

DALAM MAHKAMAH RAYUAN MALAYSIA
DI PUTRAJAYA, MALAYSIA
RAYUAN SIVIL NO: B-02(IM)(NCVC)-211-01/2019

ANTARA

NG CHEAH KOW
(NO K/P: 541021-10-6173) ... PERAYU

DAN

LOW HOCK LAI (NO K/P: 800620-10-5651)
[Sebagai Wasi harta Pusaka LOW THEAN CHOR
(NO K/P: 480914-71-5113) – SIMATI] ... RESPONDEN

(Dalam Mahkamah Tinggi Malaya Di Shah Alam
Dalam Negeri Selangor Darul Ehsan, Malaysia
Guaman No: BA-22NVC-323-07/2018

Antara

Ng Cheah Kow
(NO K/P: 541021-10-6173) ... Plaintiff

Dan

Low Hock Lai (NO K/P: 800620-10-5651)
[Sebagai Wasi harta Pusaka Low Thean Chor
(NO K/P: 480914-71-5113) – Simati] ... Defendan

CORUM

MARY LIM THIAM SUAN, JCA
HAS ZANAH BINTI MEHAT, JCA
VAZEER ALAM BIN MYDIN MEERA, JCA

JUDGMENT OF THE COURT

Introduction

[1] The plaintiff/appellant, who had obtained judgment against one Low Thean Chor, deceased. The defendant/respondent, being the executor of the estate of Low Thean Chor, deceased, refused to recognize the judgment and did not consider it as a just debt of the estate.

[2] The appellant then filed an action for breach of fiduciary duties against the defendant/respondent as the executor of the estate of Low Thean Chor, deceased, primarily on grounds of the respondent's refusal to recognize and pay the amount stated in the judgment.

[3] The respondent applied to strike out the claim under an omnibus application pursuant to O.18 r.19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012, and/or under the Court's inherent jurisdiction. The High Court allowed the respondent's application and struck out the appellant's claim in its entirety.

[4] The appellant being dissatisfied with that decision appealed to this Court. We allowed the appeal, and re-instated the claim for the following reasons.

Background facts

[5] The appellant had originally, vide Civil Suit No: MT1-22-927-2006 (“Suit 927”), commenced a civil suit against one Low Thean Chor, which the said Low Thean Chor defended through his solicitors Messrs Zain & Co.

[6] Low Thean Chor passed away on 28.11.2010, whilst Suit 927 was pending determination. Thereafter, the High Court had by an order allowed the discharge of Messrs Zain & Co from further acting as solicitors for Low Thean Chor, deceased, in Suit 927. The appellant had then applied to the High Court and obtained an order to add the deceased’s wife, Madam Tan Keaw, as the 2nd Defendant in Suit 927, and it was allowed.

[7] Low Hock Lai, the respondent in the present action, then obtained Grant of Probate for the estate of Low Thean Chor, deceased, on 15.6.2011, where Low Hock Lai was appointed the executor and trustee of the will.

[8] Suit 927 proceeded to trial and the appellant obtained judgment on 15.3.2012 for the sum of RM1,055,000.00 plus interest and costs against both Low Thean Chor, deceased and his wife Tan Keaw. Tan Keaw appealed that decision, and the Court of Appeal in allowing the appeal on

26.6.2014 set-aside the judgment against her. The judgment against Low Thean Chor, deceased, remained.

[9] The appellant then attempted to execute the judgment against the estate of Low Thean Chor, deceased, by way of a Judgment Debtor Summons (“JDS”). The respondent, as executor of the estate, applied to set-aside the JDS. The High Court dismissed that application. However, on appeal, the Court of Appeal had allowed the appeal and set-aside the JDS.

[10] The appellant then commenced another action at the Shah Alam High Court vide Civil Suit No: BA-22NCvC-323-07/2018 (“Suit 323”) against the respondent for breach of fiduciary duties as the executor of estate of Low Thean Cor, deceased. The appellant’s complaint was the refusal of the respondent to recognize the judgment sum as just debt of the estate of Low Thean Chor, deceased.

[11] The respondent as defendant in Suit 323 filed Defence to the appellant’s claim, wherein the respondent challenged the validity of the judgment on grounds that there was no proper substitution of parties in Suit 927 after the demise of Low Thean Chor in accordance to O.15 r.7 of the Rules of the High Court 1980, or the Rules of Court 2012.

[12] The respondent then applied vide Notice of Application (enclosure 7) to strike out the Writ and Statement of Claim in Suit 323 pursuant to O.18 r.19(1)(a) and/or (b) and/or (c) and/or (d) of the Rules of Court 2012, and/or under the Court's inherent jurisdiction. The grounds of application for enclosure 7 are that:

- (a) there is no reasonable cause of action disclosed in the Writ and Statement of Claim;
- (b) the Writ and Statement of Claim:
 - (i) is scandalous, frivolous and vexatious; and/or
 - (ii) it may prejudice, embarrass or delay the fair trial of the action; and/or
 - (iii) it is an abuse of process of the Court.

[13] The respondent had also filed an Affidavit In Support of the application. The primary ground is that the respondent was never substituted as party in place of the deceased in Suit 927, and therefore, the respondent contended that the estate is not liable to satisfy the judgment. The respondent further contended that the judgment is invalid and does not bind the estate of Low Thean Chor, deceased.

[14] The appellant replied that affidavit stating that Messrs Zain & Co had discharged as solicitors for the deceased in Suit 927 because they were unable to get instructions on the conduct of the matter from any of the deceased's personal representatives or family members. This led to the appellant filing an application to make the deceased's wife Tan Keaw as co-defendant and proceed with the trial. The appellant further states that even after Low Hock Lai had obtained the Grant of Probate and was appointed the executor of the estate of Low Thean Chor, neither Tan Keaw nor Low Hock Lai informed him nor his solicitors of Low Hock Lai's appointment as executor. Further, Tan Keaw as co-defendant had knowledge of the proceedings in Suit 927, and yet she chose not to attend trial or inform the court of the appointment of Low Hock Lai as the executor of the estate.

[15] The appellant further states that the respondent had knowledge at all times of Suit 927 and the judgment obtained against the deceased. However, the respondent did not take any action to challenge or set-aside the judgment, even after it was served on the respondent.

[16] The appellant further contended that the judgment is valid and is binding on the estate of the deceased, and as such the respondent as the executor of the estate of Low Thean Chor has a duty to recognize it as a just debt.

High Court's decision

[17] The learned High Court judge accepted the submissions of counsel for the respondent and found that the judgment was invalid against the estate of Low Thean Chor, deceased. The relevant parts of the Grounds of Judgment reads as follows:

[22] Jelasnya, peruntukan di bawah Aturan 15 kaedah 6A juga terpakai jika plaintif membuat permohonan untuk menggantikan LTC yang telah meninggal dunia. Plaintif tidak perlu menunggu ada pihak mengambil surat kuasa wakil atau probate bagi pusaka LTC sebelum boleh menamakan pengganti LTC. Memadailah plaintif menamakan salah seorang 'executor de son tort' iaitu mana-mana waris bagi tujuan tersebut.

[23] Namun begitu, daripada fakta yang dikemukakan, defendan telah pun menjadi wasi harta pusaka LTC sejak dari 15.6.2011 lagi. Sementara itu, plaintif hanya memasukkan penghakiman GS 927 terhadap LTC yang telah meninggal dunia pada 15.3.2012. Pada masa material, defendan telah pun ada kapasti untuk mewakili pusaka LTC di dalam GS 927. Malangnya, Tindakan untuk menamakan defendan sebagai pengganti LTC gagal diambil di atas sebab yag hanya diketahui oleh plaintif sendiri.

[24] Berasaskan kepada kegagalan tersebut, adalah didapati bahawa plaintif tidak ada kausa Tindakan terhadap defendan. Penghakiman GS 927 adalah terhadap LTC dan bukannya terhadap pusaka LTC. Penghakiman tersebut tidak ada kesan terhadap defendan walau pun dia adalah wasi kepada pusaka LTC. Tidak timbul sebarang pemecahan tugas fidusiari di pihak defendan seperti yang didakwa plaintif di dalam Pernyataan Tuntutan.

[25] Berdasarkan kepada alasan-alasan yang telah dinyatakan tersebut, adalah didapati dan diputuskan bahawa tuntutan plaintif adalah jelas dan nyata tidak dapat dipertahankan. Kegagalan plaintif menggantikan mendiang LTC semasa memperoleh penghakiman GS 927 memudaratkan, bukanlah satu

ketidakpatuhan yang boleh diperbetulkan. Kegagalan tersebut melibatkan asas tuntutan plaintif terhadap defendan. Dengan itu, permohonan defendan bagi mengetepikan Writ Saman dan Pernyataan Tuntutan plaintif perlulah dibenarkan. Perintah seperti mana yang dipohon di Lampiran 7. Plaintif diperintahkan emembayar kos sebanyak RM3,000.00 kepada defendan tertakluk kepada alokator.

In making that decision, the learned High Court judge had referred to the Federal Court decision in *Poraviappan a/l Arunasalam Pillay (suing as administrator of estate of the late Nadarajah a/l Sithambaram Pillai) v Periasamy a/l Sithambaram Pillai & Ors (on behalf of personal representatives of the estate of Ponnamal a/p Ramasamy the deceased)* [2015] 4 MLJ 285, where the Court held that only judgments that were obtained in an action against the duly appointed legal representative of the estate can be enforced against the assets of the estate.

Our findings

[18] The judgment in Suit 927 still stands and has not been set aside. Until it is set-aside, the judgment in Suit 927 is valid and subsisting. The question of its enforceability against estate of Low Thean Chor, deceased, is a triable issue and it must be determined following viva voce evidence is considered.

[19] O.15 r.7 of the Rules of Court 2012 provides.

7. Change of parties by reason of death (O. 15 r. 7)

(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it is necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first-mentioned party. An application for an order under this paragraph may be made ex parte.

[20] In a civil action, the death of a party does not abate the cause of action. This is made clear in O.15 r.7(1) of the ROC. Hence, it is clear that the death of the original defendant, Low Thean Chor, does not mean that the action against the deceased in Suit 927 abates. The deceased defendant can be substituted by a person to whom the estate of the deceased devolves. In this case, the affidavit evidence shows that the deceased left a will in which Low Hock Lai was named the executor and trustee of the will. However, that fact was never intimated to the appellant.

[21] The Grant of Probate was obtained by Low Hock Lai during the pendency of the 927 Suit, i.e. on 15.6.2011. The executor, Low Hock Lai, could have applied to court for him to substitute the deceased, Low Thean Chor, as the defendant in Suit 927. That would have been the proper thing to do. However, the executor Low Hock Lai did not do that.

[22] The appellant avers that as he was in the dark, he had applied for Madam Tan Keaw, the wife of the deceased, to be made a co-defendant after the death of Low Thean Chor. Whilst that may not have been the most appropriate mode to comply with the requirements of O.15 r.7 of the ROC, the fact remains that at least one beneficiary of the estate of Low Thean Chor had knowledge of Suit 927. And whether that amounts to a substitution of parties also remains to be seen. However, Madam Tan Keaw chose not to participate in the trial of Suit 927. Neither did the executor chose to substitute the deceased.

[23] Now, whether this as an attempt by the executor of the estate of Low Thean Chor, deceased, and his wife/beneficiary, to evade the claim in Suit 927, by their concealing the appointment of Low Hock Lai as the executor of the estate, is another issue that begs an answer. The appellant could have made the application of substitution of Low Hock Lai as executor of the estate in place of Low Thean Chor, deceased, if he had known of the Grant of Probate and the appointment of Low Hock Lai as the executor of the will.

[24] Sections 67, 68 and 69 of the Probate and Administration Act 1959 provide that the executor of an estate is required, amongst other things to pay the debts of the estate. Payable debts must in law be just and lawful debts of the deceased. The respondent herein as executor owes a duty

to make proper enquiries as to the lawfulness of the debt claimed by the appellant in Suit 927, and to continue defending the suit in place of the deceased, if he was convinced otherwise. It is well settled that once probate is granted, the person appointed as executor continue to be the legal representative of the deceased testator. See: *Re Timmis* [1902] 1 Ch 176. In this regard, whether the executor has a duty to inform the appellant of his status as the legal representative of Low Thean Chor, deceased, is another question that needs to be tried.

[25] Thus, this poses the question as to whether the respondent had knowledge of Suit 927, and if so, whether he was in dereliction of his duty in not defending Suit 927 that was pending trial when the Grant of Probate was obtained. This further begs the question as to whether the judgment obtained as a result of that breach of duty is now binding on the estate of the deceased. From the answers to these questions arise the further issues of breaches of fiduciary duties that the appellant complains in the Statement of Claim, and whether the respondent has the obligation to settle the judgment in Suit 927.

[26] In considering the peculiar circumstances of the case, we find that these issues are not frivolous or vexations, nor is the claim an abuse of the court's process. We also find that this is not an appropriate case to invoke the summary process to strike out the claim as it is not plain and

obvious that it is wholly unsustainable. It is trite that so long as the pleadings disclose some cause of action or raised some issues fit to be tried, it is enough to sustain the case for trial, and it ought not be struck out. In the circumstance, we find that this is not a plain and obvious case to be struck out under any one of the limbs in O.18 r.19(1) of the ROC. See: *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 1 MLRA 611 FC; *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Ors* [2016] 3 CLJ 1, FC. The validity of the judgment in Suit 927 against the estate of Low Thean Chor, deceased, merits examination at a full trial.

Conclusion

[27] In the premise of the foregoing, we allowed the appeal with costs, set aside the order of the High Court dated 10.1.2019, and reinstated the matter on to the cause list for case management before the High Court at Shah Alam.

Dated this 30th day of October 2020.

sgd
Vazeer Alam Mydin Meera
Judge
Court of Appeal
Putrajaya

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