

**DALAM MAHKAMAH RAYUAN DI MALAYSIA  
(BIDANG KUASA RAYUAN)  
RAYUAN SIVIL NO. J-04-125-2006**

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**Antara**

- 1. ONG KIM CHUAN (NO. K/P: 7675224)**
- 2. CHIH MOY @ CHIA SWEE MEI (NO. K/P: 420906-10-5476)**

**.. PERAYU-PERAYU**

**Dan**

**LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA**

**.. RESPONDEN**

**(DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU  
DALAM NEGERI JOHOR MALAYSIA  
RAYUAN SIVIL NO: MT1-12-1-2004**

**ANTARA**

- 1. ONG KIM CHUAN (NO. K/P: 7675224)**
- 2. CHIH MOY @ CHIA SWEE MEI (NO. K/P: 420906-10-5476)**

**.. PERAYU-PERAYU/  
DEFENDAN-DEFENDAN**

**DAN**

**LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA**

**.. RESPONDEN/PLAINTIF)**

**(DALAM MAHKAMAH SESYEN DI JOHOR BAHRU  
DALAM NEGERI JOHOR, MALAYSIA  
SAMAN NO: 52-4607-2002 (5)**

**ANTARA**

**LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA**

**.. PLAINTIF**

**DAN**

**1. HALEYWOOD INDUSTRIES SDN BHD**

**(NO. SYARIKAT: 185223-K)**

**2. ONG KIM CHUAN (NO. K/P: 7675224)**

**3. CHIH MOY @ CHIA SWEE MEI (NO. K/P: 420906-10-5476)**

**.. DEFENDAN-DEFENDAN)**

**CORAM: HELILIAH BT. MOHD YUSOF, JCA  
MOHD HISHAMUDIN YUNUS, JCA  
RAMLY ALI, JCA**

**RAMLY ALI, JCA**

**(DELIVERING JUDGMENT OF THE COURT)**

1. This is an appeal by the appellants (the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants in the original case) against the decision of the learned High Court judge in dismissing the appellants' appeal against the decision of the Session Court allowing the plaintiff's claim for summary judgment under **Order 26A of the Subordinate Court Rules 1980**.

**Factual Background**

2. The 1<sup>st</sup> defendant, Haleywood Industries Sdn Bhd, was at all material times an employer as defined under **section 2 of the Employees Provident Fund Act 1991 (EPF Act)**.
3. The 1<sup>st</sup> defendant had failed to make payment of EPF contributions in respect of its employees for the periods of June 2000 up to March 2002 and October 2000 up to May 2002 for a total sum of RM180,624.00.

4. Both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants (the Appellants) were at all material times (during the relevant periods stated above) the registered directors of the 1<sup>st</sup> defendant.
5. The 1<sup>st</sup> defendant was wound up on 18.11.2002.
6. All the above facts are not in dispute.
7. The plaintiff claimed for the said sum of RM180,624.00 initially from all the three defendants. However, since the 1<sup>st</sup> defendant was wound up on 18.11.2002, the plaintiff indicated (in its affidavit in reply – paragraph 3) its intention to withdraw its claim against the 1<sup>st</sup> defendant.
8. The plaintiff proceeded its claim for the said amount against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants (the appellants), under **section 46 of the EPF Act**. The plaintiff obtained a summary judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants at the Sessions Court. The appellants' appeal to the High Court against the said decision was dismissed. Hence, the present appeal to this Court.

9. In the present appeal, the appellants argued that they were not personally liable for the debt of the 1<sup>st</sup> defendant company under **section 46 of the Employee Provident Fund Act 1991** because the appellants who were directors have lost their status or locus as directors when the 1<sup>st</sup> defendant company was been wound-up under **section 218 of the Companies Act 1965** and the Official Receiver has taken over the affairs of the 1<sup>st</sup> defendant company.
  
10. Further it was also contended by the appellants that under **section 292(1) of the Companies Act 1965** in winding up of a company, any payment due under the Provident Fund or Employees Superannuation can be realized by filing the proof of debt with the Official Receiver.
  
11. The appellants contended that **section 46 of the Act** is not comprehensive to cover a situation where the company has been liquidated or wound up, and that the position of the directors' liability in such an event is not expressly provided for.

12. The appellants also argued that the provision of **section 46 of the Employee Provident Fund Act 1991** applies only in respect of the company which is still in operation and the directors have not lost their status or locus as directors.
  
13. The appellants also submitted that **section 46 of the EPF Act** must be read conjunctively with the provisions of the Companies Act 1965 and that the directors cannot be held personally liable at law in respect of the debt of the company. To support this contention, the appellants relied on the strength of **Salomon v. Salomon & Co. Ltd [1897] AC 22** – a judgment of the **House of Lords** which held that “the incorporation of the company created a separate person ... and the members were not liable in respect of the company’s obligations.”
  
14. Finally, the appellants stressed that the plaintiff’s claim under **section 46 of the EPF Act** for the said amount against the

appellants tantamount to fraudulent preference under the **Companies Act 1965** and thus unenforceable in law.

### **Findings of Court**

15. It is not in dispute that the 1<sup>st</sup> defendant, Haleywood Industries, was at all material times an employer as defined under **section 2 of the EPF Act**. It is also not in dispute that the 1<sup>st</sup> defendant had failed to pay contributions to the EPF for the said amount during the relevant periods; and during that periods, both the appellants were directors of the 1<sup>st</sup> defendant.
16. Under **section 65(1) of the EPF Act**, all contributions recoverable by the EPF can be recovered summarily as civil debt.
17. The plaintiff's action against both the appellants is based on the provisions of **section 46 of the EPF Act** which provides:

*“where any sum of money by way of contributions together with any dividend due thereon remaining unpaid by a company, a firm or an association or persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the fund.”*

18. Under **section 46**, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were

liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable *“notwithstanding anything to the contrary in any other written law”*.

19. Being *“jointly and severally liable”* the said directors are liable either jointly together with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (1<sup>st</sup> defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company (which was done later when the plaintiff withdrew its claim against the 1<sup>st</sup> defendant after the 1<sup>st</sup> defendant was wound up). The liability of the appellants (as directors at the relevant times) is based on the provisions of **section 46 of the EPF Act** above, not on common law or any other written law, not even the **Companies Act 1965**. **Section 46** stands by itself *“notwithstanding anything to the contrary in the **EPF Act** or any other written law”*

20. The liability on the appellants is created by statute i.e. **section 46 of the EPF Act**. The relevant period for such liability to exist is “during such period in which contributions were liable to be paid” which in the present case is between June 2000 until March 2002; and October 2000 until May 2002. During these periods, the 1<sup>st</sup> defendant company was still in operation and both the appellants were the directors. The 1<sup>st</sup> defendant company was only wound up on 18.11.2002, and the appellants directorship in the company ceased long after the relevant periods during which the said contributions were liable to be paid. On that premise, the fact that the 1<sup>st</sup> defendant company had been wound up on 18.11.2002 does not in any way absolve the appellants from the liability imposed by **section 46**.

21. The liability under **section 46** on the appellants is created by statute ‘directly’ and ‘personally’ on the appellants as director or former directors of the 1<sup>st</sup> defendant company. Thus the contributions due and payable become the debt of the

appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were "not personally liable for the debt of the company" cannot hold water.

22. The plaintiff had decided not to proceed with its claim against the 1<sup>st</sup> defendant company. Instead the plaintiff proceeded against the appellants as allowed under **section 46 of the EPF Act**. The plaintiff has the right and choice to do so. There is nothing unlawful about that. That being the case, the issue of the plaintiffs filing the proof of debt with the Official Receiver after the 1<sup>st</sup> defendant company has been wound up, as suggested by the appellants, does not arise. The appellants reliance on the case of **Salomon v. Saloman & Co.** (supra) also does not help them in any way.
  
23. Since the plaintiff's claim against both the appellants are on their personal liabilities under **section 46 of the EPF Act**, not a claim against the 1<sup>st</sup> defendant company, then the issue of

“fraudulent preference under the **Companies Act 1965**” as alleged by the appellants does not arise at all.

### **Conclusions**

24. Based on the above considerations, the Court finds that the appellants’ arguments to support their appeals are totally baseless and without merit. Therefore the Court unanimously holds that the appeal is dismissed with costs of RM3000 to be paid by the appellants to the plaintiff (respondent) here and the Court below. Deposit to the account of the costs.

Dated this 22<sup>nd</sup> day of June 2009

t.t.

**RAMLY ALI**  
**JUDGE, COURT OF APPEAL**  
**MALAYSIA**

**Solicitors:**

1. **Dr. Balasekaran**

**Tetuan Bala & Co.**

**.. for the Appellant**

2. **Dennis Yan Heen Khiong (with Mohd. Azizi Iskandar)**

**Tetuan Ishak Sharif & Co.**

**.. for the Respondent**

**Cases Referred to:**

**Salomon v. Salomon & Co. Ltd [1897] AC 22 – House of Lords**

**Legislation Referred to:**

1. **Subordinate Court Rules 1980: Order 26A**

2. **Employees Provident Fund Act 1991: section 2 and section 46**

3. **Companies Act 1965: section 218 and 292(1)**