

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO. D – 02 – 613 – 2004**

ANTARA

RHB BANK BERHAD (6171-M) ... PERAYU  
(YANG TELAH MENGAMBIL ALIH SIME  
BANK BERHAD)

DAN

YA'ACOB BIN MOHD KHALIB @ ABDUL  
GHANI BIN MUHAMMAD ... RESPONDEN  
(NO. K/P: 3283899)

[Dalam Perkara Mahkamah Tinggi Malaya di Kota Bharu  
Saman Pemula No. 24-232-2002)

Dalam perkara mengenai Seksyen  
256 Kanun Tanah Negara 1965;

Dan

Dalam perkara mengenai Gadaian  
No. Perserahan 3203/86, Jilid 17  
Folio 29 berhubung dengan tanah  
di bawah G.M. 985, No. Lot 346 di  
Mukim Gong Nangka, Daerah  
Pasar Puteh dan Negeri Kelantan  
Darul Naim;

Dan

Dalam perkara mengenai Aturan  
83, Kaedah-Kaedah Mahkamah  
Tinggi 1980.

Antara

RHB Bank Berhad (6171-M) ... Plantif  
(yang telah mengambil alih Sime Bank Berhad)

Dan

Ya'acob Bin Mohd Khalib @ Abdul  
Ghani Bin Muhammad ... Defendan  
(No. K/P: 3283899)

Coram: Gopal Sri Ram, J.C.A.  
Zainun binti Ali, J.C.A.  
Hasan bin Lah, J.C.A.

### **JUDGMENT OF HASAN BIN LAH, JCA**

1. This was an appeal by the plaintiff against the decision of the learned trial judge who disallowed the plaintiff's claim for payment of interest on the principal sum in a charge action. We allowed the appeal at the conclusion of the arguments. I now give my reasons for doing so.

2. The facts of the case were not in dispute. By originating summons the plaintiff applied for an order for sale of the defendant's land which was charged to the plaintiff as

a security for an overdraft facility after the defendant defaulted in payment. According to the plaintiff the defendant owed the plaintiff a sum of RM116,774.89 as at 31.7.2002 which was made up of the principal sum of RM20,000.00 and the interests on the said principal sum. On the date of the hearing of the said originating summons a representative from the office of the Official Assignee informed the court that the defendant was a bankrupt. The learned judge allowed the application for sale of the charged land but he also decided that the amount due to the plaintiff as a chargee was only the principal sum of RM20,000.00. He did not allow the plaintiff's claim for the interest on the principal sum by virtue of section 8(2A) of the Bankruptcy Act 1967.

3. That section 8(2A) came into force on 17.7.1992. The defendant was made a bankrupt on 24.11.1986. The plaintiff's originating summons was filed on 30.9.2002. The learned trial judge was of the view that as the plaintiff did not realize its security within six months from the date the receiving order was made against the defendant the plaintiff was not entitled to the interest on the principal sum. Notwithstanding the fact that the defendant was adjudged a

bankrupt before the coming into force of that subsection (2A) the learned judge held that that subsection (2A) applied to the plaintiff.

4. Before us the learned counsel for the plaintiff submitted that that section 8(2A) of the Bankruptcy Act was not applicable to the plaintiff as that subsection had no retrospective effect.

5. The facts of the case clearly showed that the defendant was declared a bankrupt on 24.11.1986. That section 8(2A) of the Bankruptcy Act came into force on 17.7.1992. The charge over the defendant's land was registered on 29.12.1986 which was after the defendant was declared a bankrupt. The High Court granted the order for sale of the said land on 17.5.2004. Subsection (2) and (2A) of section 8 of the Bankruptcy Act provide –

“(2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed – nor shall it operate to prejudice the right of any

person to receive any payment under or by virtue of the provisions of section 31 of the Employment Act, 1955 of the States of West Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.”

On the facts of this case I was of the view that there was merit in the submission of the learned counsel for the plaintiff. It is my judgment that that section 8(2A), with respect, did not have a retrospective effect. I find support for my view in the decision of the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1*.

6. In Yew Bon Tew's case the appellants brought an action in March 1975 for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972 between a motor bus belonging to the

respondents and a motorcycle ridden by the first appellant with the second appellant as pillion passenger. Section 2(a) of the Public Authorities Protection Act, 1948, which applied provided that action shall not lie or be instituted unless it is commenced within twelve months after the act complained of .

With effect from June 1974, this provision was amended to substitute “thirty six months” for the “twelve months”. On March 20, 1975 the appellants issued a writ for damages for personal injuries. The respondents filed a defence in which they pleaded that the appellants were barred from bringing the action by virtue of the Public Authorities Protection Act, 1948. The learned trial judge decided in favour of the appellants but on appeal the Federal Court held that the time for the claim in this case was not enlarged by the amending act, which had no application to a cause of action which was barred before the amending act came into operation. The appellant appealed to the Yang di-Pertuan Agong. The Privy Council, in dismissing the appeal, held that an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by

conferring on the statute a retrospective operation, unless such a construction is unavoidable. In this case the respondent acquired a right when the period prescribed by the 1948 Ordinance expired, and this was not taken away by the 1974 amending Act. At p.3 Lord Brightman said –

Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute. The sort of problem which can arise is neatly illustrated by the case of "*The Ydun*"<sup>(3)</sup>. This was an action by the owners of the barque "Ydun" against the Corporation of Preston. On September 13, 1893 the barque went aground owing to the alleged negligence of the Preston Corporation, which was the port authority. On December 5, 1893 the Public Authorities Protection Act was passed. It came into force on January 1, 1894. It had the effect of curtailing the period of limitation applicable to the institution of proceedings in such an action from 6 years to 6 months. The position therefore at the date of the accident was that the owners had until September 1899 to issue their writ; but on January 1, 1894, if the Act applied to this cause of action,

they had only until March 1894. The owners issued their writ in November 1898. By the time the case reached the Court of Appeal there were two issues, first whether the Corporation had been acting in pursuance of its public duties when the accident took place and was therefore entitled to the protection of the Act; and secondly whether the Act applied to a cause of action which had already accrued when the Act came into force. The second issue was decided against the owners, and was disposed of in the judgments with remarkable brevity for so important an issue. A.L. Smith L.J. expressed himself as follows (at page 245) :-

“The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright v. Hale* (1860) 6 H. & N. 227, 232, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.”

Vaughan Williams L.J. was to the same effect (at page 246) :

“I also agree that the Act is retrospective...There is abundant authority that the presumption against a retrospective

construction has no application to enactments which affect only the procedure and practice of the Courts.”

7. In *Public Bank Bhd. Lwn Khaliddin bin Busu [1998] MLJU 293* a receiving order was made against a chargor of land i.e. the defendant on 17.6.1991 which was before the coming into force of section 8(2A) on 17.7.1992. The charge over the defendant’s land was registered on 29.8.1983. The plaintiff filed the originating summons for an order for sale of the defendant’s land on 6.11.1997. One of the issues raised in that case was whether section 8(2A) was intended to have retrospective effect. Faiza Tamby Chik J, after referring to the decision of the Privy Council in Yew Bon Tew’s case, held that section 8(2A) was not intended to have retrospective effect.

8. In *Sim Seoh Beng v Koperasi Tunas Muda Sungai Ara Bhd. [1995] 1 MLJ 292* the issue was whether Order 29 r.1 (2B) of the Rules of the High Court 1980 applied retrospectively. The Court of Appeal held that it was not retrospective. Gopal Sri Ram JCA at p.297 stated that –

In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1).

9. In the instant case by virtue of subsection (2) of section 8 of the Bankruptcy Act the plaintiff had acquired a right as a secured creditor to realize its security when the land was charged to the plaintiff on 29.12.1986. As such the law applicable to the plaintiff was the law as it was on 29.12.1986. Subsection (2A) which was introduced by the Bankruptcy (Amendment) Act (Act A 827) and which came into force on 17.7.1992 could not, therefore, take away the plaintiff's accrued right under section 8(2) as the amending Act did not clearly and specifically provide that that subsection (2A) would have a retrospective effect. It was therefore not intended to have a retrospective effect. To

read otherwise it would produce an unjust result as that subsection (2A) deals with a substantive right.

10. For the reasons indicated this appeal was allowed with costs. It was ordered that the appellant was at liberty to prove its claim in the estate of the bankrupt. The costs for the appeal was also ordered to be taxed and proved against the bankrupt's estate. The deposit of this appeal was ordered to be refunded to the appellant.

11. My learned sister, Zainun binti Ali JCA, has seen this judgment in draft and has expressed her agreement with it.

Dated this 2<sup>nd</sup> November 2007.

Hasan Bin Lah  
Judge, Court of Appeal  
Malaysia

Counsel for the appellant: James Selvamuthu  
(Tetuan Ong Kok Bin & Co.)

Counsel for the respondent: Senior Federal Counsel  
Shamsul Zakri (From Official  
Assignee's office)