

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 :

MANAKA, wife of M. Deivarayan Appellant

- and -

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

CASE FOR THE RESPONDENT

20 1. This is an Appeal from the Judgment and
Order of the Federal Court of Malaysia
(Appellate Jurisdiction) (Azmi L.P., Suffian
F.J. and Ong F.J. (dissenting)) dated the
6th day of October 1973, whereby the court:

Pp.91-118

- (a) dismissed an appeal by the
Respondent herein (the Respondent
at the trial);
- (b) dismissed a cross-appeal by the
Appellant herein (the Applicant
at the trial); and
- (c) affirmed the judgment of the
Learned Trial Judge (save that
the court amended the same to
order that the Respondent herein
do also pay to the Appellant
herein interest at the rate of 6%
per annum on the sum of \$19,400.00
from 17th February 1971)

Pp.51-63

on appeal from a Judgment and Order dated

the 12th day of August, 1972, of the High Court of Malaya (at Kuala Lumpur) whereby Mohammed Azmi J ordered that the Applicant's (the Appellant herein) claim for foreclosure of the Respondent's (the Respondent herein) six parcels of land be dismissed and ordered that upon payment of \$19,400.00 by the Respondent to the Applicant within two months from the date thereof:

"(i) It is declared that the contract of loan dated the 11th day of January 1965 entered into between the Respondent and the Applicant and the Charge Presentation No.167/65 Volume 204, Folio 94, dated 11th day of January, 1965, executed by the Respondent in favour of the Applicant is illegal and void; and 10

(ii) It is ordered that :-

(a) The Registrar of Titles do cancel the Memorials appearing on the Issue Document of Title and on the Register of Documents of Title to lands charged by the Respondent in favour of the Applicant as security for loan dated 11th day of January, 1965; 20

(b) the Chargee/Applicant do deliver up the Note of Memorandum for cancellation; 30

(c) the Chargee/Applicant do within fourteen (14) 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;

(d) the said Chargee/Applicant do within fourteen (14) 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 day of January 1965 and deliver the same to the Chargor/Respondent or his Solicitors failing which the Senior Assistant Registrar of the High Court, at Kuala Lumpur be and is hereby empowered to execute 40 50

the said Memorandum of Discharge for and on behalf of the Chargee/Applicant."

2. The principal questions raised in this Appeal are :

- 10 (1) (a) Whether or not the Appellant contravened Section 8(b) and 8(c) of the Moneylenders Ordinance 1951, by carrying on business in other than her authorized name and taking security in other than her authorized name.
- (b) If the Appellant has so contravened the said sections, whether or not such conduct has rendered the transactions that are the subject of this appeal illegal and void.
- 20 (2) If the Respondent is given special leave to cross-appeal as prayed, whether or not the Federal Court was correct in so amending the Order of the Trial Judge and holding that the Respondent was liable to pay interest.

3. By an Originating Summons dated the 17th day of February 1971, the Appellant sought an order that Land (held under Grants for Land numbers 7695, 8243, 10624, 18012 and Certificates of Title numbers 12866 and 12867 for lot numbers 125, 114, 114a, 327, 321 and 323 respectively) in the Township of Tanjong Malim in the District of Batang Padang and charged to the Appellant under charges registered in the Register of Charges (Presentation number 167/65, Volume 204, Folio 94) be sold by public auction at the direction of the 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.

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P.1 Ll.
10-31

4. By consent of both parties, it was ordered by Abdul Hamid J that the foreclosure proceedings be continued as if the action had been commenced by Writ of Summons. Accordingly, an affidavit sworn in support of the Originating Summons by N.A.R.K. Nachiappa Chettiar, on the 13th day of February 1971, was treated as the Statement of Claim and an amended affidavit of the Respondent affirmed on the 8th day of

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p.52,
1.44-53
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p.2-3

p.7-12 February 1972 as a defence and counterclaim and and affidavit in reply by N.AR.K Nachiappa Chettiar on the 21st day of June 1971 be treated as the Reply and Defence to Counterclaim.

p.23-26

p.2-3 5. In his affidavit in support of the originating summons sworn on the 13th day of February 1971, N.AR.K Nachiappa Chettiar, deposing on behalf of the Appellant, set out the basis for the Appellant's claim for relief because of the non-payment of interest and principal advanced by the Appellant to the Respondent. He exhibited to the said affidavit copies of the Land Charge and Notice under section 255 of the National Land Code in respect thereof. 10

p.4-7

p.7-12 6. In his amended affidavit dated the 8th day of February 1972 Ng Siew San, in his capacity as Respondent to the Originating Summons, deposed that, inter alia: 20

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Ll.10-30 (a) he believed that the Respondent was authorized to carry on money-lending in the name AR.PR.M firm,

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Ll.20-45 (b) the Respondent had carried on the business of moneylending in her own name rather than her authorized name in breach of Section 8(b) of the Moneylenders' Ordinance 1951.

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Ll.1-16 (c) the Respondent had taken a charge on land as security other than in her authorized name in breach of Section 8(c) and the same was accordingly unenforceable. 30

p.10,L40-
p.11,L.45
p.12-23 The Respondent accordingly prayed for substantially the same relief by way of Counterclaim as was eventually granted to him. He exhibited to his said affidavit copies of the Application for a Moneylenders' Licence made by the Appellant, and Application for a Moneylenders' Licence as Agent, a Memorandum under Section 16 of the Moneylenders' Ordinance 1951, a Promissory Note executed by the co-Respondent, a Request for Statement of Account, and a Statement of the State of the Account between the Appellant and the Respondent. 40

p.23-26 7. In his Amended Affidavit in Reply dated the 21st day of June 1971, N.AR.K. Nachiappa Chettiar deposed on behalf of the Appellant

that certain allegations made in the Respondent's affidavit referred to in the previous paragraph hereof were incorrect. In particular, certain of the exhibits were stated not to relate to the material transaction and further documents were exhibited to his said affidavit in support of the contentions made therein. The documents exhibited consisted of letters between the parties of their agents. In the penultimate paragraph of his said affidavit, it was submitted that as the money advanced was not intended to have been given gratuitously the Respondent having enjoyed the benefit of the same was bound to restore them to the Appellant.

p.27-32

p.26,
Ll.2-9

8. The hearing commenced before Mohammed Azmi J on the 2nd day of March 1972. It was agreed between the Counsel for the parties that there were three issues to be decided at the hearing, namely :

(i) whether the Appellant had complied with Section 8(b) of the Moneylenders Ordinance 1951;

p.33,
Ll.9-25

(ii) whether the Appellant has complied with Section 8(c) of the Moneylenders Ordinance 1951;

(iii) whether the terms set out in paragraph 11(b) of the Respondent's affidavit sworn on 8th February 1972 should have been included in the Note of Memorandum dated 11th January 1965, (that is to say whether or not the security should have included an undertaking by the Respondent not to deal with the land charged without the consent of the Chargee and whether or not the Chargee should have the custody or possession of the title documents to the land charged), and what was the effect of such exclusion in relation to Section 16 of the Moneylenders Ordinance.

9. Two witnesses gave oral evidence on behalf of the Applicant. The first witness M.K. Kasi Chettiar M.K.Kasiviswanathan Chettiar proved the existence of the partnership between the Appellant and one AL Chockalingam. The second witness called was N.AR.K Nachiappa Chettiar who produced the Powers of Attorney given to him and his

pp.37-38

pp.38-39

predecessor by the Applicant and her partner. He also produced the Business Registration of the AR.PR.M. firm in which name all the firm's records were kept. In cross examination he acknowledged that in no documents that are relevant for the purpose of this appeal, was the name of the Applicant's partner Chockalingam used.

pp.39-41

10. The only witness called on the part of the Respondent was Ng Siew San himself. He stated that he was 78 years old and that he did not know in whose name the transaction between the parties was to be carried out, or that it was necessary for the transaction to be carried out under a specified name. He stated that it was only when he got the originating summons that commenced the action that he came to know of the authorized name of the AR.PR.M. firm.

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pp.52-61

11. The Learned Trial Judge reserved his Judgment until the 12th day of August 1972. In his Judgment after reviewing the history of the proceedings and the issue for his determination, the Learned Judge set out the relevant part of Section 8 of the Moneylenders Ordinance 1951 pertaining to the first two issues (whether or not Section 8 of the Ordinance had been contravened.) The Learned Judge then concluded, it is submitted correctly that the said section had been contravened. He stated as follows:

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p.54,L.20
p.55,L.5

"In this case the following facts are not in dispute. At all relevant times the Appellant and one AL. Chockalingam are licensed as partners to carry on business as moneylenders under the authorized name of "AR.PR.M. Firm" and at the authorised address of No.30 Leboh Ampang, Kuala Lumpur. On January 11, 1965, pursuant to a note of memorandum of loan of that date, the applicant lent to the Respondent a sum of \$20,000.with interest thereon at the rate of 12% per annum. By a memorandum of charge of the same date, the Respondent charged his six pieces of land to the applicant as security for the said loan. Both the memorandum of loan and the charge (were) executed by one Manickam Chettiar as the attorney of the applicant. At all relevant times, Manickam Chettiar was licensed to

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carry on business of moneylendings as an agent of AR.PR.M. Firm under the authorized name of that firm. Thus, by executing the note of memorandum and the Memorandum of Charge otherwise than in the authorized name of "AR.PR.M." Firm, Manickam 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", Manickam 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 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."

30 The Learned Judge then went on to consider the third issue left for him to decide (namely whether or not the two contractual terms in relation to dealing with the land charge and custody of the title documents thereto remaining with the Appellant) should have been included in the note of memorandum under Section 16 of the Money-lenders Ordinance. The Learned Trial Judge concluded that he was satisfied that the Respondent was supplied with a stamped copy of the charge as well as a stamped copy of the note of memorandum and that both documents could be read together and that would constitute sufficient compliance with provisions of Section 16(3) of the Moneylenders Ordinance. He therefore concluded the third issue against the Respondent and it is not now sought to question that ruling.

50 12. The Learned Judge then went on to consider whether or not the Appellant was entitled to the relief sought in the reply to the Respondent's Counterclaim and whether or not she was entitled to the restoration

p.55,
Ll.16-38

p.55,
Ll.39-
p.60,
L.5

of the money still due from the Respondent under Section 66 of the Contracts (Malay States) Ordinance 1950. He found as a fact that it was beyond dispute that the fact of non-compliance with Section 8(b) and 8(c) of the Moneylenders Ordinance, 1951 was only discovered by both parties when the Statement of Defence dated the 8th day of February 1972 was filed, in the premises the Learned Trial Judge concluded that the agreement was one that was discovered to be void within the first limb of the said Section 66. He concluded that as both parties in the instant case were not aware of the illegality at the time of making the loan transaction, that the Appellant was entitled to relief under the said Section 66. The Respondent does not now contend that the said conclusion of the Learned Trial Judge was wrong. The Learned Trial Judge went on to state his reasons for concluding that the Appellant was entitled to the benefit of the said Section 66 in the following words:

p.59,L.38
p.60, L.5

"Under the circumstances of the present case, I do not think it 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."

p.50,
L1.9-13

13. It had been contended before the learned Trial Judge that the Appellant would be entitled to interest on the money recovered under the said Section 66. The Learned Trial Judge did not in terms deal with the said contention but in relation to a sum of \$600 which the Respondent had paid to the Appellant earlier as interest, he stated :

p.60,L1.5-7

"For the same reason, (that is to say the reasons set out in the passage cited from the Judgment in the previous paragraph hereto) the applicant should not also be allowed to keep the \$600 paid to her as interest"

It is respectfully submitted that the Learned Trial Judge was correct in not allowing any claim for interest to be made under the said Section 66.

14. The Learned Trial Judge therefore determined to make the orders that are summarised in Paragraph 1 hereof. p.60-61

10 15. By Notice of Appeal dated the 25th day of August 1972, the Respondent herein gave notice that he appealed to the Federal Court against such part only of the decision of the Learned Trial Judge which decided that the Respondent herein should pay to the Appellant herein \$19,400.00 within two months of the 12th day of August, 1972, as a condition of ordering the relief prayed by the Respondent herein in his counterclaim. The grounds of appeal were contained in a Memorandum of Appeal dated the 2nd day of October, 1972. The Respondent herein does not wish to pursue the points taken in the said Memorandum of Appeal in this Appeal to His Majesty the Yang Di-Pertuan Agung. pp.65-69

20 16. The Applicant below, the Appellants herein, cross-appealed by Notice of Cross-Appeal dated the 11th day of October 1972. In their said Notice of Cross-Appeal the Appellants herein contended that the order made by the Learned Trial Judge should be set aside and the relief claimed under the 30 Originating Summons should be granted to her or alternatively, that the award made by the Learned Trial Judge should be augmented by an award of interest. The Appellant further submitted therein that Section 8(b) and (c) of the Moneylenders Ordinance 1951, has not been contravened and, even if the said sections had been contravened, such contravention did not make the contract of loan unenforceable. p.73, Ll.19-34

40 17. Following the appeal to the Federal Court coming on for hearing on the 20th and 22nd days of February 1973, the Respondent herein submitted a written submission to the cross appeal by the Appellants herein dated the 5th day of March 1973. The Respondent herein adopts the arguments presented herein and so far as may be necessary as part of this case. p.75-90

50 18. The Federal Court (Ong Hock Sim F.J. dissenting) dismissed the appeal, dismissed the cross appeal, and affirmed the judgment of the Learned Trial Judge, save that the Court

amended the same to order that the Respondent herein do also pay the Appellant herein interest at the rate of 6% per annum on the sum of \$19,400.00 from the 17th day of February 1971.

p.91-101
p.97,
Ll.10-20
p.97,
Ll.25-35
p.97,L.35
p.99,L.21
p.99,L.22-
p.100,L.40

19. Judgment was delivered in the said Appeal on the 6th day of October 1973. Azmi J, Lord President, in his judgment (with which Suffian F.J. concurred) reviewed the history of the proceedings, the facts in issue and the judgment of the Learned Trial Judge. The Lord President continued his judgment by dealing with the cross appeal by the Appellants herein. The Lord President considered that clearly section 8(c) of the Moneylenders Ordinance, 1951, had been contravened. He further observed that the provisions of the Land Code could conveniently be complied with by stating in the memorandum of charge that the Appellant herein was the trustee or managing partner of the AR.PR.M. Firm. After rejecting the contentions of the Appellant herein that no illegality had been committed, the Lord President considered whether or not the civil aspect of the relevant transaction was affected by such an offence. The Lord President concluded that because of Section 24 of the Contracts Ordinance and with the support of English Case Law that the agreement in the instant case being forbidden by law was void. It is respectfully submitted on behalf of the Respondent in the Appeal herein that the conclusions of the Lord President were correct.

20. The Lord President then turned in his Judgment to consider the appeal itself and whether or not Section 66 of the Contracts Ordinance was applicable. He accepted the findings of the Learned Trial Judge that both parties were not aware at the time of the execution of the documents of the illegality of the transaction and that the same was only discovered when the Statement of Defence was filed. The Lord President concurred with the Learned Trial Judge in accepting the dicta of Chandra Reddy C.J. in Kanuri Sivaramakrishnaiah V. Vemuri Venkata Narahari Rao (1960) A.I.R. Andh. Pra. 186 and in the order that the Learned Trial Judge made. The Respondent herein does not now seek to question the correctness of the decision of the Lord President in relation to his own appeal to the Federal Court.

21. The Lord President then considered whether or not interest ought to be awarded and he referred to the case of Harnath Kaur v Indar Bahadur Singh, I.A. Vol.L.69 and decided that interest ought to be awarded in the same way in the instant case. The Respondent submits that Kaur's case is inapplicable in the circumstances of the instant case and that the Lord President erred in so deciding.

p.100,L.42-
p.101, L.8

10 22. Ong Hock Sim F.J. in his dissenting judgment proposed to allow the cross appeal. He commenced his judgment by reiterating the facts and issues to be decided. He then set out the relevant legislation and the similar legislation in England upon which certain authorities referred to on behalf of the Appellant herein were decided. He then concluded that as Section 6(2) of the Money-lenders Ordinance 1951 prescribes :

p.102-106

20 "a licence taken out in a name other than the Moneylender's true name be void"

p.108,
Ll.20-21

30 that this provision saves the transaction in the instant case from contravening Section 8(b) and (c) from being illegal. It is respectfully submitted that this conclusion is wrong. The Learned Federal Judge then stated that it was his opinion that even if there had been a non-compliance with statute, it was not fatal to the claim of the Appellant herein because he concluded that Section 8 was merely enacted to establish penalties for contravention of Section 6 of the said Ordinance. The Learned Judge concluded and summarised his judgment in these words :

p.110,
Ll.19-23

40 "There was compliance however with the Ordinance in that she held a licence to carry on moneylending business in her true name and with the Land Code in respect of the registration of the charges in her own name."

Accordingly the Federal Judge considered that the appeal should be dismissed as it did not arise for consideration as he decided that the cross-appeal should be allowed and that the order of the Learned Trial Judge should be set aside.

p.116

50 23. On the 18th day of February 1974 the

p.132-133

Federal Court (Suffian C.J., High Court, Malaya: Gill, F.J.; Ong Hock Sim, F.J.) ordered that Lum Kum Chum be appointed to represent the estate of Ng Siew San in connection with the Appellants intended appeal to His Majesty the Yang Di-Pertuan Agung.

p.134-135

24. On the 8th day of July 1974 the Federal Court (Gill C.J. High Court, Malaya; Ong Hock Sim, F.J.; Wan Suleiman J) ordered that final leave be granted to the Appellant herein to appeal to His Majesty the Yang Di-Pertuan Agung against such part of the Final Judgment and Order of the Federal Court that dismissed the Cross-Appeal in the Federal Court of the Appellant herein.

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p.105,L.38-
p.106,L.15

25. The Respondent respectfully submits that this appeal ought to be dismissed and that the judgment of Mohammed Azmi J was correct. In his decision that there was no contravention of Section 8 of the Moneylenders Ordinance 1951, Ong Hock Sim F.J. failed to take due notice of the fact that the point had earlier been conceded by the Appellant at the trial.

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26. It is respectfully submitted that the Learned Trial Judge was correct both in point of law and the exercise of his discretion when he decided not to award interest on the sum he held was payable by the Appellant herein under Section 66 of the Contracts Ordinance. It is further submitted that even if the trial judge could have awarded interest, the question of an award of interest is a matter for his discretion and the Federal Court erred in impliedly concluding that there were grounds to interfere with the exercise of the discretion of the Learned Trial Judge.

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27. The Respondent respectfully submits :

(a) that the order of the Federal Court of Malaysia was correct and ought to be affirmed (save that part of the order which related to amending the order of the Learned Trial Judge by ordering payment of interest) and that the same ought to be affirmed and this appeal ought to be dismissed with costs;

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(b) if the Respondent be given leave to cross-appeal to His Majesty the Yang Di-pertuan Agung on the

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question of payment of interest,
that the order of the Learned Trial
Judge in relation thereto ought to
be restored and the Order of the
Federal Court of Malaysia relating
thereto be reversed and that the
Respondent herein may be awarded the
costs incurred in resisting the
cross-appeal of the Appellant
herein to the Federal Court.

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for the following among other

R E A S O N S

1. BECAUSE the Learned Trial Judge was correct
in his findings of fact and law.
2. BECAUSE the judgment of Azmi L.P. (with
which Suffian F.J. concurred) (apart from
the part ordering the payment of interest)
was right.
3. BECAUSE the judgment of Ong Hock Sim F.J. was
wrong.
4. BECAUSE the relevant transactions contravened
Sections 8 (b) and 8 (c) of the Moneylenders
Ordinance 1951.
5. BECAUSE the said transactions were illegal
and void.
6. BECAUSE ordering payment of interest in a
moneylending case where the law has not
been complied with is wrong.
7. BECAUSE there was no reason for reversing
the Learned Trial Judge's exercise of his
discretion with regard to the payment of
interest.

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NIGEL MURRAY

COUNSEL FOR THE RESPONDENT

No.16 of 1974

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

Respondent

CASE FOR THE RESPONDENT

LOVELL WHITE & KING
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London, EC4Y 1LP

Solicitors for the Respondent