* [1932] 1 K.B. 691, page 706, it ought not to make any difference to the validity of a transaction by way of a renewal of a loan, whether the parties go through the form

of payment by the borrower of the whole amount due and a relending of the same amount by the moneylender, or the transaction is carried out without any such payment by treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of the agreed debt.

That this view is right in principle is confirmed by the following passage in the speech of Lord Atkin in *Paton* v. *The Inland Revenue Commissioners*, [1938] A.C., 341 at p. 348, where his Lordship used these words in relation to a case involving six monthly settlements:

> "If you settle that is agree the balance at the end of six months there is nothing to prevent your making a fresh start with the total debt which no doubt includes interest and agreeing to forbear from suing for the whole debt at a rate of interest meantime."

Their Lordships do not fail to bear in mind that English decisions are not binding either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless, the reasoning of judges in the English Courts may prove helpful in solving a similar problem arising in that State. It is only in this sense that their Lordships rely in the authorities referred to above.

The appellants cited the decision of Channell J. in *Carrington Ltd.* v. *Smith*, [1906] 1 K.B. 79, in support of their appeal, and the qualified approval of that decision by the Court of Appeal in *Reading Trust and Spero* ([1930] 1 K.B. 492). It is apparent from the judgment of Lord Fairfield (then Lord Justice Greer) and from that of Lord Justice Slesser, that Channell J. was right in taking into account the fact that a willing and intelligent borrower had agreed to the interest charged, but that this was only one of the circumstances to be taken into account and was not of itself conclusive.

Their Lordships are not satisfied by the evidence in the present case that the borrowers fully understood what they were agreeing to, and in any case their Lordships are of opinion they ought not to disturb the finding of the Court of Appeal that 15 per cent. interest was the right interest to allow under all the circumstances proved at the trial.

Their Lordships are of opinion that the order of the Court of Appeal in so far as it relates to the three transactions (*e*), (*n*) and (*r*) with which alone this appeal is concerned, should be affirmed. The order made by the Court of Appeal was as follows:—

> "These appeals coming on for hearing this 5th day of April, 1937, before the Honourable Mr. Justice Howes, Acting C.J.S.S. The Honourable Mr. Justice Horne and the Honourable Mr. Justice Laville in the presence of the Honourable Dato Roland Braddell and Mr. S. C. Goho of Counsel for the Appellants-Chargors and the Honourable Mr. R. Williamson and Mr. M. V. Pillai of Counsel for the Respondents-Chargees and all parties having agreed to hear both appeals as one appeal, upon reading the Memorandum of Appeal filed herein and what was alleged by Counsel it is ordered that the appeal do stand for judgment and this appeal standing for judgment this 1st day of May, 1937, in the presence of Mr. S. C. Goho and Mr. C. G. Toh of Counsel for the Appellants-Chargors and Mr. M. V. Pillai of Counsel for the Respondents-

Chargees and THIS COURT being of the opinion that interest charged by the Chargees in respect of the advances made to the Chargors herein was excessive and usurious under all the circumstances of the case and also being of the opinion that the judgment of the trial Judge dated the 28th of January, 1937, given herein was wrong doth hereby allow this appeal and set aside the Order of the trial Judge mentioned above and doth declare that all the transactions and accounts whatsoever, arising as from the 18th June, 1927, Between the Chargors (Appellants) and the Chargees (Respondents) ought to be re-opened and set aside, and that the Chargors (Appellants) ought to be relieved from payment of any sum in excess of the sums actually advanced by the Chargees to the said Chargors and interest thereon at the rate of 15 per cent. per annum simple interest; and that if any such excess has been paid by the Chargors, the Chargees ought to repay the same to the Chargors; and the Court does order and judge the same accordingly. And it is ordered that the following account be taken, that is to say, an account of all sums actually advanced by the Chargees to or for the use of the Chargors on and from the 18th June, 1927, and of all sums received by the Chargees from the Chargors in respect of any such advance, and that on taking such account the Chargors be charged with interest at the rate of 15 per cent. per annum (simple interest) on the sums from time to time owing to the Chargees; and that the balance due from either party to the other be certified. And if any sum is found due to be paid by the Chargors to the Chargees such sums shall stand charged upon the lands of the Chargors now charged to the Chargee, in the same proportion as the amounts now charged on the said lands are distributed thereon, and such sums shall carry interest at the rate of 12 per cent. per annum until payment. And if the amount so certified and the interest due thereon is not paid on or before the 31st July, 1937, the said lands shall be sold by public auction, under the direction of the Court, with liberty to apply for such direction as may be necessary.

Their Lordships are only concerned with the loans and charges identified by the letters (*e*), (*n*) and (*r*); so far as these transactions are concerned their Lordships are of opinion that the order of the Court of Appeal should be affirmed, but varied by striking out the words "simple interest". This will have the effect of making the charge of 15 per cent. payable on the sums from time to time acknowledged to be owing by the borrowers to the lenders and will thus be allowing interest on interest contrary to the views expressed by the Court of Appeal in their judgment, and their Lordships will humbly advise His Majesty that the appeal should be dismissed subject to the variation with regard to interest already mentioned.

With regard to the costs, their Lordships are of opinion that the costs of the appeal to His Majesty will be reasonably met by an order allowing the respondents nine-tenths of their costs, and their Lordships will advise His Majesty accordingly.

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In the Privy Council

S.R.M.S. CHETHAMBARAM CHETTIAR

v.

LOO THON POO

S.M.S. SINNIAH CHETTIAR

v.

PUAN YING

DELIVERED BY LORD FAIRFIELD

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