Chia Ah Sng v Hong Leong Finance Limited
[2000] SGHC 273

Case Number : OS 668/2000

Decision Date : 14 December 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Lew Meow Fah (Lew Meow Fah & Co) for the plaintiff; Suresh Nair (Allen & Gledhill) for the defendants

Parties : Chia Ah Sng — Hong Leong Finance Limited

Res Judicata – Judgment by assistant registrar – Application made two years later to set aside judgment – Whether matter res judicata

: In June 1995, when the property market was buoyant, the plaintiff, Madam Chia Ah Seng, purchased a shophouse from the Housing and Development Board. The purchase price was $2,346,000. To finance the acquisition she had to borrow. She did so from Hong Leong Finance Limited, the defendants (`Hong Leong`).

The total amount of the loan granted by Hong Leong was $2,350,000. It was made up of $2,162,000 and $188,000. The smaller amount was the final 8% of the price.

The first loan attracted an initial interest rate of 5.75% p payable in monthly rests for the first year. From the second year it was 6.75% pa also at monthly rests. Hong Leong had the `absolute discretion` to vary the interest rates to reflect the prevailing market rate. The loan was for a term of 20 years. The repayment was to be in monthly instalments.

One of the `other terms and conditions for both loans` was:

> *`Instalments and other moneys in arrears: 1.5% per month. Late payment interest shall be calculated on the basis of 360 days per year.*

The principal security for the loan was a mortgage of the leasehold of the property in favour of Hong Leong. It was contained in and evidenced by a deed of assignment made on 16 June 1995. Then there was a memorandum of mortgage in favour of Hong Leong. In addition there was a guarantee in favour of Hong Leong by one Fok Wing Tin which was also executed on 16 June 1995.

By April 1996 expectations of the plaintiff went awry. The market turned against her. She was unable to service her loan. So by a letter dated 26 April 1996, Hong Leong`s lawyers demanded payment of the sum of $2,195,034.83 as at 22 April 1996 and interest at the rate of $1,095.72 per day until payment. This was calculated at 18% pa. They also demanded possession of the property after the lapse of one month in accordance with s 75 of the Land Titles Act.

On 6 November 1996 Hong Leong`s lawyers sent a letter of demand to the guarantor.

OS 1165/96

In these circumstances on 25 November 1996 the lenders took out OS 1165/96 against the borrower, (that is the plaintiff in this case) and the guarantor. The principal reliefs sought were these :

1 Payment of $2,271,608.86 being the principal amount and interest as at 31 October 1996.

2 Further interest at the rate of $1,075.18 per day from 1 November 1996 until payment.

3 Possession of the property.

The summons was supported by an affidavit of the deputy manager of Hong Leong. The borrower appointed a firm of solicitors to act for them - namely Chan Kum Foo & Associates. The borrower did not file an affidavit. The summons came up for hearing on 20 June 1997. It was adjourned by consent to 24 March 1997 as the parties were negotiating a settlement.

The summons came up for hearing before Assistant Registrar Phang on 24 March 1997. Further adjournment of the application was refused. Then the assistant registrar asked counsel for Hong Leong whether there was any substantive defence to the claim. Counsel replied `No` and added that there was a part-payment. Nothing was said about the default interest rate being penal. Counsel for Hong Leong asserted that the part-payment went to reduce interest first. The assistant registrar then made the following principal orders:

> *D1 and D2 do pay plaintiff outstanding sums due as at 24 March 1997 under the deed of assignment dated 16 June 1995 and the deed of guarantee dated 16 June 1995 respectively.*
>
> *Plaintiff shall by 31 July 1997 file and serve a further affidavit exhibiting and verifying a statement of account as at 24 March 1997 pursuant to cl 36 of the memorandum of mortgage registered as MMI/11341G at the Registry of Titles and Deeds.*

He also made an order for possession.

Hong Leong filed an affidavit setting out the computation of the amount due as at 24 March 1997. They did so on 31 March 1997. It was apparent from the computation that the computation was done on the basis of 18% pa It was not on a monthly rest basis. It was on a rate of $1,075.21 which reflected an interest rate of 18% pa on $2,180,218.56. Five payments had been made. This was applied to set off against interest. In the result the bottom-line amount due as at 24 March 1997 was $2,332,698.63. The property was then sold by Hong Leong. Even then, according to Hong Leong , part of the debt still remained unpaid.

OS 78/98

Some ten months after assistant registrar made the above order Hong Leong had commenced proceedings in connection with another entirely unconnected loan transaction with another customer. By OS 78/98, Hong Leong claimed against Tan Gin Huay and Sim Sai Quek outstanding loan moneys. They were secured by a mortgage of a food-stall purchased from HDB. The facts appear in a succinct summary form in **Hong Leong Finance Ltd v Tan Gin Huay & Anor** [1999] 2 SLR 153 . The originating summons came up for hearing before Warren LH Khoo J. The defendants appeared in person. The judge, inter alia, said this in his judgment which has not been reported:

> *The 18% default interest*

In the course of writing this judgment, something which I had been completely unaware of has struck me as I looked more closely at the exhibits to the plaintiffs` affidavit. That is an 18% per annum default interest imposed by the plaintiffs on the outstanding balance and which the plaintiffs had sought to recover. The 18% figure did not appear in the body of the affidavit; only the sum of $56.81 a day was mentioned. The 18% figure appears in the monthly statements exhibited to the affidavit, but I must say I did not notice it at the time of the hearing. Counsel did not refer to it, although he did refer to the monthly statements generally. I assume that he was not aware of it, or, if he was, he did not think anything of it. There is no mention of it in the letter of offer of 26 November 1996. One has to look through the fine print of the memorandum of mortgage to find the provision. That is a document on file with the Registry of Titles and incorporated by reference as part of the mortgage documents executed by the defendants.

The monthly statements show that as from the date of the notice of 4 November 1997, the default interest of 18% was imposed instead of the 5.5% normal interest. This works out to $56.81 a day, or about $1,750 a month. The penalty interest alone far exceeds the original monthly repayment sum of $949.65 (which included part repayment towards principal).

A default interest rate of this magnitude smacks of a penalty. I doubt if it can be justified by the extra cost and time required in dealing with the loan in default, or by any other considerations. Its enforceability is open to serious question. Such default interest provisions serve no purpose except to hasten the unfortunate borrower who has temporary difficulties down the slippery road to bankruptcy. The default interest applies to the outstanding principal until actual payment. Nine times out of ten, a borrower in such a situation is not able to pay the interest, let alone any part of the principal. The outstanding balance just snowballs, and the borrower, or his guarantor, is then hauled to the bankruptcy court. This is against the public policy reasons underlying recent amendments to the Bankruptcy Act making it easier for bankrupts to be discharged. I made a reference to these policy considerations in ***Re Seah Ooi Choe*** *[1998] 1 SLR 903 . A corollary of such a public policy must surely be to make it less easy for people to be made bankrupt in the first place.*

In the context of the programme to enable the small businessmen in the HDB heartlands to have their own business premises, provisions like that in question also would result in properties slipping from the hands of the intended beneficiaries to those of the financial institutions. I am sure this is not a result that was intended.

On 25 June 1998 Hong Leong being dissatisfied with the judgment of Warren LH Khoo J appealed to the Court of Appeal. The appeal was heard on 18 January 1999. On 16 March 1999 the Court of Appeal delivered its written judgment. It was a barrier breaking decision for it was the first time an increased default rate of interest was struck down as a penalty in a common law country including America. It is to be noted that the interest point was not an issue before Warren LH Khoo J and he had not ruled on it. All the same the Court of Appeal raised and struck down the clause. In doing so it made no alternate award of interest even though it had the power to do so.

OS 1390/99

Some five months after the release of the Court of Appeal judgment and some two years and a half after Assistant Registrar Phang made his order in OS 1165/96 the present plaintiff filed OS 1390/99 to set aside the order made on 24 March 1997. The summons in effect asked the court to strike down the default interest rate clause as being a penalty. The summons came up for hearing before Chan Seng Onn JC. The judicial commissioner made no order on OS 1390/99. However, he directed the `parties to clarify the judgment or order with Asst Registrar and also clarify the scope of that judgment or order`.

Assistant Registrar Phang clarified his order as follows:

> *This is a clarification not a further hearing on or request for further arguments.*
>
> *The order of court dated 24 March 1997 means what it says. At the hearing, the debt was not disputed, but the parties did not have the precise amount owing as at 24 March 1997. As the court was informed there was a conclusive end clause, I did not think there was any purpose in adjourning the matter. I therefore ordered payment of the sum due as at 24 March 1997, such sum to be certified by a statement of account verified by affidavit to be filed by 31 March 1997.*
>
> *Parties did not address me on post judgment contractual interest. As such, I did not consider that issue. In the circumstances, it follows that post jdugment interest would be at the prescribed statutory rate prevailing as at 24 March 1997.*

It appeared that Hong Leong had calculated interest after 24 March 1997 in accordance with the contractual or the prevailing default rate even after judgment. After the clarification Hong Leong calculated the interest according to the contractual provision at 18% pa until 24 March 1997 and thereafter at 6% pa which was the rate of interest on judgment according to the Rules of Court.

OS 668/2000

Two months after the clarification and some six months after the direction by Chan Seng Onn JC the present application OS 668/2000, was taken out by the borrower, Chia Ah Sng. The principal relief sought was a declaration as follows:

> *The provision of interest at the rate of 1.5% per month in the event of the plaintiff`s default of payment of the monthly instalments and other money in arrears on the mortgage of the said property as stipulated in the letter of offer dated 8 March 1995 from the defendants to the plaintiffs is a penalty and unenforceable against the plaintiff.*

There were other consequential prayers.

At the hearing of the summons counsel for Hong Leong relied on the doctrine of res judicata and asked for the dismissal of the application. Counsel for the borrower (the plaintiff before me) argued that the question of interest had not been argued before or decided either by Phang AR or Chan Seng Onn JC the matter was not res judicata. So the plaintiff, by reason of the Court of Appeal decision,

was entitled to raise it by this originating summons. I decided against the plaintiff and held that the matter cannot be reopened.

My decision was based on two long established legal doctrines. Both doctrines rendered it impossible to reopen a fully and finally adjudicated issue or matter.

The first is the doctrine of finality that is to say the doctrine of res judicata. It says that an adjudicated matter cannot be readjudicated. It applies where a judgment has been regularly entered on a thing or matter after final adjudication on its merits by a tribunal of final result having competent jurisdiction of the subject matter of the litigation. In a hierarchical court system final decision is one from which no appeal lies. It takes effect when the judgment is entered or the decision is issued or the time for appeal against the decision has expired. It is a doctrine of ancient origin and was recognized by the Roman law as well as the common law and civil law. There are no exceptions to this doctrine are of res judicata although there is an exception to the rule of issue estoppel. See below.

The force and effect of the doctrine is well illustrated by two decisions made in 1948: **Re Waring; Westminster Bank Ltd v Burton-Butler** [1948] Ch 221 and **Re Koenigsberg; Public Trustee v Koenigsberg** [1948] Ch 727 These cases reiterate that a given decision cannot be revisited even though it is overruled subsequently by a higher court.

This dimension of the doctrine has been given expression in recent cases. ***The Doctrine of Res Judicata*** by Spencer Bower, Turner and Handley (3rd Ed, 1996) at para 189 says this :

> *Whenever the party against whom a decision is pronounced failed to raise some question he could have raised without detriment to his interests which it was his duty to raise, the adverse decision includes an adverse decision on the omitted question.*

In **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581, Lord Kilbrandon speaking for the Privy Council declared by referring to the doctrine of res judicata and said:

> *There is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.*

Correctness of the decision is irrelevant to the doctrine of res judicata. Spencer Bower put it in para 15:

> ***Correctness of the decision not relevant***
>
> *It is not necessary to prove that the decision relied on is correct in law or fact: if it is a final decision, by a tribunal having jurisdiction, as to the same question, and between the same parties, it will be binding on them, until upset on appeal. `Res Judicata ... gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may b wrong`. This rests on the fact that a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal.*

Arnold v National Westminster Bank plc [1991] 2 AC 93 created an exception to the principle of issue estoppel. That exception, however, does not permit revisiting a given decision which is res judicata.

Singapore cases

Ng Chee Chong & Anor v Toh Kouw & Anor [1999] 4 SLR 45 concerned a contract for the sale and purchase of a flat. Having contracted to purchase the flat the defendant repudiated the agreement and failed to pay $5,000 which was payable `immediately upon signing the contract`. The plaintiff brought an action and obtained summary judgment for that sum of $5,000. The action was commenced on 14 August 1997 and summary judgment was given on 23 October 1997. After the commencement of the action but shortly before the date of summary judgment, that is on 5 October 1997 the plaintiff sold the flat at an alleged loss of $30,000. To recover that loss he filed another action on 25 November 1997. The defendant applied to strike out the claim on the basis of res judicata. The claim for loss, it was argued, ought to have been included in one action for all damages. The Court of Appeal held that the claim for loss had not arisen at the time the first action was filed. The doctrine of issue estoppel enunciated in **Henderson v Henderson** [1843] 67 ER 313 and **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1957] AC 581 did not catch the second action. The court found support for its decision in what Lord Upjohn said in **Carl Zeiss Stiftung v Rayner & Keeler Ltd** [1967] 1 AC 853.

The case of **Ching Mun Fong v Liu Cho Chit** [2000] 1 SLR 517 concerned, inter alia, the application of the wider res judicata doctrine enunciated in the ***Yat Tung Investment Co Ltd*** case. It was held that on the facts the case fell outside the limitations of the definition of the doctrine of res judicata.

The above cases are distinguishable from this case.

Merger

In addition to the doctrine of res judicata as outlined above there is another doctrine to be considered. It is the doctrine of merger. According to this, when a judgment is pronounced in favour of a claimant, the original claim merges in the judgment and thereupon the original claim is dead. For example when an action on debt is brought and judgment obtained, the right of action of a contractual debt is fused into the judgment and becomes a judgment debt. The latter being the greater absorbs the lessor. Thereafter the debt is extinguished is no longer capable of adjudication.

In this case the action for contractual interest, upon judgment by Phang AR, merged into judgment. Thereafter statutory interest at 6% pa ran on the composite judgment amount, that is the principal and contractual interest up to the date of judgment. A claim for the contractual judgment to continue after judgment was not included in the proceedings. Accordingly the interest claim ceased to have an independent existence and could not be enforced.

The application of the above doctrines naturally led me to dismiss the originating summons before me. The interest issue was res judicata and there was a merger of the interest claim in the judgment.

Outcome:

Application dismissed.