

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Idrus Harun, JCA; Suraya Othman, JCA; Stephen Chung Hian Guan, JCA

Thai Siew Choo v Thurghathavy A/P N Govindasamy and Another

Citation: [2018] MYCA 259 **Suit Number:** Civil Appeal No. A-02-(IM)(NCVC)-2559-12/2017

Date of Judgment: 19 July 2018

Litigation & court procedure – Consent judgment – Suit to set aside the consent judgment – Application to dismiss the suit to set aside the consent judgment under inherent jurisdiction of the court and/or pursuant to Order 18 rule 19(1)(b) and or (d) of the Rules of Court 2012 on the grounds that the issues raised in the suit have been adjudicated upon and a consent judgment was recorded – Dismissal of application – Appeal

Litigation & court procedure – Consent judgment – Nature of consent judgment – Whether the issues of a case adjudicated when a consent judgment is recorded – Whether res judicata applies to the issues involved in a case that was settled by a consent judgment

Litigation & court procedure – Striking out – Whether the suit to set aside the consent judgment should be struck out – Principles upon which a court exercises its power under any of the four limbs of Order 18 rule 19(1) of the Rules of Court 2012

JUDGMENT**INTRODUCTION**

[1] On 6.12.2016 the Respondents filed a suit (2016 suit) to set aside a consent judgment recorded between the parties in an earlier suit (2013 suit) in the High Court at Ipoh. The Appellant has filed a Defence and Counterclaim in the 2016 suit. On 2.3.2017 the Appellant filed an application that the 2016 suit be dismissed under the inherent jurisdiction of the court and or pursuant to O. 18 r. 19(1)(b) and or (d) of the **Rules of Court 2012**.

[2] The ground for the application to dismiss the 2016 suit was that the issues raised by the Respondents in this action have been adjudicated upon and a consent judgment dated 4.7.2014 was recorded in the 2013 suit.

[3] The application was dismissed and hence this appeal. The grounds of appeal are set out in the memorandum of appeal.

SUBMISSION OF PARTIES

[4] Counsel for the Appellant submitted that the Respondents were obviously mistaken in relying on the words in the consent judgment that ‘either party or both parties be at liberty to apply’ in applying to set aside the consent judgment. It was submitted that the 2016 suit should be dismissed under the inherent jurisdiction of the court and under O. 18 r .19(1)(b) and or (d).

[5] It was submitted that the judge has failed to consider that the Respondents have filed a previous suit against the Appellant namely the 2013 suit involving the same parties, the same facts and the same issues and that the parties had recorded a consent judgment which had been perfected and sealed. It was submitted that the judge failed to consider that the matter is now *res judicata* and the court *functus officio*.

[6] It was submitted that if the Respondents were not satisfied with the consent judgment, they should set it aside within the 30 days period but that the present case to set aside the consent judgment was only made after two years and five months. It was submitted that the application was out of time and barred by *res judicata*. It was submitted that the Respondents could not have a retrial of the whole case as it is *res judicata*.

OUR DECISION

[7] The facts of the case are not in dispute. The facts are pertinent and will explain why the Respondents filed the 2016 suit to set aside the consent judgment. Since 1997 Balasundram a/l Govindasamy (deceased) and the Appellant were equal partners in a legal firm under the name of S.C. Thai and Bala Associates with an office in Ipoh and in the Cameron Highlands. Balasundram died on 16.11.2010 and the Appellant continued to manage the firm under the firm’s name.

[8] On 5.6.2013 the Respondents were appointed executrixes of the estate of the late Balasundram. They engaged solicitors to represent them to deal with the Appellant and after discussions the Appellant returned some books and the registration card of a vehicle bearing number ABQ9138 belonging to the deceased. The Appellant also paid RM793,380.69 being one-half of the sum of RM1,586,761.38 which were held in 28 fixed deposit accounts of the firm. The Respondents claimed that this did not represent the deceased’s shares in the firm and there were still substantial sums of money to be paid to the estate and requested for an audit to be carried out on the firm’s account. However discussions broke down and the Respondents sued the Appellant in the 2013 suit.

[9] The trial commenced on 3.7.2014. The next day, on 4.7.2014, after two witnesses for the Respondents had testified, the parties agreed to record a consent judgment whereby the parties agreed to jointly identify and appoint a qualified and approved auditor from Ipoh within two weeks who shall ascertain the assets and income of S.C. Thai & Bala Associates up to the date of death of

the deceased.

[10] In October 2014, pursuant to the consent judgment, Lim Kam Hong and Company (Chartered Accountants) (LKH) was appointed the auditor. The facts showed that by a letter dated 9.1.2015, LKH informed the Appellant's solicitors that the Appellant had not sent the documents and records requested for the audit. On 15.5.2015 LKH wrote to the Appellant's solicitors stating that due to incompleteness of records submitted and undue delay in submitting any further documents since 26.1.2015, LKH questioned the Appellant's cooperation and commitment to the audit. The letter went on to say that they had no choice but to withdraw as auditor.

[11] The Respondent then filed an application (Encl. 22) to appoint Ms Eunice Chong of MY and Co (Chartered Accountants) as the auditor to replace LKH. In the application the Respondents prayed for reliefs and orders so as to prevent the Appellant from frustrating or undermining the proposed audit by MY and Co.

[12] In deciding whether to appoint Ms Chong as the auditor, the Appellant and her solicitors met and interviewed Ms Chong. By a letter dated 23.9.2015, MY and Co. informed the parties that they would only accept the appointment if all the documents specified in their letter were made available to them. The hearing of Encl. 22 was postponed several times because the Appellant did not provide the documents. On 15.3.2016, during the hearing, Encl. 22 was withdrawn and the 2013 suit was reinstated de novo with leave to the parties to amend their pleadings, if necessary. There was no appeal against that decision. The Respondents amended their statement of claim and the Appellant then applied to set aside the amendments which was allowed.

[13] Following that, the Respondents filed the 2016 suit seeking to set aside the consent judgment and for the Appellant to provide them with all the financial records and the accounts of the partnership. In the 2016 suit the Appellant has filed a Defence and Counterclaim. The Counterclaim was for return of the sum of RM793,380.69 and the books which were given prior to the 2013 suit. In this appeal it is not for us to make comments on the merits of the 2016 suit which would be decided in that suit. The question before us is whether the 2016 suit should be struck out under the inherent jurisdiction of the court and or under O. 18 r. 19(1)(b) and or (d) of the Rules.

[14] A consent judgment is a judgment entered into based on an agreement between the parties to resolve their disputes in the suit. It is contractual in nature. The consent judgment entered into has not been decided on merits. The trial judge has not adjudicated on the issues and merits of the case. It was an agreement entered into to enable the audit to move forward to ascertain the assets and income of the legal firm which were in issue. The income and assets of the firm have yet to be ascertained and will be adjudicated upon at the trial in the 2016 suit. Therefore res judicata does not apply to prevent the Respondent from commencing and proceeding with the 2016 suit: see **Asian Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd** [1995] 3 MLJ 189.

[15] Despite the submission that the Appellant had supplied four boxes of documents, on the facts, since the consent judgment has been entered into, the Appellant has consistently failed to provide the necessary documents requested by the auditors. Clearly out of frustration the auditors could not

proceed with the audit and withdrew.

[16] Although the Appellant submitted that the consent judgment is still enforceable and should not be set aside, since the consent judgment was recorded in July, 2014, the Appellant did not cooperate, did not comply and did not give effect to the terms of the consent judgment. Instead she stonewalled the audit process making the consent judgment unworkable. The Appellant has not only failed to cooperate but has frustrated the terms of the consent judgment. Clearly based on her conduct over the two years, she was delaying and has frustrated the audit. In doing so she has abused the process of the court. The courts have inherent jurisdiction to prevent abuse of the process: **Raja Zainal Abidin bin Raja Haji Tachik v British American Life & General Insurance Bhd** (1993) 3 MLJ 16.

[17] The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules are well settled. It is only in plain and obvious cases that recourse should be had in the summary process under this rule when it can clearly be seen that the claim is on the face of it is obviously unsustainable: **Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd** [1993] 3 MLJ 36. Whether the consent judgment should be set aside is an issue for trial in the 2016 suit. Similarly the determination of the assets and income of the firm up to the date of death of the deceased is an issue for trial in the 2016 suit. Based on the facts and circumstances of the case, we are of the view that the conduct of the Respondents in filing the 2016 suit did not tantamount to being scandalous, frivolous or vexatious or otherwise an abuse of the process of the court.

CONCLUSION

[18] During the hearing of this appeal before us, parties confirmed that the 2016 case has been set down for trial with four witnesses including the auditors having been subpoenaed and that the trial is pending the outcome of this appeal. We are of the view that there are no merits in the appeal and that the trial should proceed as soon as possible. The appeal is dismissed with costs of RM8,000.00 subject to allocatur and the deposit to be refunded.

Dated: 19th July 2018

Signed

STEPHEN CHUNG HIAN GUAN

(delivering judgment of the court)

Court of Appeal Judge

Putrajaya

COUNSEL

For the Appellant: S. Y. Lee, Messrs. Mohd Noor & S. Y. Lee

For the Respondents: M. Kumar, Messrs. Maha & Peri

LEGISLATION REFERRED TO:

Rules of Court 2012, Order 18 Rule 19(1), 19(1)(b), 19(1)(d)

JUDGMENTS REFERRED TO:

Asian Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36

Raja Zainal Abidin bin Raja Haji Tachik v British American Life & General Insurance Bhd (1993) 3 MLJ 16

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