

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. 02(i)-44-2008 (W)

ANTARA

ISMAIL BIN MOHAMAD ... PERAYU
DAN
WAN KHAIRANI BINTI WAN MAHMOOD ... RESPONDEN

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
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WAN KHAIRANI BINTI WAN MAHMOOD ... PERAYU
DAN
1. ISMAIL BIN MOHAMAD ... RESPONDEN
2. RASA RATA SDN BHD

KORAM: ZAKI TUN AZMI, CJ
ALAUDDIN DATO' MOHD SHERIFF, PCA
HASHIM DATO' HAJI YUSOFF, FCJ
MOHD GHAZALI MOHD YUSOFF, FCJ
TENGGU BAHARUDIN SHAH TENGGU MAHMUD, JCA

JUDGMENT OF ZAKI TUN AZMI, CJ

1. This case involves a dispute between a divorced Muslim couple as to the distribution of their assets on their divorce. They applied for leave to appeal to this Court, pertaining to the order of the Court of Appeal granting the injunction to prevent the Husband¹ from dissipating the

¹ The Appellant in Rayuan Sipil No. 02(i)-44-2008(W) and First Respondent in Rayuan Sipil No. 02(i)-45-2008(W)

monies held by him which is equivalent to the Wife's² share in the Company³. She holds 7.97% of shares in the Company.

2. On 16.2.2009 this Court heard the appeals from both parties against that decision; the Wife against granting partial injunction and the Husband against the Court of Appeal granting the injunction at all.
3. Due to the urgency of the matter, we delivered our decision on 24.2.2009, dismissing appeal no. 02(i)-44-2008(W) and allowing appeal no. 02(i)-45-2008(W). In other words, injunction was granted to the Wife restraining the Husband from utilising 100% of the monies held by him in trust for the Company. We now give our reasons.
4. To protect her interest, the Wife had obtained an injunction at the Syariah Court in 1992. The injunctive relief from the Syariah Court was against the Husband to protect her claim for *harta sepencarian*.
5. The background of the dispute is that the Company of which the Husband and the Wife were shareholders had during the marriage purchased many pieces of lands. As mentioned earlier, the Wife is a minority shareholder. Two lots of these lands were acquired by the government.
6. The proceeds of the compensation to the acquisition were at the request of the Husband, as director of the Company, paid to him in person. The monies are now held in his personal account in trust for the Company. This is admitted by the Husband.
7. The Wife contended that since the lands were acquired during their marriage, she is claiming 50% of it as *harta sepencarian* in the

² The Respondent in Rayuan Sivil No. 02(i)-44-2008(W) and Appellant in Rayuan Sivil No. 02(i)-45-2008(W)

³ The Second Respondent in Rayuan Sivil No. 02(i)-45-2008(W)

Syariah Court. Her likelihood of success in that Court is not our concern at this juncture. The question which we have answered is whether the Husband should be prevented from disposing any part of the proceeds.

8. More detailed facts of this case can be found in the grounds of judgment of the Court of Appeal in *Wan Khairani Wan Mahmood v. Ismail Mohamad & Anor.*⁴.
9. The Wife at the same time, acting on derivative action on behalf of a Company, sought an injunction to protect the Company's interest. What is a derivative action is quite well settled but will be briefly explained later in this judgment.
10. The injunction at the Syariah Court on the other hand is to prevent the Husband from dissipating the assets acquired during the marriage before the Syariah Court makes a decision on their distribution. The injunction at the civil court is to await the decision of the High Court on the declaration that the land (and now the compensation monies paid as a result of acquisition of the lands allegedly belonging to the Company) belongs to the Company.
11. However, the Court of Appeal in granting injunction only in respect of the Wife's share of the compensation money decided that there was overlapping jurisdiction of the Syariah Court and the civil court. According to the Court of Appeal, it has to be either within the Syariah Court or within the civil court. Here, there are two separate parties, one, the Wife and the other the Company to which the Wife is a shareholder.

⁴ [2007] 6 CLJ 582

12. It is important to note that at the application for leave to this appeal, both parties agreed or consented that the following questions mentioned below be referred to this Court. There was no argument heard as to whether leave should be allowed or not. I was a member of the panel that granted leave. The agreed questions were:

- a. Where the Syariah Court is determining the status of certain lands for a *harta sepencarian* claim (“the Syariah Action”) by the plaintiff, whether the civil court could, on the basis of exercising overlapping jurisdiction, acquire jurisdiction to determine the status of the same lands in an action brought by the same plaintiff (“the Civil Action”).
- b. Whether when put on notice to discontinue the Syariah Action in view of the Civil Action, nevertheless the plaintiff actively pursued the Syariah Action by amending the claim and applying from injunction orders thereunder, it should be regarded that the plaintiff has elected thereby to pursue the Syariah Action in place of the Civil Action?
- c. Whether it is an abuse of process for the plaintiff to simultaneously maintain two actions over the same lands in two different courts wherein the claims and the causes of action in respect of the lands are inconsistent with each other?
- d. Whether the bringing of proceedings both in the Civil Court as well in the Syariah Court amounts to duplicity of proceedings and therefore is an abuse of process of Court.
- e. In a derivative action for recovery of Company assets allegedly misappropriated by the majority shareholder, can

the Court divide the said assets according to the equity ratio of the shareholders and preserve by interim injunction only that part of the assets representing the equity ratio of the shareholder bringing the derivative action?

13. The Husband's argument is that by virtue of Article 121(1A) of the Federal Constitution, the Wife cannot apply for the injunction before a civil court because it involves the distribution of assets of a Muslim marriage which is within the jurisdiction of the Syariah Court. Alternatively, the Wife must elect whether to proceed in the Syariah Court or the civil courts. She cannot apply for injunctions in both courts.
14. According to the Husband, since there are only two shareholders in the Company, whatever the Wife does on behalf of the Company is in fact to protect her personal interest.
15. The Wife's reply is simple. She says that in the Syariah Court, she is applying as the Wife but in the civil court, she is applying as a minority shareholder in or as representative of the Company. In other words, it is the Company which is applying for the declaration. She is merely acting on behalf of the Company to protect the Company's assets. Therefore, the question of conflict of or overlapping jurisdiction does not arise.
16. The Husband's argument is that since the Wife had obtained an injunction at the Syariah Court against 100% of the assets including the proceeds of the sale of the two subject lands, the Wife cannot at the same time obtain another injunction in the civil courts in respect of the same amount. According to his counsel, this would be in breach of Article 121(1A). He cited several authorities to say

that the jurisdiction or orders made by the Syariah Court is exclusive. He says that once the matter falls within the Syariah jurisdiction, she cannot at the same time, simultaneously obtain a similar order from the civil courts.

17. I would agree to this submission had both the injunctions been obtained by the Wife in her personal capacity. Instead, we find as a matter of fact that the injunction in the civil court was sought by the Company. If that is so, on the facts and issues in this appeal, those authorities cited by the Husband cannot be relevant to this appeal. As to the argument that the final beneficiary to both injunctions is in fact the Wife, we do not think this matters.
18. It is not denied that any jurisdiction that is lawfully vested in the Syariah Court is exclusively within the jurisdiction of the Syariah Court. It is also admitted that the civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Syariah Court jurisdiction.⁵ But in this case that is not so. The Wife is seeking to exercise her right as a minority shareholder and not as a Wife. Her motive may be to protect her rights as a Wife but that is irrelevant. One must view her application as one by a shareholder. It does not prevent her from doing so. It is not denied that if she had not filed an action to claim *harta sepencarian* in the Syariah Court, the objection to her filing the derivative action may not arise.
19. In my opinion, there is a fallacy in the Court of Appeal judgment that there is an overlapping jurisdiction or “assisting jurisdiction”. There cannot be an overlapping jurisdiction between the civil court

⁵ See *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 and *Salijah bte Ab Latef v Mohd Irwan bin Abdullah Teo* [1996] 2 SLR 201

and the Syariah Court. Neither can there be double proceedings as submitted by the Husband. On the facts of this case, the action in the Syariah Court and the derivative action in the High Court are two separate independent actions although the results may seem to overlap. Therefore questions (a), (b), (c) and (d) of paragraph 12 above are answered in the negative because there is no overlapping jurisdiction resulting in no question of the party having to elect the same and therefore there was no abuse of process of the court.

20. In my opinion, a derivative action is a derivative action. The number of shareholders is not material, whether there are two or more. A minority shareholder has the right to take a derivative action to protect the interest of a company.
21. In a derivative action, the action is brought for and on behalf of the company for the company's benefit. Derivative action is one taken by a shareholder to protect his or her interest in the company. Since the action cannot be taken by a shareholder (by virtue of *Foss v. Harbottle*⁶) he/she has to name the company as a party. The Wife is therefore protecting her interest in the Company as a shareholder and not as a wife.
22. Should she be successful at the Syariah Court to more than the value proportionate to her registered number of shares in the Company, then the monies now held by her Husband as trustee for the Company can be paid to her. In a divorced wife's claim for *harta sepencarian*, at the end of the day, she may be entitled to more than just her registered portion in the company. Therefore, if we are

⁶ (1843) 2 Hare 461

to limit the injunction to only 7.97% of the monies now held in the name of the Husband, in effect this court would already be deciding that the Wife is only entitled to that portion of the monies. This court has no such jurisdiction. As to her rights in the Syariah court, I would not like to make any comments. It is left to the relevant forum to decide.

23. The facts remain that the Husband held the lands in trust for the beneficiary (i.e. the Company by virtue of an express trust deed dated 21.1.1986) and the derivative action is an action for the benefit of the Company. Therefore, with regard to question (e) of paragraph 12 above, the injunction is granted to prevent the Husband from dissipating all the monies held by the Husband in trust for the Company.
24. The Order is therefore as mentioned in paragraph 3 of these grounds of judgment.
25. My learned brother judges Alauddin Dato' Mohd Sheriff PCA, Hashim Dato' Hj. Yusoff FCJ, Mohd. Ghazali Mohd. Yusoff FCJ and Tengku Baharudin Shah Tengku Mahmud JCA have read through this judgment in draft and concurred with it.

Dated : 9 Jun 2009

ZAKI TUN AZMI
Chief Justice

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