

**IN THE COURT OF APPEAL OF MALAYSIA**

**Coram:** Tengku Maimun Tuan Mat, JCA; Abdul Rahman Sebli, JCA; Zaleha Yusof, JCA

**Five Heritage Sdn Bhd and 5 Others v Peguam Negara Malaysia and 2 Others**

**Citation:** [2018] MYCA 275 **Suit Number:** Rayuan Sivil No. P-01(A)-5-01/2017

**Date of Judgment:** 10 August 2018

*Administrative law – Judicial review – Ex-parte application for leave to make an application for judicial review under Order 53 rule 3(1) of the Rules of Court 2012 against the consent given by the Attorney General under section 9 of the Government Proceedings Act 1956 – Whether such consent merely an administrative decision – Whether such consent susceptible to judicial review*

*Administrative law – Judicial Review – Purpose of judicial review – Power of courts to grant leave for judicial review – Principles governing an application for grant of leave for judicial review – Whether the application for leave frivolous and vexatious in the instant case*

**JUDGMENT**

[1] The appellants in this appeal are appealing against the decision of the High Court at Penang which had on 22.11.2016 dismissed their ex-parte application for leave to make an application for judicial review under O.53 r.3(1) of the **Rules of Court 2012**.

[2] The application for leave for judicial review was basically against the consent given by the 1<sup>st</sup> respondent, the Attorney General, to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents under section 9 of the **Government Proceedings Act 1956 (GPA)** to proceed with proceedings commenced by the 2<sup>nd</sup> respondent under the Originating Summons No. 24 NCVC-1128-12/2014 (OS 1128) in which the 3<sup>rd</sup> respondent after successfully intervened, had been added as the 2<sup>nd</sup> plaintiff.

**BACKGROUND FACTS**

[3] The dispute herein revolves around a piece of land formerly known as Lot No. 2103, section 4, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran Pendaftaran No. 61390 (lot

no. 2103). The said lot 2103 was originally part of a land known as Lot No. 104, Section 4, Georgetown, North East District Penang held under Geran (1<sup>st</sup> Grade) No. 6719 (lot 104). Lot 104 with a temple erected thereon was originally given on trust to Burmese and Thai trustees for them to manage the temple for their community, with no power to *inter alia*, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such community. The said trust was created by the East India Company on behalf of Queen Victoria on 30.5.1845.

[4] However on 16.4.1994 the trustees had entered into an Agreement which was later endorsed by the court vide a Court Order dated 19.10.1994, to partition the trust property i.e lot 104 into 2 lots that is Lot 2102 to be taken by the trustee of the Thai Community and Lot 2103 to be taken by the trustee of the Burmese Community.

[5] The said lot 2103 had further been divided into two and now known as lot no. 10029 and lot no. 10030 respectively. The 1<sup>st</sup> appellant is currently the registered owner of lot no. 10029. The 2<sup>nd</sup> to 5<sup>th</sup> appellants are the trustees of the Penang Burmese Trust Property for the Burmese Community in Penang and the 6<sup>th</sup> appellant is the vice-chairman of the Penang Burmese Society.

[6] The 2<sup>nd</sup> respondent claims to be the owner of the premise known as no. 3, Burmah Lane, 10350 Penang which is now under Lot 10029. The 1<sup>st</sup> appellant had filed an action which is now pending at the Penang High Court registered as Civil Suit no. PA-22NCVC-34-02/2016. In their defence and counter claim, the 1<sup>st</sup> respondent averred that he need not deliver vacant possession of the said premise on the ground, *inter alia*, that the land involves a public trust under section 9 of the **GPA** and therefore cannot be sold and transferred without the consent of the Attorney General and therefore the transfer and sub-division of lot 2103 is questionable.

[7] Subsequent thereto, the 2<sup>nd</sup> respondent filed OS 1128. In OS 1128 the 2<sup>nd</sup> respondent seeks to, *inter alia*, set aside the registration of the appellants as the owner of Lots 10029 and 10030 and permanent injunction to restrain the appellants from acting as the registered owners of the two lots which the 2<sup>nd</sup> respondent alleges is a public trust property. After filing the OS 1128, on 20.8.2015, the 2<sup>nd</sup> respondent wrote to the 1<sup>st</sup> respondent for his consent to proceed with OS 1128. On 31.5.2016, the 1<sup>st</sup> respondent gave his consent which is now being opposed by the appellants herein.

## **HIGH COURT DECISION**

[8] The appellants' application for leave to proceed with the Judicial Review was dismissed by the learned High Court Judge as Her Ladyship agreed with the preliminary objection raised by the Senior Federal Counsel that the application should be dismissed as it was frivolous, vexatious and did not justify further argument on a substantive stage. The followings are the reasons given by Her Ladyship:

"The applicants' main complaint is consent was given to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is submitted that the 1<sup>st</sup> respondent's decision to give consent is a non-justiciable issue. He then cited the case of *Gouriet v Union of Post Office Workers and Others* [1977] Q.B. 729, wherein at page 730, the Court of Appeal held:

"(1) (per Lawton and Ormrod L.JJ.) "That the Attorney General's exercise of his discretion to refuse his consent to the bringing of relator proceedings in his name could not be reviewed or questioned by the courts"."

Further down, at page 758, Lord Denning M.R, states:

"It has been submitted that the discretion of the Attorney General is an absolute discretion which will not be inquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the court will not review it. That was made clear by the Earl of Halsbury L.C. in his oft-quoted dictum in *London Country Council v Attorney General* in the House of Lords [1902] A.C. 165, 168-169."

Based on the above authority, it is submitted that the 1<sup>st</sup> respondent's consent cannot be reviewed nor inquired by the court. I agree with SFC's submission. The right to give or refuse consent is within the absolute discretion of the Attorney General. In this case, the Attorney General had exercised his discretion to give the consent. The case law shows the applicants cannot challenge the consent on whatever grounds. Therefore, there is no merits in the grounds relied upon by the applicants. The issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided by the courts in Suits 22 NCVC-34-02/2016 and Originating Summons No. 24 NCVC-1128-12/2014. These issues cannot be resolved by way of judicial review. It is pre-mature at this stage for the applicants to ask the court to declare the Burmese Trust is a private trust. Each party should be given opportunity to prove its case. For the aforesaid reasons, I find the applicants' application is frivolous and vexatious. Accordingly, I dismiss the application with no order as to costs."

## OUR DECISION

[9] Before us, learned counsel for the appellants had argued that the 1<sup>st</sup> respondent's reliance on the case of **Gouriet v Union of Post Office Workers and Others** [1977] QB 729, in making his preliminary objection that the discretion of the Attorney General is an absolute discretion and therefore cannot be inquired into by the courts; and Her Ladyship's acceptance of the argument, was wrong. Unlike **Gouriet's**, supra, the appellant's application, did not relate to enforcement of criminal law by means of civil proceeding; but related to O.53 **Rules of Court 2012** and section 9 of the **GPA**.

[10] In her written submissions learned counsel for the appellants had cited the case of **Tun Dato' Haji Mohamed Salleh bin Abas v Tan Sri Dato' Abdul Hamid bin Omar & Ors** (1988) 3 MLJ 149 and the case of **Merdeka University Berhad v Government of Malaysia** (1982) 2 MLJ 243 to show that the Attorney General is a Public Officer and also a Public Authority within O.53 **Rules of Court 2012**; and that the appellants had been adversely affected by the decision of the Attorney General to give consent and as such the appellant had locus standi to challenge the decision of the Attorney General.

[11] It was also argued on behalf of the appellants that the learned High Court Judge was wrong to hold that the Judicial Review application was wrong as the only way to challenge the consent was by way of Judicial Review otherwise they will be precluded or estopped for raising the same objection when OS 1128 is heard.

[12] We had considered submissions made by the parties including the respondents' which submissions were similar with the decision of the learned High Court Judge.

[13] We must admit that learned counsel for the appellants had a point when she contended that the consent of the Attorney General, being a decision of a public authority is susceptible to Judicial Review. The consent under the said section 9 in our view is not merely an administrative decision as submitted by learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as it goes to the party's locus to bring an action.

[14] The purpose of Judicial Review is *inter alia* to ensure that public authority which exercises powers given by the law is kept within the confine of the powers conferred upon him. Its importance was clearly explained by Raja Azlan Shah, Chief Judge (Malaya) (as His Highness then was) in **Pengaruh Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd** (1979) 1 MLJ 135:

"Unfettered discretion is a contradiction in terms. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene..."

[15] Article 145 Clause (3) of the **Federal Constitution** provides that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial. Hence we agree that the Attorney General has unfettered discretion in relation to prosecution of criminal offences based on the Federal Constitution. However in respect of civil cases we opine that he has no such unfettered discretion. In our view, to assert that the Attorney General's consent under section 9 of the **GPA** is non-justiciable is a little extreme as like any other public authority, the discretion given to him in civil matter cannot be free from legal restraint as there is no absolute discretion in public law. See: **Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors** (2005) 4 CLJ 169. A matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See: **Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo** [2014] 6 MLJ 812. Hence, in a non-criminal matter like in this appeal, the court can exercise its judicial authority to ensure the power or discretion given by the law is not abused.

[16] However, looking back at the decision of the learned High Court Judge we fully agreed with the learned High Court Judge that the issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided in suit 22

NCVC-34-02/2016 and OS 1128. The appellants in their Judicial Review application had sought *inter alia* for a declaration that the Penang Burmese Trust created under the Trust Deed dated 31.7.2006 is a valid private trust. We agreed with the learned High Court Judge that it is premature to seek such a relief as the issue cannot be resolved simply by way of Judicial Review. The issues raised require serious discussion and examination at a proper trial. Witnesses need to be called and each party to be given opportunity to ventilate the issue and for the court to evaluate. It cannot definitely be exercised by mere examination of the documents.

[17] It is trite, that it is the function of the court in exercising its power to grant leave for Judicial Review to sieve through the application before it and determine that the application is not frivolous and vexatious and that there is an arguable case to merit further argument on the substantive motion. See: **Ahli Suruhanjaya yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video yang Mengandung Imej Seorang yang dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim** [2012] 1 CLJ 805. The court must always bear in mind the following principles in respect of such an application:

- i) if it is clear to the judge that there is a point for further investigation on a full inter partes basis with all evidence as is reasonably necessary on the facts and all such arguments on the law then leave ought to be granted;
- ii) if the judge hearing the leave application is satisfied that there is no arguable case the judge should dismiss the application for leave to move for leave for judicial review; and
- iii) if the judge is not really sure whether there is or is not an arguable case, the judge may invite the putative respondent to attend and submit as to whether or not leave ought to be granted; and
- iv) in exercising the powers in an inter partes leave application the test applicable by the Court must be the same approach as the test adopted in deciding whether to grant leave to appeal against the arbitrator's award. The Court has to consider the facts and law before it and ask itself whether the Court is satisfied that there is a case fit for further consideration or otherwise.

See: **R v Secretary of State for Home Department, ex parte Rushkanda Begum** [1990] Crown Office Digest 109.

[18] In the instant appeal we found that the application for leave was clearly frivolous and vexatious as there already existed two pending suits dealing with the same issues which until now have not been disposed off.

[19] Based on the above, we agreed with the learned High Court Judge that the application did not justify further argument on a substantive motion. We therefore dismissed this appeal with no order as to cost.

Dated: 10 Ogos 2018

**ZALEHA BINTI YUSOF**

Judge

Court of Appeal

Malaysia

**COUNSEL**

For the Appellants: Karin Lim Ai Ching, A. Suppiah, T/n Juli & Ameleena, Peguambela & Peguamcara, Level 33-A1, Gurney Tower, No. 18, Persiaran Gurney, 10250 Penang

For the 1<sup>st</sup> Respondent: Shamsul Bolhassan (SFC), Rosli Ahmad (SFC), Jabatan Peguam Negara Malaysia, No. 45, Persiaran Perdana, Presint 4, Putrajaya

For the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents: T. Gunaseelan, Balwant Singh, Ravin Veloo, Tetuan Balwant Singh & Co, Peguambela & Peguamcara, No. 69 Lebuah Bishop, 10200 Penang

**LEGISLATION REFERRED TO:**

*Federal Constitution, Article 145(3)*

*Government Proceedings Act 1956, Section 9*

*Rules of Court 2012, Order 53, Order 53 Rule 3(1)*

**JUDGMENTS REFERRED TO:**

*Ahli Suruhanjaya yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video yang Mengandungi Imej Seorang yang dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-Hakim v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2012] 1 CLJ 805

*Gouriet v Union of Post Office Workers and Others* [1977] QB 729

*Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* (2005) 4 CLJ 169

*Merdeka University Berhad v Government of Malaysia* (1982) 2 MLJ 243

*Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* (1979) 1 MLJ 135

*R v Secretary of State for Home Department, ex parte Rushkanda Begum* [1990] Crown Office Digest 109

*Tun Dato' Haji Mohamed Salleh bin Abas v Tan Sri Dato' Abdul Hamid bin Omar & Ors* (1988) 3 MLJ 149

*Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812

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](#).