GM4.C2

36/1963

No. 36 of 1962

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N :-

KOK HOONG — Appellant (Plaintiff)

- and -

LEONG CHEONG KWENG MINES LIMITED — Respondent (Defendant)

74126

CASE FOR THE APPELLANT

1. This is an Appeal from the Order dated the 6th March 1962, of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur allowing the Appeal of the Respondent from the Order dated the 6th September 1961 of the High Court at Kuala Lumpur.

2. The Judgments and Orders under appeal were given on the trial of a preliminary point of law as to whether or not the Respondent was estopped by a judgment in a previous suit between the parties from alleging by way of defence to this suit that the agreement sued on was unenforceable as a moneylending transaction and void as a bill of sale. The High Court (Ong J.) held that the Respondent was so estopped but this decision was reversed by the Court of Appeal (Thomson C.J., Hill J.A., and Good J.A.).

3. By his Amended Plaint dated the 14th June 1957 in the Present Suit the Appellant alleged :- pp.1-4

Paragraph 1: that he was a landowner and the Respondent was a mining company.

Paragraph 2: that by a written agreement dated the 20th June 1952 and attached to the Plaint the Appellant hired certain machinery and equipment to the Respondent for a term of 12 months at a rent of $2500 per month.

Paragraph 3: that on the expiry of the term of 12 months, the Respondent continued hiring the machinery and equipment on the terms and conditions of the agreement.

Paragraph 4: that in May 1955 by arrangement with the Respondent the Appellant retook possession of 2 items of the machinery and equipment (particularised in Paragraph 5 as 2 Diesel engines) and it was agreed that the Respondent would continue hiring the remainder on the terms and conditions of the agreement, subject to the variation that the hiring was to commence on the 20th April 1955 at a rent of $2000 per month with insurance for $80,000 (instead of $100,000).

Paragraphs 7 to 14 : that the Respondent had not paid any rent due in respect of the period commencing the 20th April 1955 or any interest on arrears of such rent and although the Appellant had duly determined the hiring on the 19th December 1955 the Respondent had not returned the machinery and equipment and had refused to allow the Appellant to retake possession of it.

The Appellant claimed arrears of rent and interest, damages for the wrongful detention and an order for delivery up of the machinery and equipment.

pp.5-6 4. By his Amended Defence dated the 22nd July 1961 the Respondent alleged :-

Paragraph 1: that the Appellant was at the material times a moneylender within Section 3 of the Moneylenders Ordinance, 1951.

Paragraphs 2 and 3: that both before and after the date of the hiring agreement the Appellant had

advanced sums of money to the Respondent and that on the same date as the hiring agreement the parties had executed a sale agreement under which the Respondent purported to sell the machinery and equipment to the Appellant and that the effect of the two agreements was to make the machinery and equipment of the Respondent security for the money advanced by the Appellant.

Paragraph 4: that the hiring agreement was void and unenforceable as being neither in the form required by nor registered under the Bills of Sale Enactment and that the sale agreement being part of a void transaction was also void and unenforceable so that the Appellant had neither the title to nor the right to possession of the machinery and equipment.

Paragraph 5: that without prejudice to the preceding contentions the Respondent admitted the variations of the hiring agreement set forth in Paragraphs 4 and 5 of the Plaint.

Paragraph 7: that the hire charges were really interest and were not recoverable because the Appellant had not furnished a note or memorandum which complied with Section 10(1) of the Moneylenders Ordinance.

5. By his Reply dated the 24th July 1961, the Appellant joined issue with the Respondent and denied that he was a moneylender or that the transaction was a moneylending transaction or that the document or documents referred to in the Amended Defence were bills of sale and in Paragraph 3 he further pleaded as follows :- pp.6-7

Paragraph 3: The Defendant is estopped by judgment dated the 3rd November 1954 in Kuala Lumpur High Court Civil Suit No. 272 of 1954 between the Plaintiff and the Defendant (wherein the Plaintiff recovered judgment against the Defendant for 9 months outstanding hire from 20-9-53 to 19-6-54 on the hire agreement being

also the subject matter of those proceedings) from contending either that the Plaintiff is a moneylender or that the transaction in question was a moneylending transaction or that the documents are other than what they purport to be or that they or either of them are or is void or that the Plaintiff is not entitled to the reliefs claimed.

p.7.1.20 6. On the 28th July, 1961, it was ordered that the point of law raised in Paragraph 3 of the Reply be tried as a preliminary point of law and that all other proceedings in the action be stayed until the determination of this point. The trial took place on the same date and at the conclusion of the argument the learned Judge said that he decided in favour of the Appellant. By an Order dated the 6th September 1961 the Court made a declaration that the Respondent is estopped by judgment dated the 3rd day of November 1954 in Kuala Lumpur High Court Civil Suit No. 272 of 1954 between the Plaintiff and the Defendant from contending in this action that the Plaintiff is a moneylender or that the transaction in question in the Pleadings mentioned was a moneylending transaction or is void or unenforceable under the Moneylender's Ordinance, 1951 or otherwise or that the documents in the Pleadings mentioned are other than what they purport to be or that they or either of them are or is a bill of sale or void or unenforceable under the Bills of Sale Enactment or otherwise.

7. The facts relevant to the plea of estoppel are as follows :-

(1) The parties to both suits are the same.

(2) Both suits were brought in the same Court which was a court of competent jurisdiction to adjudicate upon them.

(3) The previous suit was brought for arrears of rent and interest thereon then due under the hiring agreement dated the 20th June 1952 as continued after the expiry of the term of 12 months. The present suit was brought for subsequent arrears of rent and interest for the continued hiring in accordance with the terms and conditions of the

hiring agreement as varied in May 1955 and also for possession of the machinery and equipment consequent upon the termination of the hiring.

(4) Paragraphs 1, 2 and 3 of the Plaint in the previous suit were identical with Paragraphs 1, 2 and 3 of the amended Plaint in the present suit. Paragraph 5 of the former was identical with Paragraph 7 of the latter.

(5) The Plaint in the previous suit was dated the 30th June 1954 and marked "Summary Procedure". The Respondent not having obtained leave to appear, judgment was entered on the 3rd November 1954 for the Appellant for the sums claimed in the Plaint. p.64.l.20 p.67.l.10.

8. At the date when the present suit was commenced, the Civil Procedure Code (Cap. 7, Laws of the Federated Malay States) was in force. Section 6 of the Civil Procedure Code (so far as material) was as follows :-

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression 'former suit' denotes a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto.

Explanation II: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other.

Explanation III: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

With effect from the 1st April 1958 the Civil Procedure Code was repealed and was replaced by The Rules of the Supreme Court. (Federal Ordinance No. 57 of 1957,

Legislative Notifications Nos. 321 of 1957 and 42 and 81 of 1948.) The Rules, which closely follow the Rules of the Supreme Court in England, contain a provision that they shall apply "where practicable and unless the Court shall otherwise order" to all pending proceedings, but they contain no provision corresponding with Section 6 of the Civil Procedure Code. The Appellant submits in the first place that the repeal of Section 6 has not altered the law of the Federation of Malaya, and secondly that, if it has, this suit should be decided in accordance with the law prevailing at the date of its commencement.

9. At the trial of the preliminary issue it was contended by the Respondent that no estoppel could be raised in the present suit because the Appellant was seeking relief which he did not ask for in the previous suit and because the judgment in the previous suit was by default. The learned judge, it is submitted rightly, rejected these contentions and reached the following conclusions :-

p.17.l.4. "It seems to me clear beyond dispute that a judgment for rent claimed by the Plaintiff as owner of chattels hired necessarily and directly involves, where there was no dispute, a declaration as to their ownership. The root of the Plaintiff's title to the rent is his ownership. In an action for rent, as in Civil Suit No. 272/54, I am of opinion that, when the hiring agreement was specifically pleaded, any question as to its validity was concluded once judgment had been entered for the rent claimed thereunder. That judgment not having been set aside still stands." .....

p20.l.26. "It is therefore not open now to the Defendant to say that a judgment <u>ex facie</u> for rent was in truth a judgment for interest."

10. At the hearing of the appeal it was contended further that the two suits were different in substance on the ground that the present suit was based on a variation of the earlier agreement, which amounted to an entirely fresh or different agreement. The Judgment of the Court
pp.35-52. of Appeal, delivered by Thomson C.J., upheld this contention. It is submitted that this is wrong in that both suits were expressly founded on the continuation of the same hiring of the same chattels on the terms

and conditions set out in the same written agreement. The Judgment of the Court of Appeal proceeded to draw a distinction between estoppel and res judicata and to refer Section 6 of the Civil Procedure Code exclusively to the latter. It is submitted that this distinction is inappropriate in this case in which the question at issue is whether the Appellant is entitled to raise the plea of estoppel per rem judicatam.

11. After reviewing the authorities the learned Chief Justice summarised the legal principle as follows :- p.50. l.1.

"There would thus seem to be ample authority for the proposition that when a Plaintiff in an action makes averments relevant to his action which are not denied the Defendant is estopped in any subsequent proceedings from denying these averments or averring facts inconsistent with them. No such estoppel, however, arises from an omission in the previous proceedings to plead facts which are not inconsistent with those pleaded by the Plaintiff and which go to support a defence by way of confession and avoidance or a special plea in law."

Applying this principle to the facts of this case, the learned Chief Justice decided that the Respondent was p.51.l.34. estopped from denying the amount of his indebtedness to the Appellant under the judgment in the previous suit or from denying that he executed the agreement of the 20th June 1952 or from denying any other averment of fact contained in the Plaint in the previous suit, but that he was not estopped "from averring that the p.52. l.3. Appellant is a moneylender or any of the other facts on which they seek to base their defences under the Moneylender's Ordinance or the Bills of Sale Enactment". It is respectfully submitted that, on the application of the principle as so defined, the relevant averments made by the Appellant in the previous suit were that the Appellant let certain machinery and equipment on hire to the Respondent on the terms and conditions of the written agreement, which specified the Appellant as the Owner and the Respondent as the Hirer and contained provisions for payment of rent and the subsequent repossession of the machinery and equipment, and that the defences sought to be raised by the Respondent in this present suit are inconsistent with these averments inasmuch as they deny the letting on hire, the obligation to pay rent or the right of repossession and allege

instead the execution of a bill of sale as security for money lent.

p.53. l.25. 12. By Order dated the 18th September 1962 the Appellant was granted Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong.

13. The Appellant respectfully submits that the judgment and order of the Court of Appeal should be set aside and that this appeal should be allowed with costs throughout for the following among other -

R E A S O N S

(1) Because the Respondent is estopped by the Judgment in Kuala Lumpur High Court Civil Suit No. 272 of 1954 from denying that under an agreement in writing dated the 20th June 1952 the Appellant let certain machinery and equipment on hire to the Respondent for a term of 12 months and that on the expiry of such term the Respondent continued hiring the said machinery and equipment on the terms and conditions contained in the said agreement.

(2) Because the said Judgment conclusively and directly decided the said facts and matters.

(3) Because the matters alleged in Paragraphs 1, 2, 3, 4, 6 and 7 of the Amended Defence are matters which might and ought to have been made ground of defence in such suit and accordingly were directly and substantially in issue therein and have been heard and finally decided by such Court.

(4) Because the Judgment and Order of the learned Trial Judge were correct and ought to be affirmed.

Dingle Foot, Q.C.

Joseph Dean.

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FOR THE APPELLANT

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