

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Mary Lim, JCA; Hasnah Hashim, JCA

Dato' Haji Muhammad Bin Hamzah v RHB Bank Berhad

Citation: [2018] MYCA 291 **Suit Number:** Civil Appeal No. B-02(IM)-173-01/2018

Date of Judgment: 07 September 2018

Litigation & court procedure – Limitation – Whether the plaintiff is barred from proceeding with the auction under section 21(1) of the Limitation Act

JUDGMENT**Introduction**

[1] This appeal filed by Dato' Haji Muhammad bin Hamzah (“the defendant”) emanates from the decision of the learned High Court judge at Shah Alam.

[2] The learned judge affirmed the decision of the learned Registrar in dismissing the defendant’s application to restrain RHB Bank Bhd (“the plaintiff”) from proceeding with any action to enforce the charge or to recover the proceeds of sale of the property known as HS (D) 11668, PT No 5301, Mukim Ampang, Selangor (“the property”).

[3] We had allowed the defendant’s appeal and we now state our reasons.

The background facts

[4] The defendant is the registered owner of the property. In 1997, the defendant was granted a housing loan facility for RM200,000.00 and an overdraft facility for the same amount by Bank Utama (Malaysia) Berhad (“Bank Utama”).

[5] The security for the loan, was inter alia, a charge on the property which was registered on 24.12.1997 in favour of Bank Utama.

[6] The defendant defaulted on the loan. Bank Utama issued a statutory demand vide Form 16D dated 6.9.1999 on the defendant. This was followed by the filing of an originating summons by Bank

Utama in December 1999 seeking for an order for sale of the said property, under sections 256 and 257 of the **National Land Code 1965**.

[7] The originating summons filed by Bank Utama was withdrawn. The plaintiff who had taken over the business of Bank Utama filed a fresh originating summons in 2001 and obtained an order for sale of the property on 6.5.2002.

[8] Directions for the sale of the property were issued under Application for Execution No. AE 38-36-2004. Notwithstanding the order for sale and the directions for public auction, the property has yet to be sold and remains in the possession of the defendant.

[9] On 14.8.2000, the defendant was adjudged a bankrupt after a receiving order and an adjudication order was made against him.

[10] In April 2017, having obtained the sanction from the Director General of the Insolvency Department, the defendant filed a notice of application seeking for an order that the plaintiff be restrained from taking any action to recover the sums due or to enforce the charge or to recover the proceeds of sale of the property.

[11] The application was premised on section 21(1) of the **Limitation Act 1953** (“**the Limitation Act**”). It was the defendant’s contention that the plaintiff’s action to auction the defendant’s property was barred by limitation, as more than 12 years had passed since Form 16D was issued or since the order for sale was made.

[12] The application was dismissed by the learned Registrar. On appeal to the Judge in Chambers, the defendant’s appeal was dismissed. The learned judge agreed with the learned Registrar that the plaintiff’s originating summons for an order for sale was not barred by limitation and that there was no cause to the contrary shown. The learned judge found that the plaintiff’s application made on 18.5.2017 was merely for a new date for a public auction and that section 21(2) of **the Limitation Act** relied upon by the defendant was not applicable.

The Appeal

[13] The argument of learned counsel for the defendant was simply this: taking the date of Form 16D on 6.9.1999 or the date of the order for sale on 6.5.2002, the plaintiff’s action to auction the property is barred by section 21(1) of **the Limitation Act**.

[14] In opposing the appeal, learned counsel for the plaintiff argued that the plaintiff’s action was filed within the time stipulated according to the Limitation Act. Reliance was placed on two decisions of this Court in **Peh Lai Huat v MBf Finance Bhd** [2011] 3 MLJ 470 and **Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal** [2013] 3 MLJ 61 for the proposition that a chargee bank’s cause of action accrues upon the expiry of the statutory notice period in Form 16D sent to the chargor. Learned counsel for the plaintiff also highlighted the recent decision in **Sivadevi a/p Sivalingam v CIMB Bank Berhad** [2018] MLJU 521 where this

Court declined to follow the decisions in **Peh Lai Huat** and **Jigarlal K Doshi**.

Our Decision

[15] The learned judge dismissed the defendant's appeal on inter alia the ground that the defendant's application was based on section 21(2) of **the Limitation Act** and that the said section was not applicable.

[16] With respect, we found that the learned judge was mistaken as to the basis of the defendant's application. As a matter of fact, the application was not based on section 21(2) but on section 21(1) of **the Limitation Act** (see the written submission of the defendant in the High Court at pg 100-107 of the Record of Appeal).

[17] Section 21(2) of **the Limitation Act** adverted to by the learned judge reads:

"(2) No foreclosure action in respect of mortgaged personal property shall be brought after expiration of twelve years from the date on which the right to foreclose accrued:

Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued."

[18] In any event, the dispute before us did not concern the filing of the originating summons for the order for sale or the foreclosure action as such but rather the further action taken by the plaintiff to auction the property, after a lapse of twelve years from the date the order for sale was granted.

[19] To recap, the plaintiff filed the originating summons and obtained an order for sale in May 2002 having served Form 16D on the defendant in September 1999. There is no dispute that the plaintiff's originating summons seeking for an order for sale was filed within the twelve year period. The defendant had no complaint on the filing of the originating summons. The defendant's complaint was in respect of the plaintiff's action to auction the property. Hence in this regard, the cases relied upon by the plaintiff are not relevant as those cases dealt with the filing of the foreclosure proceedings whereas that was not the issue before us.

[20] The issue before us was whether the plaintiff is barred from proceeding with the auction under section 21(1) of **the Limitation Act**.

[21] Section 21(1) of **the Limitation Act** upon which the defendant's application was anchored provides:

"No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued."

[22] We found the answer to this issue in section 2(1) of the **Limitation Act** which defines action as follows:

“ “action” includes a suit or any proceeding in a court of law:”

[23] In **Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad** [2011] 1 MLJ 145, the Federal Court considered the meaning of the word “proceedings” in section 8 of the **National Language Act 1963/67** and sets out *P Ramanatha Aiyar's Advanced Law Lexicon* at pg 3745 relied upon by the appellant:

“[11] ...

‘Proceedings’ is a word much used to express the business done in Courts. A proceeding in Court is an act by the authority or direction of the Court, express or implied. It is more comprehensive than the word ‘action’, but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term ‘proceeding’ may include-(1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the remitter, or sending back of the record to the lower Court from the appellate or reviewing Court; (13) the enforcement of the judgment, or a new trial, as may be directed by the Court of last resort. EDWIN E. BRYANT, *The Law of Pleading Under the Codes of Civil Procedure* 3-4 (2nd edi. 1899).”

[24] The Federal Court further states:

“[12] *Black's Law Dictionary*, (7th Ed) at p 1221 defines the word ‘proceeding’ in the following term:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.

(see also *Stroud's Judicial Dictionary of Words and Phrases*, (7th Ed) Vol 3 at p 1426).

[13] Section 3 of the Courts of Judicature Act 1964 (“the CJA”) defines ‘proceeding’ as follows:

‘Proceeding’ means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of the proceeding.

[14] From the above definitions, we may conclude that ‘proceeding’ includes amongst others the institution or commencement of action, judgment, execution and the taking of an appeal or writ of error. ...”.

[25] Guided by the above authority, while fixing of a new auction date by the court may be defined to be a progression of the plaintiff's originating summons, it is nevertheless a distinct and separate action requiring the respondent's application to court. This is evident by the entry of a separate code, in this case "Execution No: 38-36-2004" although the order for sale was granted in 2002. It clearly falls under "any proceeding in a court of law".

[26] Given the clear definition of the word "action" which includes "proceeding", we agreed with the defendant that section 21(1) of **the Limitation Act** applies to the plaintiff's action to auction the property, such action is a proceeding in a court of law within section 2 of **the Limitation Act**. Taking the date of the order for sale, any action by the plaintiff to auction the property would be clearly beyond the twelve year period. Such an action would, in any case, be caught by section 6(3) of **the Limitation Act**.

[27] In the circumstances, we allowed the appeal with no order as to costs. The order of the High Court was set aside. We granted order in terms of the defendant's application in prayer (b) at pg 13 of the Record of Appeal to the extent that the plaintiff is restrained from taking any action to enforce the charge.

Dated: 7th September 2018

signed

TENGGU MAIMUN BINTI TUAN MAT

Judge

Court of Appeal

COUNSEL

For the Appellant: H C Tan, Messrs. H C Tan & Zahani

For the Respondent: Jasvinder Singh, Messrs. Mazwan Pathma & Co

LEGISLATION REFERRED TO:

Limitation Act 1953, Sections 2, 6(3), 21(1), 21(2)

National Land Code 1965, Sections 256, 257

National Language Act 1963/67, Section 8

JUDGMENTS REFERRED TO:

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad [2011] 1 MLJ 145

Jigarlal K Doshi @ Jigarlal a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and Another Appeal [2013] 3 MLJ 61

Peh Lai Huat v MBf Finance Bhd [2011] 3 MLJ 470

Sivadevi a/p Sivalingam v CIMB Bank Berhad [2018] MLJU 521

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