

IN THE FEDERAL COURT OF THE REPUBLIC OF SINGAPORE

[1968] SGFC 7

CA Y8/1968

Between

United Overseas Bank Ltd

... Appellant

And

Chung Khiaw Bank Ltd

... Respondent

GROUND OF DECISION

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

United Overseas Bank Ltd v Chung Khiaw Bank Ltd

[1968] SGFC 7

CA Y8/1968

Chua F A J; Tan Ah Tah FJ; Wee Chong Jin CJ (Singapore)

10 July 1968

- 1 The circumstances which give rise to this appeal are as follows:
- 2 The appellants, United Overseas Bank, Ltd, sued Tay Soo Tong in Suit No 2189 of 1965 and obtained a judgment for \$378,267.31 on 16 June 1966.
- 3 On 22 September 1966 the respondents in this appeal, Chung Khiaw Bank, Ltd, took out an originating summons no 239 of 1966 against the same Tay Soo Tong and an order for substituted service was obtained against him and the originating summons was not heard until 14 November 1966.
- 4 In the meanwhile United Overseas Bank Ltd took out a writ of seizure and sale and an order was obtained on 27 October 1966, attaching the interest of Tay Soo Tong in certain immovable properties (hereinafter referred to as the said properties) and on 28 October 1966, the order of attachment was registered against the said properties.
- 5 At the hearing of the originating summons no 239 of 1966, Tay Soo Tong, not having entered an appearance, the Chung Khiaw Bank Ltd obtained an order, inter alia:

- (a) declaring them to be the legal mortgagee of the said properties;
- (b) giving them liberty to sell the said properties out of court;
- (c) directing the net proceeds of sale to be paid to them in satisfaction or part satisfaction of the amount due and owing by Tay Soo Tong to them.

6 At the hearing no mention was made of the order of attachment of 27 October 1966, obtained by the United Overseas Bank, Ltd and registered against the said properties on the 28 October 1966.

7 Between 15 November 1966, and 10 March 1967, correspondence passed between the solicitors for United Overseas Bank, Ltd and the sheriff of Singapore regarding the sale of the said properties that had been attached. The sheriff tried to bring the United Overseas Bank Ltd and the Chung Khiaw Bank Ltd to some sort of understanding as to the disposal of the said properties but without success.

8 On 23 January 1967, the Chung Khiaw Bank Ltd registered the order obtained by them on 14 November 1966, at the Registry of Deeds against the said properties.

9 On 18 March 1967, the Sheriff applied in summons-in-chambers entered No 441 of 1967 in Suit No 2180 of 1965 for, inter alia, liberty to proceed with the sale of the said properties pursuant to the writ of seizure and sale dated 25 October 1966. The sheriff in his affidavit said that he believed that there was a question of priority as between the United Overseas Bank Ltd and the Chung Khiaw Bank Ltd in regard to the said properties. Both the banks were served.

10 The sheriff's summons was heard on 29 May 1967, by AV Winslow J, who made no order on the application.

11 On 25 October 1967, the United Overseas Bank Ltd took out a summons-in-chambers entered no 2393 of 1967 in originating summons no 239 of 1966 seeking an order:

(1) that a copy of the summons-in-chambers and copies of all affidavits in support thereof be served on the sheriff of Singapore;

(2) that the sheriff of Singapore be made a party to the said originating summons;

(3) that the order of court dated 14 November 1966, made in the originating summons be set aside and that the Registrar of Deeds do rectify the Register of Deeds and cancel the entry made on 23 January 1967, in the said register of the registration of the order of court dated 14 November 1966, made in the originating summons;

(4) for other consequential orders.

12 This application came before AV Winslow J in open court. Counsel for the Chung Khiaw Bank Ltd raised preliminary objections to the application on various grounds which were summarised by the judge in his judgment as follows:

(i) that the applicants were total strangers to the originating summons in question and accordingly were not parties to it and should therefore obtain the leave of the court if they intended to intervene;

*(ii) that the applicants have no locus standi in the matter at an and should apply for leave to intervene on the principles laid down in **Jacques v Harrison** (1884) 12 QBD 165 as to the modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default can set a judgment aside;*

(iii) that the grounds for setting aside the order of court in question have not been set out in the summons itself as required by O LXIII r 3.

13 Counsel for the United Overseas Bank, Ltd submitted that the court should assume that the United Overseas Bank, Ltd had a locus standi because they were persons injuriously affected and said that he was not attacking the order of court in question for irregularity and therefore the principles laid down in *Jacques v Harrison* did not apply. Reliance was placed mainly on O LIII r 4 (1) on the grounds that the United Overseas Bank, Ltd were persons who had been affected by the order and had not been served, as they should have been, and that such failure vitiated the order made.

14 O LIII r 4 (1) reads:

*Any order made **ex parte** may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seem fit.*

15 The judge disagreed with this contention and took the view that an order made in an originating summons to which a defendant is required to enter an appearance which he fails to do is an order in default of appearance which is governed by O XIII r 14 and cannot be regarded as an ex parte order under O LIII r 4 (1). The judge was further of the view that United Overseas Bank Ltd were `not persons affected by the order of court of 14 November 1966, in the sense that they were necessary parties to it because they suffered no injury directly under it.`

16 The judge held that the preliminary objections to the application succeeded and he dismissed the application with costs.

17 It is against this order that the United Overseas Bank Ltd now appeal.

18 Counsel for the appellants` contention is that the United Overseas Bank Ltd by registering the order of attachment on 28 October 1966, have priority in title over the Chung Khiaw Bank Ltd to the properties of Tay Soo Tong and consequently the United Overseas Bank Ltd were an essential party to the originating summons of the Chung Khiaw Bank Ltd and since the United Overseas Bank Ltd were not served the order made on the originating summons was a nullity and the court in its inherent jurisdiction should set it aside *ex debito justitiae*. Counsel for the appellants further contends that the judge was wrong in deciding that the order made on the originating summons was not an *ex parte* order.

19 The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within O LIII r 4 (1).

20 The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case O LI r 16 provides:

where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed ex parte, if he thinks it expedient to do so and may require such evidence of service as he thinks fit.

21 It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of O LIII r 4(1).

22 The question then arises as to whether the appellants were persons affected by the order made on 14 November 1966.

23 Counsel for the appellants submits that as the appellants were necessary parties to the originating summons they were affected parties.

24 Now, what is the legal effect of the registration of an order of attachment against the properties attached?

25 The Registration of Deeds Ordinance after providing in s 2 that the expression `order of court` means, inter alia, `writ of execution` and that the expression `assurance` includes, inter alia, `memorandum of charge` and `order of court` provides in s 7(1) that `where any lien or charge on any lands is claimed ... by reason of any deposit of title or otherwise, memorandum of such lien or charge, signed by person against whom such lien or charge is claimed, may be provisionally registered on presentation by any person claiming to be interested therein`, and, after providing the mode of registration in sub-s (2), sub-s (3) provides that `no such lien or charge shall have any effect or priority as against any assurance for valuable consideration unless and until a memorandum thereof has been registered in accordance with this Ordinance`, and by s 15 (1) it is provided that `... all instruments ... entitled to be registered under this Ordinance shall have priority according to the date of registration thereof and not according to the date of such instruments or of the execution thereof and sub-s (4) of s 15 provides that `all priorities given by this Ordinance shall have full effect in all courts. ...`

26 The question arises whether an assurance for valuable consideration includes a writ of execution. In the case of ***Fung Sin Wa v Moi Chan Hen*** (1897) 4 SSLR 175 Leach J held that an assurance for valuable consideration included a writ of execution. The case went to appeal and the Court of Appeal affirmed the judgment of Leach J. In our view that decision is still good law.

27 Once an order of attachment is made on a writ of execution and the order is duly registered it has priority over other assurances for valuable consideration registered thereafter by virtue of the provisions of the Ordinance.

28 In the present case the Chung Khiaw Bank Ltd have failed to register the memorandum of charge before the registration by the appellants of the order of attachment and the appellants have therefore obtained priority over them and that being the case it seems to us that the appellants were an essential party to the originating summons and clearly were persons affected by the order made ex partewithin the meaning of O LIII r 4 (1).

29 It further appears to us that the order made on the originating summons is a nullity and the appellants who are affected by it are entitled ex debito justitiaeto have it set aside (see ***Craig v Kanseen*** [1943] 1 All ER 108).

30 For these reasons we think this appeal should be allowed and that the appellants should have the orders prayed for in prayers (3) and (4) of their application. They are also entitled to costs here and in the court below.

31 ***Appeal allowed.***

Chua F A J
Tan Ah Tah FJ
Wee Chong Jin CJ (Singapore)

G Starforth Hill and KS Chung (Chung & Co) for the appellants
David T See and Francis Teoh Ong Cheh (RCH Lim & Co) for the
respondents
