

Tham Kok Onn v Perwira Habib Bank Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03-36 OF 1997
ARIFIN ZAKARIA, MOHD GHAZALI AND NIK HASHIM JJCA
4 NOVEMBER 2004

Limitation — Execution of judgment — Leave to execute — Sum claimed include interest barred by limitation — Whether leave should be set aside — Limitation Act 1953 s 6(3)

Limitation — Pleading — Defence of limitation — Summons action — Whether limitation must be pleaded — Limitation Act 1953 s 4 — Rules of the High Court 1980 O 1 r 4 & O 18 r 8

On 23 September 1988 the respondent had obtained summary judgment against the appellant, a Singaporean. Since the judgment was more than six years ago, the respondent applied for leave to execute the judgment which was granted on 23 May 1996. The appellant's application to set aside the leave to execute was dismissed by the senior assistant registrar ('the SAR'). The appellant's appeal to the High Court was also dismissed. The appellant then appealed to the Court of Appeal. Counsel for the appellant submitted that the respondent was entitled to enforce the full judgment in the order and this was not permissible under s 6(3) of the Limitation Act 1953 ('the Act'). The respondent's counsel objected to the application by the appellant, firstly, on the ground that this point was never pleaded, raised or argued before the learned SAR, or the learned judge in the court below. He further submitted that s 4 of the Act expressly requires the limitation point to be pleaded.

Held, dismissing the appeal:

- (1) Section 4 of the Act does not apply to a summons action because by definition 'pleading' does not include a petition, summons or preliminary act (see O 1 r 4 Rules of the High Court 1980 (the 'RHC')). Further, the requirement to plead statute of limitation as a defence is contained in O 18 r 8 RHC which relates to writ action and not to a summons. Therefore, s 4 of the Act does not apply to this case (see para 7).
- (2) Section 6(3) of the Act had no application in the present case as the order made by the High Court on 23 May 1996 was merely an order granting leave to issue writ of execution to enforce judgment made under O 46 r 2(1)(a) RHC, it was not an act of recovery or execution. Only at the execution stage will s 6(3) of the Act apply, and it will then become incumbent upon the judgment creditor to state how much is being executed and to ensure that that amount does not include arrears of interest of more than six years calculated from the date of judgment or any future interest (see para 10). Therefore, the proper construction to be placed on O 46 r 2(1)(a) is that leave to issue execution to enforce

A a judgment may be granted for as long as the judgment is capable of being enforced provided that the execution or recovery should be limited to that part of the judgment which is not time barred (see para 11).

B [Bahasa Malaysia summary

Pada 23 September 1988, responden mendapat penghakiman terus terhadap perayu, seorang warganegara Singapura. Memandangkan penghakiman tersebut adalah lebih daripada enam tahun dahulu, responden telah memohon kebenaran untuk melaksanakan penghakiman yang dibenarkan pada 23 Mei 1996.

C Permohonan perayu untuk mengetepikan kebenaran melaksanakan penghakiman telah ditolak oleh penolong kanan pendaftar ('PKP'). Rayuan perayu keMahkamah Tinggi juga telah ditolak. Perayu kemudian telah merayu keMahkamah Rayuan. Peguam bagi pihak perayu berhujah bahawa responden berhak untuk menguatkuasakan penghakiman penuh dalam perintah tersebut

D dan ini tidak boleh dibenarkan di bawah s 6(3) Akta Had Masa 1953 ('Akta tersebut'). Peguam bagi pihak responden membantah permohonan oleh perayu, pertamanya, atas alasan bahawa perkara ini tidak pernah diplidkan, ditimbulkan atau dihujahkan di hadapan PKP yang bijaksana, atau hakim yang bijaksana di mahkamah bawahan. Beliau juga berhujah bahawa s 4 Akta tersebut dengan

E jelas menghendaki perkara tersebut diplidkan.

Diputuskan, menolak rayuan tersebut:

F (1) Seksyen 4 Akta tersebut tidak terpakai ke atas tindakan saman kerana berdasarkan definisi 'pliding' tidak termasuklah satu petisyen, saman atau tindakan awal (lihat A 1 k 4 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT')). Tambahan pula, keperluan untuk memplidkan statut had masa sebagai satu pembelaan terkandung dalam A 18 k 8 KMT yang berkaitan tindakan writ dan bukan suatu saman. Oleh itu, s 4 Akta tersebut tidak terpakai dalam kes ini (lihat perenggan 7).

G (2) Seksyen 6(3) Akta tersebut tidak terpakai dalam kes semasa kerana perintah yang dibuat oleh Mahkamah Tinggi pada 23 Mei 1996 hanya satu perintah membenarkan kebenaran untuk mengeluarkan writ pelaksanaan untuk menguatkuasakan penghakiman yang dibuat di bawah A 46

H k2(1)(a) KMT, ia bukan satu tindakan mendapat kembali atau pelaksanaan. Hanya di peringkat pelaksanaan s 6(3) Akta tersebut akan terpakai, dan ia adalah penting untuk pemiutang penghakiman menyatakan setakat mana dilaksanakan dan untuk memastikan bahawa jumlah tersebut tidak termasuk faedah yang tertunggak lebih enam tahun dikira dari tarikh penghakiman atau apa-apa faedah di masa hadapan (lihat perenggan 10).

I Oleh itu, pembentukan yang betul ke atas A 46 k 2(1)(a) adalah bahawa kebenaran untuk mengeluarkan pelaksanaan menguatkuasakan penghakiman

boleh diberikan dengan syarat pelaksanaan atau mendapat kembali hendaklah terbatas kepada bahagian penghakiman tersebut yang bukan di luar had masa (lihat perenggan 11).]

Notes

For cases on execution of judgment, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2205–2206.

For cases on defence of limitation, 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2286.

Cases referred to

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385 (refd)

Legislation referred to

Limitation Act 1953 ss 4, 6(3)

Rules of the High Court 1980 O 1 r 4, O 18 r 8, O 46 r 2(1)(a)

Appeal from: Commercial No C3796 of 1985 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (TS Lai with him) (Ngeow & Tan) for the appellant.

Chang Wei Mun (Raja, Darryl & Loh) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

[1] This is an appeal by the appellant/fourth defendant against the order of the learned High Court judge in dismissing the appellant's appeal against the order of the learned senior assistant registrar ('the SAR') in dismissing the appellant's application to set aside the leave to execute given to the respondent/plaintiff on 23 May 1996 under O 46 r 2(1)(a) of the Rules of the High Court 1980 ('RHC'). On 11 May 2004 we heard submissions of counsel for both the appellant and the respondent and we reserved our decision to 12 May 2004, and on the said date we dismissed the appeal. The order of the High Court was thus affirmed but with modification. We further ordered that each party to bear his/its own costs. We now give our reasons.

[2] The background facts leading to this application are as follows. On 23 September 1988 the respondent obtained summary judgment against the appellant for the amount due and owing to the respondent under a loan facilities granted to the first defendant (who is not a party to this appeal) by the respondent wherein the appellant stood as guarantor.

- A [3]** As the appellant is a Singaporean the respondent caused the judgment to be registered in Singapore. This was done on 11 September 1990. On 8 March 1991 the registration of judgment in Singapore was set aside on the application of the appellant on the ground that the registration was premature as the matter was pending appeal in Malaysia. On 1 November 1994 the
- B** Federal Court dismissed the appellant's appeal against the summary judgment. Following that the respondent registered the judgment in Singapore on 6 June 1995. On 9 February 1996 the second registration in Singapore was again set aside on the ground that the judgment was more than six years and leave to execute had not been obtained in Malaysia. The respondent then applied for
- C** leave to execute and it was duly granted on 23 May 1996. The judgment was re-registered in Singapore for the third time on 28 October 1996. The appellant appealed against the order of 23 May 1996, and since the matter is under appeal in Malaysia a stay of execution was granted by the Singapore judge on the application of the appellant.
- D [4]** In the appeal before us, two grounds were advanced by the appellant in his memorandum of appeal. At the hearing before us, learned counsel for the appellant informed us that he was abandoning these two grounds and sought leave of the court to raise a point of law, that is, on the interpretation of s 6(3) of the Limitation Act 1953 ('the Act') as found in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 ('the *UMBC's case*').
- E [5]** The learned counsel for the appellant submitted that looking at the order as it stands, the respondent is entitled to enforce the full judgment. This, he submitted is not permissible under s 6(3) of the Act as interpreted in the *UMBC's case*.
- F [6]** The respondent's counsel objected to the application by the appellant, firstly, on the ground that this point was never pleaded, raised or argued before the learned SAR, or the learned judge in the court below. He further submitted that s 4 of the Act expressly requires the limitation point to be
- G** pleaded. Failure to do so is fatal to the appellant's case. Section 4 of the Act provides:
- 4 Limitation not to operate as a bar unless specially pleaded.
- H** Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.
- I [7]** However, learned counsel for the appellant contended that s 4 of the Act does not apply to a summons action because by definition 'pleading' does not include a petition, summons or preliminary act (see O 1 r 4 RHC). Further he said the requirement to plead statute of limitation as a defence is contained in O 18 r 8 RHC which relates to writ action and not to a summons. Having

considered the issue, we agree with the appellant that s 4 of the Act does not apply to this case. For the above reasons we dismissed the respondent's objection on the pleading point.

[8] The next issue in contention is whether the order of the High Court dated 23 May 1996 is rendered invalid and thus unenforceable in the light of the interpretation given by the Federal Court to s 6(3) of the Act in the *UMBC's* case. The said section provides:

An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[9] The Federal Court in *UMBC's* case held, *inter alia*, that in view of the provision of the second limb of s 6(3) of the Act, an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovering and could not include future interest even if the amount due had not been paid.

[10] The learned counsel for the respondent, however, contended that s6(3) of the Act has no application in the present case as the order made by the High Court on 23 May 1996 was merely an order granting leave to issue writ of execution to enforce judgment made under O 46 r 2(1)(a) RHC, it is not an act of recovery or execution. It is also submitted for the respondent that only at the execution stage will s 6(3) of the Act apply, and it will then become incumbent upon the judgment creditor to state how much is being executed and to ensure that that amount does not include arrears of interest of more than six years calculated from the date of judgment or any future interest.

[11] It is further submitted that an application for leave under O 46 r 2(1)(a) by necessity requires a judgment to be more than six years old, and therefore, if the appellant's contentions are correct it would mean that the court has no jurisdiction to grant leave in respect of monetary judgment which carry interest. That, the learned counsel for the respondent submitted could not be the case. Having considered the issue, we agree with submissions of the learned counsel for the respondent that the proper construction to be placed on O 46 r 2(1)(a) is that leave to issue execution to enforce a judgment may be granted for as long as the judgment is capable of being enforced provided that the execution or recovery should be limited to that part of the judgment which is not time barred.

[12] For the above reasons we dismissed the appeal herein, but in the circumstances of this case, we ordered that each party is to bear his/its own costs in respect of this appeal. It is further ordered that the order of the High

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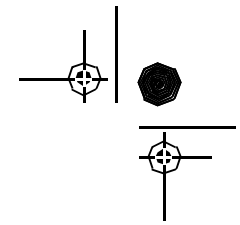
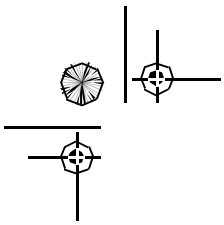
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A Court dated 23 May 1996 be amended by inserting the words, '*tertakluk kepada peruntukan s 6(3) Akta Had Masa 1953*' at the end of the said order immediately following the words, '*sejak penghakiman itu*'.

Appeal dismissed.

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Reported by Loo Lai Mee

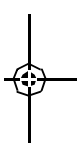


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