

ARAB-MALAYSIAN FINANCE BERHAD v. AIK SOON AUTOSDN. BHD. & 4 Ors.

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR

YA DATUK KL REKHRAJ

GUAMAN SIVIL NO. D3-22-1278-92

2 January 1996

CONTRACTS - default in payment - appeal against summary judgment under *O14 Rules of the High Court* against guarantor - whether claim "prima facie" or disputed

Counsel:

Counsels:

Mr. C.K. Lim for the respondent/plaintiff. (Solicitors: T/n Syed Alwi, Ng & Teoh).

Mr. Leow Shin Fong for the third defendant/appellant. (Solicitors : T/n Arifin & Partners).

GROUND OF JUDGMENT

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR.

(BAHAGIAN DAGANG).

GUAMAN SIVIL NO. D3-22-1278-92.

DIANTARA

ARAB-MALAYSIAN FINANCE BERHAD

... PLAINTIFF

DAN

1. AIK SOON AUTO SDN. BHD.
2. NGA YAN SOON @ HUANG SHING MIN
3. GOH LEE BOON @ GO AH TEE
4. GOH LEE GUAN @ GOH AH TE
5. GOH BAH BEE @ GOH GENG GUAN

... DEFENDAN-DEFENDAN

The first named defendants entered into a Block Discounting agreements with the plaintiff (hereinafter referred to as the said agreements). The said agreement is referred to in enclosure 21 paragraph 4 to the affidavit of Encik Kamarul Bahrin Md. Aznan - and annexed as exhibit 1. It is important to note that the Block agreement is shown as dated 15th September 1982; and for the consideration therein, the plaintiffs granted to the first defendant loan facility amounting to RM 6 million; which was later reduced to RM 1.5 million; the full terms and effect of which are to be lead at the hearing of this action.

2. The third named defendant together with the other defendants guaranteed the payment of all sums accruing under the said agreement and undertook to bear all losses expenses and charges that may be borne by the plaintiffs as a result of the first named defendant's default in complying with the terms of the said agreement.

3. Upon a default being made in the payments as reserved the plaintiffs made a demand by letters dated 9th January 1988; 19th April 1988 and 14th November 1991 on the defendants and then commenced these proceedings and obtained judgment in default against all the defendants; except for the third defendant - who filed his defence on the 16th day of January 1993 pleading inter-alia:-

- (a) denying that the said agreement was a Block Discounting agreement;
- (b) that the said agreement was an agreement to enter into an agreement; or an agreement to purchase the contractual rights under the Hire Purchase agreement;
- (c) that the said agreement was illegal null and void; as the plaintiff was not then carrying on the borrowing business as defined under the Finance Companies Act 1969;

- (d) that the said agreement was executed contrary to and in breach of section 20 of the Finance Companies Act; and therefore unenforceable;
- (e) that the plaintiffs must be put to proof of the loss and damages so suffered; if any;
- (f) that the plaintiffs had failed to take the required legal assignments of the Hire Purchase agreements; and this non-taking of the security on the part of the plaintiff had prejudiced the defendant;
- (g) that the said guarantees when signed by the third named defendant was in blank and the reading of it, is an Indemnity;
- (h) that if it was an indemnity, then it can not be enforced by the plaintiff; on a successful plea of illegality; as the court would not lend its support.

4. The plaintiffs filed an [Order 14](#) application against the third named defendant - enclosure 22, supported by enclosure 21 an affidavit of Encik Kamarul Bahrin Mohd. Aznan. The third named defendant filed an affidavit in reply - enclosure 30. This was followed by further affidavits enclosure 34 and enclosure 38 by plaintiffs deponent; and enclosures 40 and 41 in reply to enclosures 34 and 38 by the defendant.

5. The senior Assistant Registrar gave judgment in favour of the plaintiffs; and thus this appeal. Upon hearing the counsels, I allowed the appeal and my reasons for so doing were briefly given at the time of judgment as appears in the notes of evidence.

6. [Order 14](#) summary judgment is made available to the plaintiff, only where the plaintiff can clearly prove the claim as "prima facie". It is not available where there are disputed facts or a serious point of law involved. The defendant had raised many issues in his defence and repeated the contents in the affidavits in reply. The affidavit evidence showed contradictions on facts; one particular glaring issue was the date of the Block Discounting agreement; whether it was executed on the 15th September 1982; or 2nd August 1982 as referred to in the letters of demands - see enclosure 21 -exhibit 4 where in letters dated the 9th January 1986 and the 19th April 1988 all addressed to the defendants at paragraph 2 thereof, referred to the Block Discounting Agreement as having been signed on the 2nd August 1982. The question in dispute is how many Block Discounting agreement are there. There certainly appears to be at least 2; dated the 15th September 1982; and the other dated 2nd August 1982.

7. The non-production by the plaintiffs at the hearing of Order 14 of the other agreement dated 2nd August 1982 was an act of withholding; and clearly came within the presumption of [section 114 \(g\) of the Evidence Act 1950](#) which reads :-

"The court may presume the existence of any fact which it thinks to have happened, regard being had of the common course of natural events ... in their relation to the facts of the particular case ... (g) that the evidence which. could be and is not produced, would if produced be unfavourable to the person who withholds it. "

8. All throughout the plaintiffs case; they only referred to the agreement dated the 15th September 1982; and completely suppressed the fact of there being in existence the other agreement referred and dated the 2nd August 1982 - as identified in the demand letters.

9. There was the other point - a point of law; on the effects of section 20 of the Finance Companies Act and its repeal by [section 127 of the Banking and Financial Institution Act 1989](#). This certainly was a serious question of law which required the court to interpret its application; and whether it applied retrospectively or prospective; under [section 30 of the Interpretation Act 1948 and 1967](#).

10. In the discretion of the court this was fit and proper case to allow the appeal; and in addition thereto an early trial was fixed for the 14th May 1996.

Dated the 20th March 1996.

(Y.A. DATUK K.L. REKHRAJ)

Pesuruhjaya Kehakiman,

Mahkamah Tinggi,

Kuala Lumpur.

Date of Hearing : 2nd January 1996.

Date of Decision : 1st March 1996.

