

## IN THE COURT OF APPEAL OF MALAYSIA

**Coram:** Tengku Maimun Tuan Mat, JCA; Hamid Sultan Abu Backer, JCA; Hanipah Farikullah, JCA

**Randhir Singh A/L Bhajnik Singh v Sunildave Singh Parmar**

**Citation:** [2018] MYCA 307 **Suit Number:** Civil Appeal No. B-02(NCVC)(W)-2587-12/2017

**Date of Judgment:** 25 September 2018

*Evidence – Burden of proof – Evidentiary value of admissions – Section 17 of the Evidence Act 1950*

*Statutory declaration – Law regarding statutory declaration – Appropriateness or validity of statutory declaration to seek repayment of a loan*

**JUDGMENT**

[1] The appellant/ defendant appeals against the decision of the High Court which entered judgment for the respondent/ plaintiff (administrator of the deceased's estate of K. Surjit Kaur a/p Gean Kartar Singh) principally on a statutory declaration of indebtedness of a debt for the sum of RM2 million.

[2] In the instant case, the learned counsel for the respondent had relied on the case of **Wong Kian Wah v Ng Kien Boon** [2018] MLJU 989; [2018] AMEJ 0827, the coram consisting of Hamid Sultan bin Abu Backer JCA, Abdul Rahman bin Sebli JCA and Mary Lim Thiam Suan JCA. The facts of **Wong Kian Wah**'s case is different. In **Wong Kian Wah**'s case, the admission was in the agreed facts. There was no challenge to that admission. In the instant case, the statutory declaration and its purpose had been a point of contention in the entire trial.

[3] The said statutory declaration and its terms as well as the amount will on the face of record, to any reasonable tribunal will appear that there must be a great story behind the whole transaction. The appellant in rejecting the claim had explained in his evidence in a cogent manner.

[4] The learned trial judge had acted on the basis of principles of admission (under section 17 of the **Evidence Act 1950 (EA 1950)** only), ignoring other parts of the Act such as section 31 as well as section 102, etc. There was no mention of these sections in the judgment as well, thereby warranting appellate intervention to set aside the judgment *in limine*.

[5] The said statutory declaration read as follows:

“I Randhir Singh a/l Bhajnik Singh NRIC No 710628-10-6545 address No.12, Jalan Camar 4/25, Villa Damansara, 47810, Kota Damansara, Petaling Jaya, Selangor Darul Ehsan would like to declare that I have been receiving friendly loans free from any interest whatsoever from K. Surjit Kaur a/p Gean Kartar Singh NRIC No. 591229-10-5426 address 302 Summervilla Condominium, Wangsa Baiduri, 11 Jalan SS12/1, 47500 Subang Jaya, Selangor Darul Ehsan.

The total amount of loans received till to date is Ringgit Malaysia Two Million Only (RM2,000,000.00).

I undertake to return the said amounts of money taken from K. Surjit Kaur within 24 months from receiving any formal notice of demand from K. Surjit Kaur or ten years (10 years) from this date whichever is earlier.”

[6] The defendant’s version to the plaintiff’s claim has been well articulated by the learned counsel for the appellant and to save courts time, we repeat verbatim. It *inter alia* read as follows:

**Brief Facts**

1. The Appellant/ Defendant is a director and shareholder of the Company by the name of Tiger Force Sdn Bhd.
2. The Appellant/ Defendant have received a personal loan amounting to RM672,225.00 from K. Surjit Kaur A/P Gean Kartar Singh (the deceased), whom was the Appellant's/ Defendant's friend whom was conducting a money lending business without a valid license wherein the deceased have charged interest amounting to 4% on the said loan.
3. The Appellant/ Defendant have settled the full capital payment to the deceased and also have paid half of the said interest charged by the deceased on the said loan. However, there were accrued interest of the said loan and as such the Appellant/ Defendant have affirmed a Statutory Declaration dated 05/01/2017.
4. The Appellant/ Defendant have affirmed the said Statutory Declaration upon the pressure and coercion by the deceased, whereby the deceased have threatened the Appellant/ Defendant that if the Appellant/ Defendant refuse to pay the accrued interest by affirming the statutory declaration, the deceased would tarnish the Appellant's/ Defendant's name for the money lending in their Sikh religion Community.
5. The said Statutory Declaration was affirmed for the accrued interest which from the said personal loan given by the deceased to the Appellant/ Defendant whereby the deceased have informed the Appellant/ Defendant that he should pay the said accrued interest in 10 years' time with a fixed amount of RM2,000,000.00 as stated in the said Statutory Declaration dated 05/01/2011.

6. Upon affirming the Statutory Declaration, the Appellant/ Defendant did not make any payment to the deceased.
7. Besides the personal loan given to the Appellant/ Defendant, the deceased have also given loan amounting to RM1,604,925.00 to the Appellant's/ Defendant's previous company Dominasi Cendana Sdn Bhd and have also charged an interest amounting to 4% on the said loan.
8. The said borrowing was paid by Dominasi Cendana Sdn Bhd vide cash to the deceased as requested by the deceased. Besides that the deceased have also conducted money lending business by lending the Appellant's/ Defendant's current company, Tigerforce Sdn Bhd, whereby the Appellant/ Defendant do not have any control over the money flow.
9. However, on 28/02/2017, the Respondent/ Plaintiff as the administer of the deceased's estate have initiated a legal proceeding against the Appellant by claiming for the said RM2,000,000.00 as per the Statutory Declaration and as alternative have claimed the amount of RM1,654,925.00 from the Appellant/ Defendant which clearly the Appellant/ Defendant have denied to the claim.
10. The Respondent/ Plaintiff have in his submitted banking slips which were issued to Dominasi Cendana Sdn Bhd and Tigerforce Sdn Bhd and have claimed the sum of RM1,654,925.00 from the Appellant/ Defendant who is merely the shareholder and director of the companies. The Appellant/ Defendant have denied all through his defence dated 25/05/2017.”

[7] The appellant in the Memorandum of Appeal had taken into issue the facts and breach of law, etc. We do not think it is necessary to go into those issues inclusive of issues related to limitation. It will be sufficient on the facts of this case to consider whether as per the statutory declaration, the plaintiff is entitled to judgment on the face of defendant’s evidence taking into consideration the fact that a sum of RM1,609,925.00 was paid to the appellant’s previous company. The said Memorandum of Appeal read as follows:

- “1. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/ Defendan bahawa K. Surjit Kaur A/P Gean Kartar (Simati) menjalankan satu urusan pinjaman wang berfaedah tanpa berlesen yang bertentangan dengan Akta Pinjaman Wang 1951 (Money Lenders Act 1951);
2. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila tidak mengambil kira bukti iaitu rakaman video yang bertarikh 18/01/2011 yang diberikan oleh Perayu/ Defendan yang dengan jelasnya menunjukkan bahawa K. Surjit Kaur A/P Gean Kartar (Simati) menjalankan satu urusan pinjaman wang berfaedah tanpa lesen yang sah;
3. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal melihat transaksi pinjaman yang diberikan oleh Simati K. Surjit Kaur A/P Gean Kartar kepada Perayu/ Defendan merupakan satu transaksi yang menyalahi undang-undang;
4. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/ Defendan yang menyatakan bahawa Perayu/ Defendan

mempertikaikan kandungan Surat Akuan yang telah diikrarkan oleh Perayu/ Defendan pada 05/01/2011;

5. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/ Defendan yang menyatakan bahawa pinjaman peribadi diberikan oleh Simati K. Surjit Kaur A/P Gean Kartar kepada Perayu/ Defendan adalah jumlah wang RM672,225.00 yang telah dibayar balik oleh Perayu/ Defendan kepada Simati dan bukanlah wang jumlah Ringgit Malaysia Dua Juta (RM2,000,000.00);

6. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/ Defendan menyatakan bahawa wang jumlah Ringgit Malaysia Dua Juta (RM2,000,000.00) tersebut adalah jumlah faedah terakru yang dikenakan oleh Simati K. Surjit Kaur A/P Gean Kartar kepada Perayu/ Defendan dan bukanlah satu pinjaman wang diberikan oleh Simati kepada Perayu/ Defendan seperti dinyatakan oleh Responden/ Plaintiff;

7. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan isu yang dibangkitkan oleh Perayu/ Defendan bahawa tuntutan Responden/ Plaintiff adalah “*time barred*” mengikut Seksyen 6(1) Akta Had Masa 1953;

8. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/ Defendan menyatakan bahawa tuntutan Responden/ Plaintiff tidak berasas dan bercanggah atas sebab terdapat tiga senario tuntutan berlainan dituntut oleh Responden/ Plaintiff terhadap Perayu/ Defendan yang dimana menunjukkan bahawa Responden/ Plaintiff sendiri tidak pasti akan tuntutannya terhadap Perayu/ Defendan. Perkara ini telah diakui oleh Responden/ Plaintiff sendiri semasa perbicaraan dan Yang Arif yang bijaksana telah terkhilaf dengan tidak mengambil perhatian terhadap isu ini;

9. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/ Defendan menyatakan bahawa Responden/ Plaintiff adalah seorang saksi yang tidak bermaterial dan tidak pasti akan tuntutannya terhadap Perayu/ Defendan yang merupakan satu penyalahgunaan proses Mahkamah;

10. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana segala transaksi pinjaman berdasarkan slip-slip deposit dinyatakan oleh Responden/ Plaintiff dalam tuntutannya adalah pinjaman wang diberikan oleh Simati pada tahun 2010 iaitu sebelum Akuan Berkanun bertarih 05/01/2011 diikrarkan oleh Perayu/ Defendan yang dengan jelasnya merupakan satu “*past consideration*”.

11. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta Perayu/ Defendan yang menyatakan bahawa tuntutan Responden/ Plaintiff adalah tidak berasas atas sebab Responden/ Plaintiff menuntut Ringgit Malaysia Dua Juta (RM2,000,000.00) dan secara alternatif Ringgit Malaysia Satu Juta Enam Ratus Lima Puluh Empat Ribu Sembilan Ratus Dua Puluh Lima (RM1,654,925.00) di mana Responden/ Plaintiff sendiri tidak pasti akan tuntutannya yang sebenar. Yang Arif yang bijaksana dengan jelasnya telah

terkhilaf dengan tidak mengambil perhatian terhadap tuntutan yang tidak berasas ini apabila gagal meletakkan jumlah tuntutan yang sebenar Responden/ Plaintiff di dalam mindanya.”

[8] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submission of the learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) It is trite that legal burden is on the plaintiff and the evidential burden and/or opposing evidence to rebut the plaintiff’s claim on the balance of probability lies on the defendant. In **Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals** [2018] 4 CLJ 323, the Court of Appeal observed:

“[7] It is well-established as a general rule that 'burden of proof' in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence. ...”.

[See **Selvaduray v Chinniah** [1939] 1 MLJ 253].

(b) In addition, when the plaintiff materially relies on section 17 of the **EA 1950**, the court must take cognisance that section 17 is not a conclusive proof provision as stated in section 31 of the Act which read as follows:

“Admissions not conclusive proof but may estop

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.”

(c) In addition, in the instant case the deceased had died and in consequence the defendant’s version had not been rebutted in any material form. The plaintiff in this case will be in no position to credibly provide sufficient evidence to neutralise the defendant’s story. Thus, purely relying on section 17 may not meet the challenge related to conclusive evidence provision.

(d) Further, the terms for the return of money stated in the statutory declaration is quite unusual. The debt mention relates to past consideration. The terms of payment is also unusual. In addition, statutory declarations are not generally used as a document to recover a loan granted as it will impinge on the **Stamps Act 1949**. When a loan is granted and parties want it to be documented, it requires an ad valorem duty to be paid. In the instant case, there was no evidence of payment *ad valorem*. The **Stamp Act 1949** says:

“22 BOND, CONVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:

(1)(a) being the only or principal or primary security for any annuity (except upon the original creation thereof by RM1.00

way of sale or security, and except a superannuation annuity), for the term of life or any other indefinite period for every RM100 and also for any fractional part of RM100 of the annuity or sum periodically payable

- (b) for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack. The same *ad valorem* duty as a charge or mortgage for such total amount.”

[9] The general principles related to the statutory declaration in most of the Commonwealth countries are as follows:

- (a) It is a statement made under oath but it is not sworn.
- (b) It is used to allow a person to declare something to be true for the purposes of satisfying some legal requirement or regulation when no other evidence is available. They are thus similar to affidavits (which are made on oath).
- (c) It may be used for:
  - (i) Declarations of identity, nationality, marital status, etc. when documentary evidence is unavailable.
  - (ii) Declaring the intention to change one's name.
  - (iii) Affirming the provenance and nature of goods for export or import.
  - (iv) Statements of originality for patent applications.

[10] Even though parties have not submitted on the law regarding statutory declaration as well as the Stamp Act, section 57 of the **Evidence Act 1950** requires the court to take cognisance of the law of the country. The judges' oath of office also requires the court to take cognisance of the law of the country to sustain rule of law. Any decision of courts saying otherwise may be *per incuriam*. [See **Reebok (M) Sdn Bhd v CIMB Bank Berhad** [W-02(NCVC)(W)-2459-12/2017]; **Kenanga Investment Bank Berhad v Swee Joo Berhad & Ors** [2017] 1 LNS 2086; **Ong Koh Hou @ Won Kok Fong & Ors v DA Land Sdn Bhd** [B-02(NCVC)(w)-487-03/2018]].

[11] We take the view *inter alia* that the statutory declaration to seek repayment of a loan is in breach of general purpose for what statutory declaration are meant for. In addition, if *ad valorem* duty is not paid, the statutory declaration as admission of loan may not be worth the paper it is written on. We also find that the defendant's defence is one sustainable in law. The failure of the learned judge to give proper weight to the defence version in actual fact compromises the integrity of the decision making process.

[12] For reasons stated above, the appeal is allowed. The decision of the High Court is set aside with costs of RM10,000.00 for here and below subject to allocatur. Deposit is to be refunded.

We hereby ordered so.

Dated: 25 September 2018

sgd

**DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER**

Judge

Court of Appeal

Malaysia

**COUNSEL**

For the Appellant: Dato' PM Nagarajan Periasamy [with Vinoshni Narayanasamy], Messrs Nagarajan Peri & Co, Advocates & Solicitors, No. 40A, Tingkat 1, Jalan Tukang, 43000 Kajang, Selangor Darul Ehsan

For the Respondent: Mr. K. Thavanesan [with Mr. D. Ramesh], Messrs K. Thava, Advocates & Solicitors, Unit B, 3<sup>rd</sup> Floor, Wisma 1 Alliance, No. 1, Lorong Kasawari 4B, Taman Eng Ann, 41150 Klang, Selangor Darul Ehsan

**LEGISLATION REFERRED TO:**

*Evidence Act 1950, Sections 17, 31, 57, 102*

*Stamp Act 1949*

**JUDGMENTS REFERRED TO:**

*Kenanga Investment Bank Berhad v Swee Joo Berhad & Ors [2017] 1 LNS 2086*

*Ong Koh Hou @ Won Kok Fong & Ors v DA Land Sdn Bhd [B-02(NCVC)(w)-487-03/2018]*

*Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and Other Appeals [2018] 4 CLJ 323*

*Reebok (M) Sdn Bhd v CIMB Bank Berhad [W-02(NCVC)(W)-2459-12/2017]*

*Selvaduray v Chinniah [1939] 1 MLJ 253*

*Wong Kian Wah v Ng Kien Boon [2018] MLJU 989; [2018] AMEJ 0827*

Notice: The Promoters of Malaysian Judgments acknowledge the permission granted by the relevant official/ original source for the reproduction of the above/ attached materials. You shall not reproduce the above/ attached materials in whole or in part without the prior written consent of the Promoters and/or the original/ official source. Neither the Promoters nor the official/ original source will be liable for any loss, injury, claim, liability, or damage caused directly, indirectly or incidentally to errors in or omissions from the above/ attached materials. The Promoters and the official/ original source also disclaim and exclude all liabilities in respect of anything done or omitted to be done in reliance upon the whole or any part of the above/attached materials. The access to, and the use of, Malaysian Judgments and contents herein are subject to the [Terms of Use](#).