

The Syndic of the Bankruptcy of the firm of S. N. Khouri *Appellant*

v.

Victor Germain - - - - - - *Respondent*

FROM

THE SUPREME COURT OF PALESTINE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND FEBRUARY, 1940.

Present at the Hearing :

VISCOUNT MAUGHAM

LORD PORTER.

SIR GEORGE RANKIN

[*Delivered by* LORD PORTER.]

This is an appeal from a judgment dated 4th June, 1935, of the Supreme Court of Palestine sitting as a Court of Appeal. That Court by a majority reversed the decision in favour of the appellant of the District Court of Haifa dated the 15th October, 1934.

The material facts are short and are not in issue.

The appellant is the Syndic of the Bankruptcy of the firm of Selim Nasrallah Khouri of Haifa. The firm was declared bankrupt in October, 1930, and the winding-up is not yet concluded.

The respondent claimed to be a creditor in the bankruptcy in respect of the sum of £P.1354·670 and on the 7th August, 1931, the appellant admitted and the Juge Commissaire attested the claim subject to a deduction of £P.301·620 stated to be excessive interest—the debt was accordingly reduced to a sum of £P.1053·050.

On the 21st April, 1933, a meeting of creditors took place for the purpose of considering the question of a concordat (composition). Both at this meeting held some year and a half after the admission of the debt at £P.1053·050, and also on a subsequent occasion, the bankrupt objected to the admission of the claim on the ground, as he asserted, that the claim was solely made up of excessive interest on an original debt which had been wholly and indeed more than wholly paid off if legitimate interest alone had been charged.

Beyond objecting, however, he took no further steps until the 2nd May, 1933, when he petitioned the District Court of Haifa that the Court should order the Syndic to reject the claim of the respondent and request him to prove his debt

in a competent Court. On the 6th April, 1934, this petition was sent by the Syndic to the Juge Commissaire together with a forwarding note. In this note the Syndic stated that, in accordance with legal advice which he had received, the matter was one for reference to the Court and suggested that the points for discussion were:—

“(1) Is it possible to enquire into an opposition after a debt has been confirmed and the document concerned endorsed with the confirmation, in spite of the fact that all the creditors have not applied to the Juge Commissaire as per last para. of Art. 204 to have their amounts ratified?”

(2) If the decision will be that, generally speaking it is not possible to object to a debt duly proved by the creditor before the Syndic and duly endorsed, then are the views of some of the advocates to be adopted, i.e., that the question of excessive interest is subject to opposition even after the debt is proved and the confirmation procedure is completed as per Art. 204? ”

After receiving this petition the Juge Commissaire reported on the appellant's note and referred the matter to the Commercial Court in the following terms:—

“ I find that the points raised by the Syndic are legal points which are to be decided by your Honourable Court. Therefore in accordance with Art. 205 of the Commercial Code, I pray the Court to decide whether it is possible to enquire again into the debts which have already been confirmed if and when an opposition is made as to the illegality of the confirmed debts alleging that they contain excessive interest or for any other reason.”

The case was argued before the District Court of Haifa on the 24th May, 1934, when two points were taken on behalf of the bankrupt:—(1) that the respondent's claim had not been certified by the Juge Commissaire as required by the last paragraph of Article 204 of the Commercial Code, and; (2) that even if such a certification was either unnecessary in the first instance or its omission could not alone form a ground of objection in the case of an admitted debt, yet in the case of usurious or excessive interest the debt could be objected to so long, at any rate, as it had not been paid or the bankruptcy had not been closed.

The answer to the first question depends primarily on the construction to be placed upon and the steps to be taken under section 204 of the Ottoman Code de Commerce. But in order to arrive at a correct conclusion on the matter it is necessary to consider certain other articles of the code and the method by which under Ottoman law the debts entitled to rank for dividend in the distribution of the assets are to be ascertained.

The general provisions as to the verification of debts are contained in the fifth section of the Code, Articles 198 to 210. In this connection it is perhaps sufficient to point out that in Ottoman as in French law the debts are not verified by the oath of the creditor but are publicly determined in the presence of all creditors who desire to be present, of the debtor, of the Syndic and of the Juge Commissaire.

The latter parts of Article 200 and Article 201 are as follows:—

“(200). . . . After the personal claims of the Syndics have been verified by the Juge-Commissaire the claims of the other creditors shall be examined, considered and verified by the

Syndics in the presence of the creditors or their agents and before the Judge-Commissary, who shall draw up a report of the proceedings.

(201) Every creditor whose claims have been verified or noted in the balance sheet of the bankrupt is entitled to be present at the verification of the claims and advance his objections in reference to any claims that have been verified or are under examination. The bankrupt also has the same right."

Some dispute arose before their Lordships as to the correct translation of Article 204. The first paragraph as to which there is no dispute runs as follows:—

"Where a debt of the bankrupt is admitted, the Syndics shall endorse each document proving such debt with a statement of the amount noted in respect of it in the list of the bankrupt's liabilities, and shall date such statement, which shall also be attested by the Judge-Commissary."

In the case of all the French versions of the Ottoman Code which their Lordships were able to examine the second paragraph may be translated as follows:—

"Eight days at latest after his debt has been admitted, each creditor shall be obliged to affirm before the Judge-Commissary that his debt is really and honestly due."

On the other hand the translation apparently accepted by both parties in Palestine and recognised by the District Court runs as follows:—

"Every creditor shall within eight days after the verification of his claim cause the same to be certified by the Judge-Commissary to be a true claim."

In the latter translation no doubt verification means admission after public verification, but it substitutes certification by the Judge-Commissary for affirmation by the creditor.

In this conflict their Lordships do not propose to lay down, even if they had the means of doing so, the true meaning of the Turkish text. Though the Ottoman Code de Commerce is no doubt founded upon the French Code and generally copies certain articles of that Code, they are not prepared to accept the French version as necessarily correct.

Their Lordships cannot part with this aspect of the case without expressing the hope that an authoritative translation of the Ottoman Codes will be made at some early date, since the serious differences in the various translations now in use may well add to the difficulty of ascertaining the law in force in Palestine. Meanwhile in any case in which the wording or true construction of the wording of a Turkish Act or document comes in question their Lordships would be greatly assisted if the local courts would determine exactly what the true wording and meaning of the Turkish text is.

In the present case, however, they think the ascertainment of the exact terms of the section immaterial, and so far as they are able to ascertain, the correctness of the latter version was not called in issue until it was challenged before their Lordships' Board. It appears to be common ground that the debt was admitted, a statement of the amount noted and dated, and attested by the Juge Commissaire. But it was not either affirmed thereafter before the Juge Commissaire if affirmation was necessary, or certified by him if certification was necessary.

Plainly in either view the second paragraph of section 204 was not complied with. What then is the effect of this omission?

The District Court appear to have taken the view that Ottoman law required certification by the Juge Commissaire only, that as that official had already attested the claim, the further formality of certification was unnecessary and that the neglect to comply with this part of the section was sanctioned by long usage in the Ottoman Empire. Their Lordships doubt whether this result was seriously contested in the Court of Appeal, but whether this is so or not they think the public admission of the debt, after the sum claimed had been reduced in amount owing to an allegation of excessive interest, should not be interfered with when so long a period has elapsed between the admission of the debt and its dispute by the bankrupt, especially as it was open to the debtor and to all other interested parties to object to the admission in the first instance.

This indeed has been the practice in Palestine and even if French law or its principles be applicable, appears to be the view of the French Courts. Their Lordships' attention was called to the case of *Banon freres C. Lobin et Ferchat*, a decision of the Cour de Cassation, to be found in Dalloz Jurisprudence Générale (1886), p. 69, where it was held, and is stated to be a long recognised principle of French law, that an admission "pure et simple" of a debt as part of the liabilities in a bankruptcy constitutes between the creditor and the Syndic a "Contrat Judiciaire", i.e., a legally binding bargain subject to the right of any of the interested parties to dispute it in case such a bargain is contrary to the requirements of public order or presumably in the case of fraud.

In opposition to this view their Lordships' attention has been called to an unreported case decided on the 6th February, 1930, by the Court of Appeal in Palestine on appeal from the District Court of Jaffa of which the short title is "C.A. No. 29/30, *Muhammad Sha'aban el Hindi and his sons Mahmud and Ali v. Ayesb Omar Ajjour on behalf of the heirs of his father Omar Ajjour.*"

In that case it appears to have been held that a judgment which had been signed and under which some payments had apparently been made could be reopened on proof that excessive interest had been charged and a reduction to the legal rate of interest directed in accordance with Art. 6 of the Ottoman Law of Interest.

The facts and circumstances of the case are not set out in the report furnished to their Lordships and without further particulars the principles there followed cannot be determined. In any case the decision deals with the setting aside of a judgment and not with a case in which a debt has been admitted in bankruptcy and therefore is not *in pari materia* with the case now under consideration.

It follows that in their Lordships' view the mere omission of the certification or affirmation, as the case may be, does not of itself invalidate the admission of the debt or enable the debtor, the Syndic, or the other creditors to dispute it.

But this decision does not finally determine the case since the appellant has contended that the debtor's liability can be reopened in Ottoman as in French law in case the Contrat Judiciaire created by the admission is contrary to the requirements of public order.

In French law the contract could be reopened in the case of deceit, fraud, and force majeure and, as appears from the case quoted above from Dalloz, in certain cases where the admission would be contrary to those laws which in France before 1921 limited the interest permitted to be charged to a maximum percentage.

Their Lordships do not think it necessary to determine in what instances French Law would regard, or more accurately, would before 1921 have regarded the exaction of excessive interest as contrary to public policy. At one time the charging of usurious interest was undoubtedly penal but the meaning of usurious interest is a matter of French law, and not in their Lordships' opinion germane to the determination of the present case.

The principle upon which a claim for usurious interest could be rejected under French law is that it is contrary to public order in France and their Lordships are prepared for the purposes of the present case to assume that a debt admitted in bankruptcy could under Ottoman law likewise be rejected if it were found to be contrary to public order in Palestine.

But the Ottoman Code in adopting a certain limited number of the articles of the French Code de Commerce even if it accepted them without variation did not adopt the background of French law in the light of which the Code de Commerce is construed in that country. As Tyser C.J. said in *E. Michailides v. A. Michailides* (10 Cyprus L.R. 77 at p. 80): "the Ottoman Commercial Code is a partial adaptation of the French Commercial Code without any of the enactments of the French Code Civile on which the French Commercial Code is based." It does not follow therefore that the charging of excessive interest even if it were in all cases against public order in France would be against public order in Palestine.

The true method of interpretation of a foreign code which is adopted in whole or in part within the territory of a country governed by a system of law other than that of the country from which the code is borrowed has been set out on many occasions in judgments of this Board. It is only necessary to refer to the principles laid down in a judgment of the Board in *Quebec Railway Light Heat and Power Co. v. Vandry*, [1920] A.C. 662 at p. 671 in the words:—

"The contention on the other hand is that the Civil Code of Lower Canada was founded on the Code Napoleon from which it differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding art. 1384 ought to be applied, the prior decisions of the Canadian Courts notwithstanding"

It seems plain that both these trains of reasoning start rather from the text of the Code Napoleon as interpreted by French Courts and the general jurisprudence of Quebec than from the very

words of arts. 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind. 'The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoleon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law.' *Maclaren v. Attorney General for Quebec*, [1914] A.C. 258, 279. Thus, however stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, 'recent French decisions, though entitled to the highest respect . . . are not of binding authority in Quebec' (*McArthur v. Dominion Cartridge Co.* [1905] A.C. 72, 77) still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire."

The same principle is more lately to be found set out in *Laverdure v. Du Tremblay*, [1937] A.C. 666 at p. 677, where the meaning of the Civil Code of Quebec was in issue.

"The Civil Code of Quebec" it is said "must no doubt be construed according to the principles laid down in *McArthur v. Dominion Cartridge Co.*; *Maclaren v. Attorney General for Quebec*; and *Quebec Railway Light Heat and Power Co. v. Vandry*. The conclusions of French Courts or French jurists upon articles of a Code similar, if not identical, with those in the the Civil Code now under consideration, though entitled to great respect, are not of binding authority in Quebec. The Civil Code of Quebec, as Lord Sumner pointed out in the last cited case, is in the language of a legislature established within the British Empire."

In the light of these considerations the question which their Lordships have to determine is not whether the charging of excessive interest is against public policy in France or in other countries which have adopted the French Commercial Code but the narrower one, viz., whether the charging of excessive or usurious interest is contrary to public order in Palestine.

No doubt under Ottoman law the recovery of interest beyond the amount of 9 per cent. per annum has been prohibited by an Act dated the 9th Rajah 1304. The material provisions are as follows:—

"Article 1.—As from the date of publication of this law the maximum rate of interest for all ordinary and commercial debts shall be 9 per cent. per annum.

Article 3.—If it be proved that a creditor and debtor have in a deed of contract agreed to a rate of interest higher than the legal rate, whether this be explicit in the deed or whether the excess be included in the principal amount, the rate shall be reduced to 9 per cent. per annum.

Article 4.—The total interest on a debt shall not exceed the capital amount of the debt, irrespective of the period of the debt. No court shall grant a decree for interest exceeding the capital amount.

Article 5.—Compound interest shall not be allowed. Provided that if the debtor has paid nothing on account for 3 years or if the creditor and debtor have agreed that the accumulated interest for three years shall be added to the capital, compound interest for three years but not more, shall be added to the capital. Compound interest on current accounts between merchants kept under the rules of the Commercial Code are excepted from the provisions of this article.

Article 6.—Claims for the reduction of interest to the legal rate may be heard so long as there is an account standing between the parties, even though the account has been transferred or the debt

renewed. When the debt has been paid and accounts between the creditor and the debtor have been closed, no claim to recover an excess of interest paid shall be heard."

Even under French law it seems doubtful whether the mere charging interest beyond a maximum stipulated by law is in all cases contrary to public order. See *Dalloz Repertoire Pratique* Vol. XII p. 568 Sect. 1, sub-divisions 2, 4 and 6 under the heading "Usure". However this may be the Ottoman Code in their Lordships' view shows no indication that a failure to comply with its terms constitutes an offence against public order. It is true that an action founded upon a claim for excessive interest as such cannot succeed. But the result of charging such interest is not to make the contract illegal or even invalid but merely to limit the amount recoverable to interest calculated at the limited rate. Where, however, the claim is based not upon the contract to pay excessive interest but as here upon an agreement to pay a specified sum publicly admitted to be due, the statute would not of itself prevent recovery, and so far from such a contract being contrary to public order the terms of Article 6 of the statute appear to recognize the rights of the creditor to the stipulated interest, even though the statutory rate has been exceeded, once the account has been closed and the debt paid.

It is difficult in such circumstances to hold that the charging of interest beyond that permitted by the statute is contrary to public order and their Lordships agree with the view expressed by the Palestine Court of Appeal that it is not.

The appellant's representatives feeling the difficulty of this objection to their contention maintained that the admission of the debt should be set aside on the ground that the interest charged was not only in excess of that allowed by law but was usurious and that usury consisted in the charging of exorbitant interest, i.e. interest greatly in excess of that which the lender could legitimately exact. They maintained therefore that the Ottoman law of interest had no application to the matter and that no deduction such as that mentioned above could be drawn from the wording of Art. 6. Altogether apart from the difficulty of ascertaining what interest is usurious in the sense contended for under a system of law in which the maximum interest is fixed, their Lordships cannot find that such a contention was ever raised in the local courts. In them the argument throughout was that the interest was usurious because it exceeded the permitted maximum, and that argument their Lordships, as they have indicated, find to be unsound. But even if it were open to the appellant to contend that usurious as opposed to excessive interest was contrary to public policy in Palestine their Lordships have not been able to find, and their attention has not been drawn to, any provision in the Ottoman law making usurious interest, in the sense in which the appellant seeks to define it, contrary to public policy.

In the result, therefore, their Lordships are of opinion that both the appellant's contentions fail, and will humbly advise His Majesty that the appeal be dismissed.

The appellant must pay the costs of the appeal.

In the Privy Council

THE SYNDIC OF THE BANKRUPTCY
OF THE FIRM OF S. N. KHOURI

v.

VICTOR GERMAIN

DELIVERED BY
LORD PORTER

Printed by His Majesty's Stationery Office Press,
Pocock Street, S.E. 1.

1940