IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 29

CA 192/1993

Between

Brooks Exim Pte Ltd

… *Appellant*

And

Bhagwandas

… *Respondent*

GROUNDS OF DECISION

Credit and Security — Money and moneylenders; Credit and Security — Money and moneylenders; Restitution — Money had and received

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Brooks Exim Pte Ltd v Bhagwandas

[1995] SGCA 29

CA 192/1993
Goh Joon Seng J; Karthigesu JA; L P Thean JA
20 March 1995

1 This was an appeal from the decision of the High Court giving judgment for the respondent in his claim against the appellants for money had and received. We dismissed the appeal. We now give our reasons.

2 **The facts**

3 The respondent, an Indonesian resident, is a businessman of considerable inherited wealth. He did not carry on any business in Singapore. Part of his inheritance was in an account with the Singapore branch of the Bank of India (BOI). He wished to obtain some banking facilities in Indonesia from PT Bank Mashill Utama (BMU) for his business in Indonesia, to be guaranteed by a standby letter of credit to be issued by BOI. This was not acceptable to BMU because BOI did not have a branch in Jakarta. It had only a representative office. The respondent then turned to the appellants, two of whose directors are his brothers-in-law, for help in arranging for a standby letter of credit from Deutsche Bank, Singapore (DB). For this purpose the respondent proposed to transfer from his BOI account the sum of US$960,181.11 to be deposited with DB in his name. The respondent however was told by the appellants that this

was not possible because DB did not have his signature to open an account for him in his own name. Accordingly the said sum of US$960,185.11 was paid into the appellants` `one day call` deposit account with DB. DB then issued the one year standby letter of credit in favour of BMU dated 10 July 1990 (the LC). On 5 June 1991 before its expiry, BMU released the LC.

4 Following the release of the LC, the respondent made several demands for the repayment of the US$960,185.11 plus the accumulated interest on the deposit. Despite many instalment plans agreed to by the parties the appellants failed to repay the same except for some payments of interest.

5 On 8 May 1992, the respondent commenced these proceedings for:

> (i) the said sum of US$960,185.11;
>
> (ii) a further sum of US$83,251.93 by way of interest to date of the writ;
>
> (iii) interest from date of the writ to date of judgment;
>
> (iv) loss if any suffered by reason of conversion of the amount due from US dollars into Singapore dollars; and
>
> (v) costs.

6 The main defences were on illegality in that:

> (i) the transaction whereby the money was deposited into the appellants` account breached Indonesian revenue law; and
>
> (ii) the transaction was one of illegal moneylending.

7 On alleged breach of Indonesian revenue law, on the facts the learned trial judge Lai Siu Chiu JC (as she then was), found that under art 4(1)(f) of the Law of the Republic of Indonesia No 7 of 1983 interest derived from inheritance is taxable. The respondent had not paid income tax to the Indonesian authorities

on the interest accrued but the respondent was ` ***genuinely ignorant*** ` of the distinction between interest accruing from inheritance and the inheritance itself which was not subject to income tax in Indonesia.

8 On the law, the learned trial judge applied . In that case GP Selvam JC (as he then was) held that before a contract would be regarded as unenforceable by domestic courts for contravening the law of another state as a matter of public policy, a two-fold test would be applied; first, whether the agreement would be unlawful under the law of the place of performance, and second, whether the person seeking the enforcement had at the time of making the contract knowledge that foreign law would be breached by performance of the contract. As the failure to declare the interest accrued and to pay income tax thereon to the Indonesian authorities had nothing to do with the deposit arrangement made with the appellants and the respondent was not aware that he had to pay income tax on such interest, this defence based on breach of Indonesian revenue law failed.

9 Then following , the learned trial judge also held that as the respondent had no knowledge of his liability under art 4(1)(f) of the Law of the Republic of Indonesia No 7 of 1983, the deposit transaction was not tainted with illegality as to be unenforceable.

10 On the transaction being one of illegal moneylending, the learned trial judge held, following , that what is prohibited by the Moneylenders Act (Cap 188) is not moneylending but the business of moneylending by an unlicensed moneylender.

Version No 1: 29 Oct 2026 (23:45 hrs)

11 On the facts of this case, she found that the respondent was not carrying on the business of moneylending. The defence of illegal moneylending was therefore unsustainable.

12 Accordingly the learned trial judge gave judgment in terms of the respondent`s claim. [See 431.]

13 **The appeal**

14 Before us the appellants contended that the deposit arrangement though ex facie legal was for the sole purpose of evading Indonesian income tax. As this purpose was illegal, the deposit arrangement designed for this purpose was so tainted with illegality as to be unenforceable by the respondent. The appellants relied in the main on where AP Rajah J at first instance said at p 136F:

> *It is quite clear from the evidence before me that this whole operation was designed expressly by the parties herein and the Indonesian buyer to evade Indonesian customs duties. ...*

15 ... A contract which contemplates the performance in a foreign and friendly country ... of some act which is inimical to the public welfare of that country is a breach of international comity and is regarded as illegal by our courts. It is unlawful to make an agreement in Singapore to do something in a foreign country which will violate the local law ...

16 The appellants also placed reliance on , which concerned shares in American companies belonging to a British citizen resident in South America with his wife who was an American citizen. The shares were registered in the name of the wife to avoid liability for withholding tax under United States federal law. Differences arose between the husband and the wife. The wife sold

the shares and retained the proceeds. The husband claimed one half of the proceeds. Wynn-Parry J held that though the intention, when the shares were acquired was that they should belong equally to the husband and wife yet the presumption of advance must arise. But as the reason for the shares being solely in the wife`s name was the desire to evade payment of American federal tax the court would not grant equitable relief to the husband to rebut that presumption as his claim was based on an arrangement to contravene the revenue laws of a friendly foreign country.

17 There is no doubt that the courts will not enforce an agreement, the object of which was to evade the revenue laws of a friendly foreign country. The facts of the present case however did not support the appellants` contention that that was the object of the deposit arrangement. The respondent had offered BMU a standby letter of credit to be issued by BOI presumably on the security of his deposit with BOI. It was because BOI`s standby letter of credit was not acceptable to BMU as the former had only a representative office in Jakarta that the respondent sought the appellants` assistance to procure the LC from DB. For this purpose the respondent transferred part of his funds with BOI to DB. Initially the money was to be deposited with DB in his name. It was only upon the advice of the appellants that this could not be done as DB did not have his signature to open the deposit account in his own name that the money was deposited into an account in the name of the appellants with DB. The deposit arrangement therefore could not have been tainted with illegality as the underlying intention was not one of evading the revenue laws of Indonesia, a friendly foreign country.

18 On the appellants` contention that the deposit arrangement was an illegal moneylending transaction, s 8(1)(b) of the Moneylenders Act [`the Act`] states that `if any person ... carries on business as a moneylender without holding a

licence .... he shall be guilty of an offence **...** `. Section 15 states that `no contract for the repayment of money lent by an unlicensed moneylender shall be enforceable.` Section 2 defines `moneylender` as including:

> *every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent but does not include - (a) any body corporate, incorporated or empowered by a special Act of Parliament or by any other Act to lend money in accordance with that Act; (b) any society registered under the Co-operative Societies Act; (c) any person bona fide carrying on the business of banking or insurance or bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money; (d) any pawnbroker licensed under the provisions of any written law in force in Singapore relating to the licensing of pawnbrokers; and (e) any finance company licensed under the Finance Companies Act.*

19 Our Act is in pari materia with the [English] Money Lenders Act of 1900. In Farwell J said at pp 588-589:

> *A man who carries on business as a money-lender, and is not registered under the [English] Act, cannot recover ... But not every man who lends money at interest carries on the business of moneylending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry provided that they are from his point of view eligible ...*

20 In the matter before us, the money was transferred to the account of the appellants with DB for the purpose of establishing the LC. It was not a loan given by the respondent to the appellants in the course of moneylending business. Therefore s 15 of the Act does not apply. That disposed of the appeal on the issue of illegal moneylending. But the learned trial judge holding herself bound by this court`s judgment in , invited us to reconsider our statement there on the construction of s 5(1) of the Act. In that case the appellant was a

Version No 1: 29 Oct 2026 (23:45 hrs)

Malaysian businessman who obtained a loan from a company, Private Investment Co for Asia (PICA) SA (PICA), an investment company incorporated in Panama with a branch office in Singapore. The loan was to enable the appellant to buy shares in a company in the Cayman Islands. The loan was funded from New York, deposited in a Hong Kong account and secured by securities in Kuala Lumpur. The appellant then executed a promissory note in favour of Pica for the repayment of the loan in one month. The note stated that it had been made in Singapore and was to be governed by and construed in accordance with the law of Singapore. The note was rolled over twice upon the same terms but with interest. The third note was delivered to Pica in Singapore. The appellant failed to pay, and the respondents, who were Pica`s successors in title after a group reorganization, sued on the third note. The appellant`s defence was that Pica had carried on the business of moneylending without a licence under s 5(1) of the Moneylenders Act, and accordingly its claim under the note for the money lent was unenforceable under s 15. In the course of our judgment it was stated at pp 372-373:

> *The same issues canvassed at the trial were canvassed before us, namely, (a) whether Pica was a moneylender within the meaning of that word as defined by s 2 of the Act and if so, whether Pica came within exception (c) of the definition; (b) whether Pica was residing and carrying on the business of moneylending in Singapore; and (c) whether the loan to Osman was made by Pica in Singapore or outside Singapore.*

21 ...

22 In our view it is logical to consider issue (b) before considering issues (a) and (c) because if Pica was not `residing` in Singapore within the meaning of s 5(1) of the Act, it would not be subject to the provisions of the Act. ...

23 Section 5(1) reads:

> *Every moneylender residing and carrying on the business of moneylending in Singapore whether as principal or as agent shall take out a licence annually.*

24 Referring to that part of our judgment quoted above, the learned trial judge said, at p 441:

> *Such a construction of s 5(1) would mean, in effect, that a person borrowing from a moneylender who resides outside Singapore is deprived of any protection afforded by virtue of the Act. It follows that any person may carry on the business of moneylending, without licence, in Singapore, with impunity, so long as he is not residing in Singapore. With the utmost respect, this result could not have been intended by Parliament. In my view, s 5(1) is not the exclusive provision defining the scope of the Act. A careful perusal of the Act would tend to show that any person residing outside Singapore is, far from being given the to carry on the business of moneylending in Singapore without licence, absolutely prohibited from carrying on the business of moneylending in Singapore. Read together, ss 5(2), 8(1)(b) and 15 seem to bear out this conclusion. Section 5(2) reads:*
>
> *`A licence shall be taken out in respect of each name under which moneylending business is conducted. No licence shall be granted to a person not ordinarily resident in Singapore or to a firm where the person proposed to be responsible for the management of the firm is not ordinarily resident in Singapore.`*

25 We appreciate the concern expressed by the learned trial judge. On further reflection, the statement of this court in , that if PICA was not residing in Singapore within the meaning of s 5(1) of the Act, it would not be subject to the provisions of the Act requires modification. In that case, this court came to the conclusion that PICA was resident and carrying on business in Singapore. But its business was that of making and facilitating capital investment and the loan was made for that purpose and accordingly PICA fell within exception (c) of s 2 of the Act. The loan transaction and the note sued on were therefore not void or unenforceable. The statement on residence was therefore obiter. Nevertheless, we would like to clarify that s 5 of the Act lays down the circumstances in which a moneylender is required to obtain a licence and a

Version No 1: 29 Oct 2026 (23:45 hrs)

licence may be granted to a moneylender: sub-ss (1) and (2). It has no bearing on the issue or question whether or not a person is a moneylender or is carrying on the business of moneylending. That issue or question turns on the construction of that part of s 2 pertaining to the definition of `moneylender`. It follows that even if a person - be it a body corporate or natural person - does not reside in Singapore and does not fall within any of the exceptions (a)-(e) to the definition of `moneylender`, any `moneylending` transactions such person enters into would be subject to the Act.

26 As the transaction herein was not a loan given by the respondent in the course of moneylending business, the Act has no application. Accordingly the appeal was dismissed with costs.

27 ***Appeal dismissed.***

Goh Joon Seng J
Karthigesu JA
L P Thean JA

Harry Elias and Yap Teong Liang (Harry Elias & Partners) and Sarjit Kaur (Sarjit Kaur &Co)fortheappellants
G Radakrishnan and Jayanthi Menon (Ong Tan Nair & Kwek) for the respondent

Version No 1: 29 Oct 2026 (23:45 hrs)