MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Dr. Badariah Sahamid, JCA; Mary Lim, JCA; Yeoh Wee Siam, JCA

Hafizah Binti Hamzah v Trans Resources Corporation Sdn Bhd

Citation: [2018] MYCA 194 **Suit Number:** Civil Appeal No. W-03-(IM)-34-05/2017

Date of Judgment: 12 June 2018

Litigation & court procedure – Garnishee order – Whether the alleged debt could be garnished pursuant to Order 49 rule 1 of the Rules of Court 2012 as a "debt due or accruing due to the judgment debtor by the garnishee"

Litigation & court procedure – Garnishee order – Whether the amount in question a debt within the terms of Order 49 of the Rules of Court 2012 – Whether the alleged debt, which is termed as unsecured, interest free and has no fixed terms of repayment, has crystallised into an actionable debt to qualify as a "debt due or accruing due" for the purposes of Order 49 rule 1 of the Rules of Court 2012

JUDGMENT

[1] The appellant here is the Garnishee in the proceedings before the High Court. Her appeal to set aside the Garnishee Order Absolute dated 6.04.2015 which was ordered by the learned Senior Assistant Registrar was dismissed by the learned Judge on 8.10.2015. On 9.8.2016, the Court of Appeal set aside the decision of the learned Judge and directed the High Court to hear the issue under Order 49 rule 5 of the **Rules of Court 2012**- see pages 6 & 7 of the Appeal Records.

[2] On 17.04.2017, the learned Judge dismissed the appellant's appeal and the grounds of decision are as appearing at pages 14 to 22. The grounds do not allude to the specific directions of the Court of Appeal; neither is Order 49 rule 5 addressed.

[3] At the hearing of the present appeal, we further noted that the issue of whether there was a "debt due and accruing due" under Order 49 rule 1(1) of the **Rules of Court 2012** was not addressed by the learned Judge. We then invited the parties to further address us on the meaning of that phrase, and the explanation of Note 9 in the Financial Statement of the Judgment Debtor. This is our decision following the further written submissions of both learned counsel.

Background facts

[4] A dispute between the respondent and Carmichael Asia Sdn Bhd culminated in an arbitration award rendered in its favour on 7.8.2012. After the award was registered at the High Court under section 38 of the **Arbitration Act 2005** on 14.5.2013, the respondent initiated Judgment Debtor Summons proceedings against Carmichael Asia Sdn Bhd [Carmichael Asia]. At those proceedings, one Sivakumaru a/l V Kaliappan [Siva], the auditor of Carmichael Asia testified on 24.6.2014 [and not 24.6.2017 as stated in the grounds of decision, see page 133 Appeal Records] that there was a sum of RM1,416,279.00 owing from the directors of Carmichael Asia as shown in the Financial Statement of Carmichael Asia for the year ended 31.1.2012. Siva singled out the appellant as the director who owed that sum of money to Carmichael Asia. Although the appellant herself was examined, it was never established that she was the director who owed Carmichael Asia the sum mentioned. The only evidence came from Siva.

[5] Relying on this information, the respondent, as Judgment Creditor, filed garnishee proceedings pursuant to Order 49 of the **Rules of Court 2012** seeking to garnish the debt of RM1,416,279.00 that the appellant purportedly owes to Carmichael Asia.

[6] In response to the order to show cause, the appellant denied owing Carmichael Asia; claimed that she had fully paid for her purchase of shares in Carmichael Asia even before the shares were issued to her in her name; denied taking any advance from Carmichael Asia, neither were there any advances made to her- see affidavit affirmed on 10.2.2015, pages 26 to 28 record of appeal (Bahagian B & C). The appellant tendered a statutory declaration from Siva wherein Siva corrected his earlier testimony, explaining that his evidence given at the hearing of the JDS was without the benefit of certain information from the company secretary and that he now confirms that there is no debt due from the appellant.

[7] The learned Judge rejected the contention of the appellant. The learned Judge found that Carmichael Asia's financial statement ended 31.1.2012 was "more than clear and unambiguous in stating that a loan of RM1,416,279.00 was owed by the directors of Carmichael Asia", that Siva had testified that that amount was a loan granted by Carmichael Asia to the appellant and is still owing and that Siva repeatedly said this during his testimony in the JDS proceedings. The learned Judge rejected Siva's statutory declaration on the grounds that it was contradictory to his oral testimony; citing the decision in **Citibank Berhad v Pembangunan Cahaya Tulin Sdn Bhd (Receivers and Managers appointed) & Ors & Another Suit** [2012] 9 MLJ 181, where the same was prohibited under Order 38 rule 1 of the **Rules of the High Court 1980**.

Determination of this Court

[8] Since this was a rehearing on terms that were directed by the Court of Appeal on 9.8.2016, it is imperative that there be compliance of that direction. The order of the Court of Appeal states:

> "... **DAN SETELAH MENDENGAR** hujahan pihak-pihak yang hadir **MAKA ADALAH DENGAN PERSETUJUAN DIPERINTAHKAN** bahawa:

a) Perintah Mahkamah Tinggi bertarikh 08.10.2015 diketepikan tanpa perintah terhadap kos dan perkara ini dirujuk semula dihadapan Hakim yang sama untuk dibicarakan mengenai isu yang diperuntukkan dalam Aturan 49 Kaedah 5, Kaedah-Kaedah Mahkamah 2012;

b) Deposit dipulangkan kepada Perayu."

[9] The Court of Appeal specifically directed a rehearing under Order 49 rule 5 which reads as follows:

Dispute of liability by garnishee (O. 49, r. 5)

5. Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 100 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without, if it orders before the Registrar, the need for any consent by the parties.

[10] Nowhere in the grounds of judgment does the learned Judge expressly address this issue. However, from a careful reading of the grounds, we are minded to find that the learned Judge has nevertheless implicitly dealt with the matter in the manner directed. His lordship had considered the appeal and had summarily determined the dispute of liability by the appellant based on the affidavits before the Court.

[11] Moving on to what we see as the pivotal issue before this Court and that is the question of whether the alleged debt may be garnished pursuant to Order 49 rule 1 of the **Rules of Court 2012**, as a, *"debt due or accruing due to the Judgment Debtor by the Garnishee".* Although seemingly simple, this phrase is not "exactly easy to understand", as observed by Suriyadi Halim Omar FCJ in the majority decision in **Malaysian International Trading Corporation Sdn Bhd v RHB Bank Bhd** [2016] 2 CLJ 717, citing Jackson J in **Bank of Montreal v IM Krisp Foods Ltd** (1996) 6 CPC (4^{th}) 90 Sask CA. Furthermore, the debt must be due or accruing due at the time of the application for the garnishment order.

[12] For this part of our judgment, we shall thenceforth refer to the appellant as the "Garnishee", the respondent as the "Judgment Creditor" and Carmichael Asia as "the Judgment Debtor".

[13] After careful consideration of both counsel's oral and written submissions as well as a perusal of the Appeal Records, we are of the unanimous view that the alleged debt cannot be garnished as it has not complied with the requirements of O 49 r 1 in two material respects.

[14] First, there must be a debt owed by the Garnishee to the Judgment Debtor, as seen from the consistent line of authorities- **Malaysian International Trading Corporation Sdn Bhd v RHB Bank Bhd** [2016] 2 CLJ 717; **Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd TSR Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)** [2001] 6 CLJ 213; **Maybank Islamic Berhad v WWE Holdings Berhad** [2017] 1 LNS 712; **Flextronics Technology**

(Malaysia) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd & Another Appeal [2017] 4 CLJ 397; **Tiong Hoo Teck v Wong Ho Enterprise** [2014] 1 LNS 272; **Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd & Anor** [1988] 2 CLJ 194. It must be clear that it is the Garnishee who is indebted to the Judgment Debtor, and not someone else.

[15] In the present appeal, the Judgment Creditor relied on the 2012 Financial Statement of the Judgment Debtor and the evidence of Siva, the Judgment Debtor's auditor to prove the existence of the Garnishee's debt of RM1,416,279.00 owed to the Judgment Debtor. Both pieces of evidence were seriously flawed and unreliable.

[16] From the evidence adduced, there is uncertainty as to whether the alleged debt was the debt of the Garnishee solely or the debt of any or some or all of the directors of the Judgment Debtor, and there are five directors according to the company records filed with Companies Commission. The 2012 Financial Statement of the Judgment Debtor, stated that the amount was owed by the "directors" to the Judgment Debtor. It did not, however, state whether the total amount or any part thereof was in fact owed to the Judgment Debtor by the Garnishee.

[17] In addition, at the garnishment proceedings the Garnishee had denied owing the alleged debt to the Judgment Debtor. And, it was not a mere denial.

[18] According to the Judgment Creditor, the Garnishee's debt is in relation to the Garnishee's purchase of shares in the Judgment Debtor. Apparently, the Garnishee had not paid for the purchase and the sum of RM1,416,279.00 represents that debt.

[19] Not only was the allegation of non-payment of the shares and thereby the existence of the debt denied by the Garnishee, she had also provided evidence to the contrary. At pages 112 to 115 of the Appeal Record is Form 24, evidencing the allotment of shares after the Garnishee has fully paid for the purchase of her shares. This piece of material evidence was unfortunately, not examined or evaluated at all by the learned Judge. This evidence shows that the Judgment Creditor's claim of the existence of a debt owed by the Garnishee by reason of non-payment of her purchase of shares in the Judgment Debtor is, unsustainable.

[20] The Judgment Creditor also relied on the evidence of Siva, who testified that the sum of RM1,416,279.00 is owed by the Garnishee. At pages 109 and 110, it can be seen that Siva went on to agree with the suggestion of the Judgment Creditor's counsel that this sum is then "a loan" to a director, and that the *"loan amount ini owed back to the Company"*.

[21] Quite aside from our earlier observations on the improper treatment of this sum of RM1,416,279.00, it is unclear how that same sum for the unpaid shares has now become a loan to a director. And, this is without production of any Board resolutions for that purpose.

[22] In any case, there is now the contradictory evidence of Siva. At the hearing of the JDS, Siva testified that the loan amount stated in the 2012 Financial Statement was owed by the Garnishee to the Judgment Debtor; that it was payment towards the Garnishee's share acquisition. However, he

subsequently retracted his statement by filing a statutory declaration refuting his earlier contention that the loan to the directors was owed by the Garnishee to the Judgment Debtor.

[23] The learned Judge declined to look at Siva's statutory declaration citing **Citibank Berhad v Pembangunan Cahaya** [*supra*]. However, if that decision had been properly considered, the learned Judge would have found that the decision made under O 38 of the **Rules of the High Court 1980** has no application in the present circumstances. That was a case where a witness who was supposed to provide oral testimony attempted to testify instead through a statutory declaration on the ground that he was medically unfit to give evidence at the trial. The admissibility of the statutory declaration, given under such conditions, was challenged. In upholding the challenge, the Court cited Order 38 r 1 in support, that a witness of fact in writ actions must testify orally and in open Court. The Court refused to admit the statutory declaration, seeing it as an attempt to "by pass Order 38 rule 1 of the **RHC**".

[24] The present proceedings do not involve a trial within the terms of Order 38 [now Order 38 of the **Rules of Court 2012**]; and certainly it cannot be said that the statutory declaration was prepared in order to bypass any of the provisions of the Rules of Court. The Garnishee was adducing affidavit evidence in answer to the cause issued against her. She is entitled to adduce evidence to prove her responses. More materially, it was incumbent on the learned Judge to properly appreciate the full circumstances including considering whether Order 38 of the **Rules of Court 2012** in fact applied and how Order 49 operates in the event of such a happenstance; critically analyze the evidence taken at the JDS proceedings in order to determine whether there was credible evidence upon which the Court may grant the garnishee order absolute; consider whether Siva was in fact contradicting himself in the first place; and evaluate the contents of the statutory declaration against the affidavits filed by both parties.

[25] The Judgment Creditor's application does not meet the requirements of Order 49 in another material respect. Before an order to garnish may be issued, the debt must be *"due or accruing due to the Judgment Debtor"*.

[26] Having examined the 2012 Financial Statement of the Judgment Debtor, and even if we were to accept that the alleged debt stated therein is the debt of the Garnishee, (although there is no evidence to that effect), it is not a *"debt due or accruing due to the Judgment Debtor"*.

[27] These are the terms of Order 49 rule 1 of the **Rules of Court 2012**:

> 1. (1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount for any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

(2) ...

(3) In this Order, "any debt due or accruing due" includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

[28] At Note 9 in the Notes to the 2012 Financial Statement, it is stated as follows:

"This amount is unsecured, interest free and has no fixed terms of repayment."

[29] It is our respectful view that Note 9 puts it beyond doubt that the amount of RM1,416,279.00 is not a debt within the terms of Order 49. The debt has yet to crystallise as it is "unsecured, interest free and has no fixed terms of repayment". With no fixed terms of repayment, it is unclear how the Judgment Debtor would have been able to mount a claim against the director concerned, whoever it may be. If the Judgment Debtor is unable to claim upon such a "debt", clearly that sum of RM1,416,279.00 is not a "debt due or accruing due" within the meaning and intent of O 49 of the **Rules of Court 2012**.

[30] We are further fortified in our view by the Federal Court's recent decision in **Malaysian International Trading Corporation Sdn Bhd v RHB Bank Bhd** [*supra*]. Here, the Federal Court had occasion to consider the meaning of the phrase *"debt due and accruing due"* in Order 49 r 1. Although there was substantial debate on whether monies held in fixed deposit accounts used to secure the respondent bank's grant of various banking facilities to the judgment debtor could be uplifted and utilized by the respondent bank to set off the debt, or could these same monies be paid over under the order of garnishment, that issue is not relevant for the purposes of this appeal. After examining a line of authorities including the case of **Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd** [2004] 1 CLJ 357, the Federal Court went on to propound the view that for a debt to be due and accruing due to the Judgment Debtor, there must be, at the time of application of the Garnishee order a crystallised actionable debt owed by the Garnishee to the Judgment Debtor.

[31] Thus, a Judgment Creditor is not entitled to garnish the debt before it becomes due and payable. The Federal Court also approved of the case of **Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd (Intervener)** [*supra*], where it was similarly held that there must be a crystallised actionable debt by the garnishee to the Judgment Debtor before an absolute garnishee order could be given.

[32] Premised on the authorities abovementioned, we are of the considered view that since the alleged debt referred to in Note 9 of the 2012 Financial Statement has no fixed terms of repayment, it has not crystallised into an actionable debt to qualify as a "debt due or accruing due" for the purposes of O. 49 r 1 of the **Rules of Court 2012**. We are not convinced that there is a debt due or accruing due from the Garnishee to the Judgment Debtor, upon which the Judgment Creditor could garnish and have the debt settled directly to the Judgment Creditor.

[33] The learned Judge failed to take any of the aforementioned matters into consideration. Had the learned Judge done so, it would not be proper for this Court to interfere as it is an exercise of discretion and the learned Judge would be entitled to draw his conclusions. But, in the instant appeal, the learned Judge has plainly erred in the appreciation and application of the legal principles pertaining to the grant of a garnishee order.

[34] We add that in the event of such conflicting evidence, there is the further option of O 49 r 5. Under this provision, the learned Judge may direct the issue of establishing whether there was a debt due and accruing due be disposed of through viva voce' evidence. That, too, was not considered.

[35] Thus, it is our unanimous finding that the decision of the learned High Court Judge was plainly wrong and warrants appellate intervention. Accordingly, we allow this appeal with no order as to costs. The decision and order of the High Court is therefore set aside.

Dated: 12 June 2018

Signed by

MARY LIM THIAM SUAN
Judge
Court of Appeal, Putrajaya
Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Rules of Court 2012, Order 38, 49, Order 49 rules 1 and 5

Rules of the High Court 1980, Order 38 rule 1

JUDGMENTS REFERRED TO:

Bank of Montreal v IM Krisp Foods Ltd (1996) 6 CPC (4th) 90 Sask CA

Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd TSR Bina Sdn Bhd (Garnishee); Hong

Leong Finance Bhd (Intervener) [2001] 6 CLJ 213

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd [2004] 1 CLJ 357

Citibank Berhad v Pembangunan Cahaya Tulin Sdn Bhd (Receivers and Managers appointed) & Ors & Another Suit [2012] 9 MLJ 181

Flextronics Technology (Malaysia) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd & Another Appeal [2017] 4 CLJ 397

Hong Leong Finance Bhd (Intervener) [2001] 6 CLJ 213

Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd & Anor [1988] 2 CLJ 194

Malaysian International Trading Corporation Sdn Bhd v RHB Bank Bhd [2016] 2 CLJ 717

Maybank Islamic Berhad v WWE Holdings Berhad [2017] 1 LNS 712

Tiong Hoo Teck v Wong Ho Enterprise [2014] 1 LNS 272