

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-MENAKA, Wife of M. Deivarayan Appellant

- and -

LUM KUM CHUM as Executrix of
 the last will of Ng Siew ^{San now}
 deceased appointed by Order
 of the Federal Court, dated
 the 18th February 1974, to
 represent the Estate of
 Ng Siew San Respondent

CASE FOR THE APPELLANTRECORD

1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia (Azmi, L.P., Suffian, F.J., and Ong Hock Sim, F.J., dissenting) dated the 6th October 1973 which dismissed an appeal by the original Respondent (hereinafter called "Ng") and a cross-appeal by the original Applicant (hereinafter called "Menaka") from a Judgment and Order of the High Court in Malaya (Mohd. Azmi, J.) dated the 12th August, 1972 whereby (a) Menaka's application for the sale by public auction of certain pieces of land to satisfy a principal sum of \$20,000 and interest thereon, lent by her to Ng. was dismissed; and (b) certain orders were made conditional upon the payment of the sum of \$19,400 by Ng to Menaka within two months; and (c) no order as to costs was made.
2. By Originating Summons dated 17th February
- pp. 91-118
- pp. 51-63

RECORD

- p.1 1971, Menaka applied for an Order
- "that the land held under Grants for Land Nos. 7695, 8243, 10624, 18012 and Certificates of Title Nos. 12866 and 12867 for Lot Nos. 125, 114, 114A, 327, 321 and 323 respectively in the Township of Tanjong Malim in the District of Batang Padang totalling in area 0 acres 3 Roods 25-52 Poles and charged to Menaka wife of M. Deivarayan under the charge registered in the Register of Charges Presentation No. 167/65 Volume 204 Folio 94 be sold by public auction under the direction of this Honourable Court under Section 256 of the National Land Code to satisfy the principal sum of \$20,000.00 with interest thereon at the rate of 12% per annum from the 11th day of April 1965 to date of payment and costs." 10
- p. 2 1.17-
p. 7 1.16 3. The Summons was supported by an Affidavit dated the 13th February 1971, sworn by N.AR.K. Nachiappa Chettiar, the Attorney of the Applicant Menaka. 20
- p. 7 1.17-
p.23 1.13 4. Ng opposed the application and in his Amended Affidavit dated the 8th February 1972, he contended that the claim is illegal and void and/or unenforceable on the ground of alleged contraventions of Sections 8, 16, 18, 19 & 21 of the Moneylenders Ordinance (No. 42 of 1951).
- p.23 1.14-
p.32 1.13 5. In an Amended Affidavit in reply dated the 21st June 1971, Chettiar, on behalf of Menaka, contended that even if Ng succeeded in his claims, Ng had received from her \$20,000 not intended to be given gratuitously and that having enjoyed the benefit thereof, he is bound to restore the same to Menaka. 30
- p.34
11.4-15 6. By consent, it was ordered that the foreclosure proceedings be continued as if the action had been commenced by Writ of Summons; and for the purposes of the proceedings, the Affidavit referred to in paragraph 3 above was treated as the Statement of Claim, the Amended Affidavit referred to in paragraph 4 above as the Defence and Counterclaim and the Amended Affidavit referred to in paragraph 5 above as the Reply and Defence to Counterclaim. 40

7. At the outset of the hearing, Ng abandoned his defences under Sections 16, 18, 19 & 21 of the Moneylenders Ordinance and it was agreed that 3 issues were left for determination of the Court, viz:-

p.33 11.8-25

- (i) Whether Menaka has violated Section 8(b) of the Moneylenders Ordinance.
- (ii) Whether she has violated Section 8(c) of the said Ordinance.
- 10 (iii) Whether two contractual terms stated in the charge should have been included in the Memorandum of loan under Section 16(3) of the Ordinance.

8. Section 8(b) and (c) of the Ordinance provides as follows:-

"If any person -

- (a)
- 20 (b) carries on business as a moneylender without holding a licence or, being licensed as a moneylender, carries on business as such in any name other than his authorised name or at any other place than his authorised address or addresses; or
- 30 (c) in the course of business as a moneylender enters as principal or agent into any agreement with respect to any advance or repayment of money or takes any security for money otherwise than in his authorised name. he shall be guilty of an offence under this Ordinance and shall be liable to a fine not exceeding one thousand dollars and for a second or subsequent offence shall be liable to the fine aforesaid or to imprisonment for a term not exceeding twelve months and an offender being a company shall for a second or subsequent
- 40 offence be liable to a fine not exceeding five thousand dollars."

9. Issue (iii) above is no longer in issue in

p.55 11.6-8

RECORD

this appeal. The learned trial judge decided that the omission to include the two terms was not fatal to Menaka's application, since Ng had been supplied with the stamped copies of the charge and of the Memorandum under Section 16; that both the memorandum and the charge should be read together and in the circumstances constituted sufficient compliance with the provisions of Section 16. There was no appeal against the said finding in the Federal Court.

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p.94 l.17-
p.95 l.4

10. The following facts were stated by Azmi, L.P., in the Federal Court to have emerged or may be inferred:-

- "(1) that the authorised name of the money-lender is the firm of AR.PR.M. and the authorised address is 30 Leboh Ampang, Kuala Lumpur.
- (2) Manickam Chettiar was also licensed to to carry out the business as an agent of the firm.
- (3) he was apparently also an attorney of Menaka.
- (4) the memorandum under Section 16 showed that Menaka was the lender and it was signed by Manickam Chettiar as her attorney.
- (5) the memorandum on the charge registered at the Land Office disclosed Menaka as the lender. Again this document was signed by Manickam Chettiar as her attorney.
- (6) two receipts were produced by Nachiappa Chettiar (Menaka's present attorney) and showed that Ng paid \$400/- on 28th August 1969 and \$200/- on 16th March 1965 as interest on this loan, and both receipts have the words "AR.PR.M. Firm, Managing Partner Menaka w/o Deivarayan, 30 Leboh Ampang, Kuala Lumpur." printed on them.
- (7) a cheque signed by Manickam Chettiar for AR.PR.M. Firm for \$20,000/- payable to Messrs. Shook Lin & Bok and dated

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11th January 1965 was also in evidence.

- (8) the ledger entries included in the bundle show that the firm was the Lender."

11. With regard to the issues concerning the alleged contravention of Sections 8(b) and 8(c) of the Ordinance, the learned trial judge held as follows:-

10 "Thus, by executing the note of memorandum and the Memorandum of charge otherwise than in the authorised name of "AR.PR.M. Firm", Manicham Chettiar has contravened the penal provisions of sections 8(b) and 8(c) of the Ordinance. Similarly, since the applicant has entered into the loan transaction and the charge in her name personally instead of in the authorised name of "AR.PR.M. Firm", she has also contravened both the said penal provisions. In his oral submission, learned 20 counsel for the applicant has now conceded that sections 8(b) and 8(c) have not been complied with. Under the circumstances, the secured on demand loan in this case is illegal and void, and the applicant is liable to the penalty imposed under Section 8."

p.54 l.37-
p.55 l.5

12. The learned trial judge then proceeded to consider the relief sought by Menaka in her Reply, namely whether she was entitled to the restoration of her money under Section 66 of the Contracts (Malay States) Ordinance 1950, which provides:- 30

"66. When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it,"

13. On this issue, the learned trial judge firstly made the following findings:-

40 (1) that both parties had no knowledge of the illegality until the Statement of Defence dated 8th February 1972 was filed, and

p.57 ll.33-38

RECORD

- (2) there was no evidence upon which such knowledge could be imputed to either of them.

He then concluded :-

p.59 1.23-
p.60 1.7

"As both parties in this case were not aware and genuinely ignorant of the illegality at the time of making the loan transaction, the applicant is entitled to relief under Section 66. Under the circumstances of the present case, I do not think it is reasonable that the Respondent who has had the benefit and advantage of using ₹20,000/- of the applicant's money and who is now relying on the illegality of the loan transaction and counterclaiming, inter alia, for the return and cancellation of the note of memorandum and the memorandum of charge, should have reliefs, notwithstanding such illegality, without being put on terms by which both parties may be restored to the positions they occupied before the transaction commenced. For the same reason, the applicant should not also be allowed to keep the ₹600/- paid to her as interest."

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14. The learned judge then made the following orders:-

p.60 1.8-
p.61 1.13

- "(1) the applicant's claim for an order of foreclosure of the respondent's six parcels of land is dismissed;
- (2) upon payment of the sum of ₹19,400/- by the respondent to the applicant within two months from today -
- (i) it is declared that the contract of loan dated January 11th, 1965 entered into between the Respondent and the Applicant and the Charge Presentation No. 165/65 Volume 204 Folio 94 dated January 1 th, 1965 executed by the respondent in favour of the applicant is illegal and void; and
- (ii) it is ordered that ?
- (a) the Register of Title do cancel the Memorials appearing

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on the Issue Document of Title and on the Register Documents of Title to lands charged by the Respondent in favour of the Applicant as security for loan dated January 11th, 1965;

- 10 (b) the chargee/applicant do deliver up the Note of Memorandum for cancellation;
- (c) the chargee/applicant do within fourteen days from the date of payment deliver to the chargor/respondent or his solicitors the duplicate copy of the Memorandum of the Charge and issue documents of title relating to the aforesaid lands;
- 20 (d) the chargee/applicant do within fourteen days from the date of payment execute a good and valid registrable Memorandum of Discharge, discharging the Charge Presentation No. 167/65 Volume 204, Folio 94 dated 11th January, 1965 and deliver
- 30 the same to the chargor/respondent or his solicitors; and that failing the same, the senior Assistant Registrar, High Court, Kuala Lumpur, be empowered to execute the said Memorandum of Discharge for and on behalf of the said chargee/applicant;

(2) there will be no order as to costs."

40 15. Ng appealed against the judgment of the trial judge on the principal ground that the judge was wrong in ordering him to pay Menaka the sum of \$19,400/- as a condition for obtaining the reliefs he sought.

pp.64-68

16. Menaka cross-appealed upon the principal grounds that the judge erred in holding (i) that

pp.69-73

RECORD

Sections 8(b) and 8(c) of the Ordinance were contravened and (ii) that because they were contravened the loan transaction was illegal and void.

p.99 1.22-
p.101 1.3

17. The majority judgment in the Federal Court was delivered by Azmi, L.P., With regard to Ng's appeal, the Lord President agreed with the trial judge's findings as to fact and as to the effect of Section 66 of the Contracts Ordinance. The appeal was accordingly dismissed, subject to one amendment: viz that the trial judge should have awarded interest on the sum of \$19,400/-. There was accordingly, a further order directing Ng to pay interest at the rate of 6% from the date of the institution of the suit. He made no order as to costs.

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18. It is respectfully submitted that Azmi, L.P., was correct in awarding interest, but should have given it at the rate of 12% per annum from the 11th day of April 1965 as claimed in Menaka's Originating Summons. It is further submitted that the sums of \$600/- paid as interest by the deceased debtor Ng referred to in paragraph 10(6) above should not have been deducted from the principal sum of \$20,000/- in the relief given to the Appellant.

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19. With regard to Menaka's cross-appeal, Azmi, L.P. held, it is submitted wrongly, as follows:-

p.97-
p.99 1.21

- (1) as to Section 8(b), he was inclined "to agree with counsel that on the evidence produced it could be argued successfully that Menaka was in fact carrying on the business in the name of AR.PR.M. Firm."
- (2) as to Section 8(c), he held that the provisions of that Section had clearly been contravened.
- (3) that non-compliance with Sections 8(b) and 8(c) renders the agreement "forbidden by law" under Section 24 of the Contracts Ordinance and thus void.

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pp.102-116

20. In his dissenting judgment, Ong Hock Sim, held, it is submitted correctly, that:-

- (1) there had been no contravention of

Section 8(b) and 8(c), which are wholly inapplicable to this case.

- (2) even if there had been such a contravention, this was not fatal to Menaka's claim because Section 8 is purely a penal provision and non-compliance therewith does not render the contract or security unenforceable.

10 21. Ng died on the 30th October, 1973, and on the 18th February, 1974, Lum Kum Chum, the Executrix of his last will, was appointed to represent his estate in these proceedings.

pp.132-133

22. On the 8th July 1974, an Order was made granting Menaka final leave to appeal to His Majesty the Yang Dipertuan Agong against such part of the final Judgment and Order of the Federal Court dated the 6th October 1973 as dismisses or has the effect of dismissing the cross-appeal.

20 23. The Appellant, Menaka, respectfully submits that this appeal should be allowed with costs herein and below and an Order made in the terms of Menaka's Originating Summons dated the 17th February 1971 for the following amongst other

R E A S O N S

- (1) BECAUSE there was no contravention of Section 8(b) and 8(c) of the Moneylenders Ordinance in this case.
- 30 (2) BECAUSE even if there had been such a contravention, this did not render the transaction void or unenforceable.
- (3) BECAUSE the judgment of the trial judge and the majority judgment of the Federal Court on this issue are wrong; and the dissenting judgment of Ong Hock Sim, F.J., is right for the reasons given therein.

ROBERT GATEHOUSE

EUGENE COTRAN

No. 16 of 1974

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- and -

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18th February 1974, to represent
the Estate of Ng Siew San.
Respondent

CASE FOR THE APPELLANT

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