9/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 49 of 1981
No. 50 of 1981
No. 51 of 1981

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

KOH KIM CHAI — Appellant (Chargor/ Respondent)

and

ASIA COMMERCIAL BANKING CORPORATION LIMITED — Respondent (Chargee/ Applicant)

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Judgment of the Federal Court of Malaysia holden at Johore Bahru (Lee Hun Hoe C.J., Borneo, Wan Suleiman F.J. and Hamid J.) dated 24th June 1980 dismissing with costs the Appellant's appeal from a Judgment of Syed Othman Bin Ali J. in the High Court of Malaya at Johore Bahru dated 28th December 1978 whereby it was adjudged that the Respondent Bank was entitled to seek by way of relief the sale by public auction of a piece of land belonging to the Appellant in order to recover the amounts due to the Respondent secured on the said land by three charges in favour of the Respondent all dated 22nd May 1973. Three appeals on the same grounds are involved. For the sake of convenience the Appellant has been directed to lodge a Petition to consolidate all three appeals and each side is to lodge one Case.

THE ISSUES

2. The issues are whether the Respondent in obtaining a charge on land situate in Malaysia as security for a loan and attempting to enforce the charge was :

Record

(a) Carrying on a 'banking business' within the meaning of section 2 of the Banking Act 1973 requiring a licence under section 3 of the Act or

(b) Holding itself out as a 'bank' in contravention of section 9 of the Banking Act 1973 or

(c) Conducting a moneylending transaction within the meaning of the Money Lenders Ordinance 1951 requiring a licence under section 5 of the said Ordinance or

(d) Acting in contravention of sections 9, 11 and 15 of the Exchange Control Act 1953.

(Refs. for Record in No. 50 save where stated)

THE FACTS

3. The Respondent is a Bank registered in Singapore where it carries on business. The
P17:36 Appellant is the registered proprietor of the
P32:36-7 land comprised in Grant 23940 Lot 2605 in the
P32:39-40 Mukim of Senai-Kulai ("the land"). Prior to 22nd
P32:36-40 May 1973 the Respondent in Singapore lent money on overdraft to three of its customers, respectively Overseas Lumber (Pte) Limited (registered in Singapore), Kimwood Trading Company (registered in Malaysia) and Overseas Lumber Berhad (registered in Malaysia) ("the Companies"). The money was loaned under
P33:42-54 facilities granted by agreements governed by Singapore Law. The loans have not been repaid. On 22nd May 1973 the Appellant in Singapore executed three charges of the land in favour of the Respondent in respect of the borrowings of
P32:40-P33:1-8 each of the said companies. The limits of the charges were $350,000 (Overseas Lumber (Pte) Limited), $400,000 (Kimwood Trading Co.) and $500,000 (Overseas Lumber Berhad) ("the Charges") as to principal.

4. Under the terms of the Charges the amounts owing by the respective companies were payable by the Appellant upon demand in writing. By Notices of Demand in Form 16E under the National Land Code dated 22nd August 1976 the Respondent requested
P54 payment of the amounts due.

5. No payment was made by the Appellant, so by Originating Summonses dated 7th June 1977 the Respondent sought Orders for the sale of the land
No.49 p.1-3 by public auction.
50 p.1-3
51 p.1-3

Record

6. By Orders of Sayed Othman Bin Ali J. dated 28th December 1978 it was ordered that the said land be sold by public auction. The land has not been sold and accordingly no monies have been remitted to Singapore. — No.49 p.4-6, No.50 p.26-28, No.51 p.4-6

THE REASONS FOR THE DECISION OF SAYED OTHMAN BIN ALI J.

7. Sayed Othman Bin Ali J. held that :

(i) Section 3 of the Banking Act 1973 related only to a bank operating in Malaysia and that the Respondent Bank was operating in Singapore. The transaction was good according to Singapore law which was the relevant law. — P.23 : 5-10

(ii) Section 9 of the Banking Act 1973 only applied to a bank operating in Malaysia. — P.23 : 9-10

(iii) Section 5 of the Moneylenders Ordinance 1951 had no relevance to the facts of the present case as the transaction was conducted outside Malaysia and there was nothing to show that the transaction was contrary to any equivalent Singapore law. — P.23 : 11-16

(iv) Section 9 of the Exchange Control Act 1953 did not appear to be applicable as the Respondent Bank would have to seek the permission of the Controller before the Senior Assistant Registrar in Malaysia could make any payment to it from the proceeds of sale. — P.23 : 17-33

(v) The charges were not securities within sections 11 and 15 of the Exchange Control Act. — P.23 : 34-50, P.23 : 1-52

THE REASONS FOR THE DECISION OF THE FEDERAL COURT

8. The Federal Court held that the Appeal was primarily concerned with the proper construction of statutes. The words 'bank' and 'banking business' were defined in the Banking Ordinance 1958 - that definition having been replaced by section 2 of the Banking Act 1973. Section 2 provides as follows : — P.34 : 39-40, P.35 : 29-38, P.36 : 35-52

> "'Banking business' means the business of receiving money on current or deposit account, paying and collecting cheques

Record

drawn by or paid in by customers, and making advances to customers and includes such other business as the Central Bank, with the approval of the Minister, may prescribe for the purposes of this Act."

Section 2 defines 'bank' to mean -

P.36 : 51-52

"any person who carries on banking business."

P.34 : 52;55
P.36 : 1-29

9. The Federal Court referred to Bank of China -v- Lee Kee Pin (1961) M.L.J.40 in which Rigby J. permitted the recovery of debts incurred towards a bank which had subsequently failed to obtain a licence and described the mischief which the 1958 Banking Ordinance sought to avert as the carrying on by a person or company in Malaysia

P.36 : 7-29

of a banking business without having in that country the requisite paid-up capital. In the present case,the Federal Court held that the

P.37 : 14-21

crucial question was whether the Respondent in acquiring and accepting charges of Malaysian land, was conducting banking business and the Court held that such transactions could not be said to come within the ambit of section 3 of the Banking Act, 1973.

10. The Federal Court further :

(i) Agreed with the Judge's interpretation of section 2 of the Exchange Control Act 1953 and held that the charges were not securities

P.38 : 4-10

within the Act.

(ii) Held that there was no restriction on the movement of monies between Singapore and

P.38 : 11-17

Malaysia when the charges were made.

(iii) Noted that there was no provision in the National Land Code preventing a foreigner, including a foreign bank, from effecting a

P.38 : 40-43

charge on land in Singapore

(iv) Agreed with the Judge's views upon sections 3 and 9 of the Banking Act, section 45 of the Moneylenders Act and section 9 of the

P.38 : 44-54
P.39 : 1-39

Exchange Control Act.

(v) Held that the Judge was right in ordering

P.39 : 33-35

the sale of the land.

SUBMISSIONS

Issue (a) Was the act of creating a charge 'banking business'?

11. The loans were given to the borrowers in Singapore and other than taking charges of land in Malaysia there was no evidence that the Respondent had entered into any transaction in Malaysia. The proper law applicable to the contract of loan was that of Singapore. Further, there was no evidence that any money was remitted to Malaysia by the Respondent Bank.

Record

P.34 : 11-13
P.33 : 45-46
P.19 : 35-36

12. It is submitted that the Courts below were correct for the reasons given by them in holding that the giving of the charges in Singapore with their registration and enforcement in Malaysia did not constitute the transaction of banking business or the transaction of banking business within Malaysia.

13. Therefore in attempting to enforce the charges, it is submitted that the Respondent Bank was not carrying on a 'banking business' within the Banking Act 1973.

Issue (b) Holding out as a 'bank'.

14. It is submitted that for the reasons given by them the Courts below were correct in finding that the Respondent Bank was not holding itself out as a 'bank' within the meaning of section 9 of the Banking Act 1973. In order for the Respondent to fall within the provisions of this section it would have to have been engaged in 'banking business'. The creation, registration and enforcement of a charge do not fall within the definition of 'banking business' contained in section 2 of the Banking Act 1973.

P.36 : 41-50

Issue (c) The Moneylenders Ordinance 1951.

15. The only transactions conducted by the Respondent in Malaysia were not in the nature of banking business and/or moneylending. It is therefore submitted that section 5 of the Money-lenders Ordinance 1951 has no application to the Respondent Bank and the Respondent relies upon the reasons given in the Courts below.

P.19 : 35-36

Issue (d) Exchange Control

16. As found by the Courts below :

(i) When the charges were given there was no prohibition on the movement of funds between Malaysia and Singapore.

P.38 : 11-17

Record

P.38 : 4-10

(ii) The charges are not 'securities' within the meaning of the Act.

(iii) It is implicit that upon the sale of the land the assent of the Controller will be sought for any remission of the proceeds

P.39 : 14-32 to Singapore.

17. The Respondent submits that this Appeal should be disallowed with costs for the following among other

R E A S O N S

(i) BECAUSE in charging land owned by him, the Appellant validly secured overdraft facilities given by the Respondent Bank together with interest thereon.

(ii) BECAUSE the charges do not contravene the Banking Act 1973.

(iii) BECAUSE the charges do not contravene the Moneylenders Ordinance 1951.

(iv) BECAUSE the charges do not contravene the Exchange Control Act 1953.

(v) BECAUSE under the terms of the charges the Appellant is liable to the Respondent for the sums claimed against him.

(vi) BECAUSE the decision of the Federal Court is correct and ought to be upheld.

ROBERT ALEXANDER

NICHOLAS CHAMBERS

No. 49 of 1981
No. 50 of 1981
No. 51 of 1981

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 :

KOH KIM CHAI — Appellant (Chargor/ Respondent)

- and -

ASIA COMMERCIAL BANKING CORPORATION LIMITED — Respondent (Chargee/ Applicant)

CASE FOR THE RESPONDENT

COWARD CHANCE
Royex House
Aldermanbury Square
London EC2V 7LD.

Solicitors for the Respondent