

peguam defendan telah berlaku untuk menyebabkan tindakan selewat ini.

Peguam yang arif bagi pihak defendan telah merujuk ke kes *Hee Awa & Ors Iwn Syed Muhammad Sazalay & Anor*<sup>1</sup> di mana Mahkamah Agung telah menolak rayuan terhadap keputusan Mahkamah Tinggi yang telah memerintah penunggang motosikal yang terlibat dalam kemalangan di antara motosikal tersebut dengan van kepunyaan kerajaan atas pegangan bahawa pihak kerajaan dalam hal demikian boleh memilih menjadikan penunggang motosikal pihak sama ada melalui A 15 k 6(2)(b) atau A 16 Kaedah-Kaedah Mahkamah Tinggi 1980 (kemudian disebut 'kaedah-kaedah tersebut'). Dalam kes berkenaan, pembonceng motosikal telah meninggal dunia dan penumpang van berkenaan telah tercedera. Penumpang van telah menuntut ganti rugi terhadap penunggang motosikal di mahkamah sesyen dan pemandu van dan kerajaan telah dijadikan pihak ketiga. Ibubapa dan pentadbir kuasa pembonceng motosikal pula telah menuntut ganti rugi terhadap pemandu van dan kerajaan di Mahkamah Tinggi dan dalam hal demikian Mahkamah Agung telah bersetuju dengan Mahkamah Tinggi bahawa penunggang motosikal sepatutnya dijadikan defendan bersama. Prinsip ini telah diperteguhkan selanjutnya oleh panel Mahkamah Agung yang lain dalam kes *Chan Yee Iwn Chan Yoke Fong*.<sup>2</sup>

Walau bagaimanapun sungguhpun perkara ini tidak dibangkitkan oleh mana-mana pihak, mahkamah berpendapat bahawa kedudukan dalam kes ini adalah berlainan oleh kerana pihak yang hendak dijadikan defendan bersama oleh defendan ialah harta pesaka penunggang motosikal yang telah meninggal dunia (kemudian disebut 'simati') yang melaluinya plaintif pertama sebagai orang tanggungan sah harta pesaka simati sedang menuntut terhadap defendan. Jika permohonan dibenarkan, ini akan bermakna bahawa orang tanggungan sah harta pesaka simati sedang menuntut dari harta pesaka simati juga. Dalam kata lain, harta pesaka simati akan menjadi plaintif pertama dan juga defendan kedua dan ini bukanlah keadaan yang dimaksudkan oleh A 15 k 6(2)(b) kaedah-kaedah tersebut kerana ianya tidak sepatutnya timbul. Penyata pembelaan defendan juga telah membutirkan tentang kecuaihan simati dan jika mahkamah berpendapat bahawa butir-butir tersebut telah dibuktikan selepas pendengaran dijalankan, tentulah plaintif pertama tidak akan berjaya langsung dalam tuntutananya.

Seterusnya, mahkamah telah pun menolak permohonan tersebut dengan kos.

*Permohonan ditolak.*

Peguamcara: *Gurdip & Co; KH Ting & Co.*

Dilaporkan oleh *Neoh Lay Choo*

## A Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO R1-22-4-91  
EUSOFF CHIN J  
25 MAY 1991

B *Civil Procedure — Jurisdiction of High Court — Whether matter within jurisdiction of syariah court — Jurisdiction of syariah court — Federal Constitution, art 121(1A) & Ninth Schedule List II — Courts of Judicature Act 1964, ss 23 & 24 — Administration of Muslim Law Enactment 1952 (Selangor), s 45(2) & (3)*

C *Islamic Law — Jurisdiction of syariah court — Determination of whether a person who had converted to the religion of Islam is presently, or if he had died, at the time of his death was Muslim or not — Federal Constitution, art 121(A) & Ninth Schedule List II — Courts of Judicature Act 1964, ss 23 & 24 — Administration of Muslim Law Enactment 1952 (Selangor), s 45(2) & (3)*

D The plaintiff is the widow of Lee Siew Kee ('the deceased') who died on 2 May 1991. She sought, inter alia, a declaration that the deceased was a Buddhist during his lifetime and at the time of his death. At the hearing of an application for interlocutory injunctions against the second defendant not to deliver the remains of the deceased to anyone but to her, and against the first defendant not to take possession of the remains of the deceased or interfere with the delivery of the remains of the deceased by the second defendant to the plaintiff, the first defendant's counsel raised a preliminary objection and challenged the jurisdiction of the High Court to entertain the plaintiff's claim. Counsel for the first defendant argued that this is a cause or matter which falls within the jurisdiction of the syariah court of the Federal Territory of Kuala Lumpur.

**Held**, dismissing the preliminary objection:

F (1) The Federal Constitution, Ninth Schedule, List II — State List (para 1) specifically gives powers to state legislatures to constitute Muslim courts which when constituted, shall have jurisdiction only over persons professing the Muslim religion and in respect only of any of the matters included in that paragraph. A syariah court therefore derives its jurisdiction under a state law or for Federal Territories, an Act of Parliament, over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.

G (2) If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

H (3) The main issue in this application is the determination of whether the deceased was or was not a Muslim at the time of his death. Section 45(2) and (3) of the Selangor Administration of Muslim Law Enactment 1952 gives jurisdiction to the syariah court over matters enumerated there and these do not include the jurisdiction to determine if a person is professing and practising the Muslim religion or not.

I (4) Since there is nothing to show that the syariah court has the jurisdiction conferred on it by any written law to determine the issue of whether a person was or was not a Muslim at the time of his death, the High Court is not precluded from determining that issue.

[Bahasa Malaysia summary]

Plaintif adalah balu Lee Siew Kee ('simati') yang meninggal dunia pada 2 Mei 1991. Dia memohon antara lainnya, satu

deklarasi bahawa simati adalah seorang penganut Buddha sepanjang hayatnya dan pada masa kematiannya. Semasa perbicaraan suatu permohonan untuk injuksi interlokutori terhadap defendan kedua supaya tidak menghantar mayat simati kepada sesiapa pun melainkan kepadanya, dan terhadap defendan pertama supaya tidak mengambil mayat simati atau bercampurtangan dengan penghantaran mayat simati oleh defendan kedua kepada plaintif, peguam defendan pertama menimbulkan satu bantahan permulaan dan mencabar bidangkuasa Mahkamah Tinggi untuk melayan tuntutan plaintif. Peguam bagi defendan pertama berhujah bahawa ini adalah satu kausa atau perkara yang terjatuh di bawah bidangkuasa mahkamah syariah Wilayah Persekutuan Kuala Lumpur.

**Diputuskan**, menolak bantahan permulaan:

(1) Perlembagaan Persekutuan, Jadual Sembilan, Senarai II — Senarai Negeri (perenggan 1) secara khususnya memberi kuasa-kuasa kepada badan perundangan negeri untuk menubuhkan mahkamah Islam yang selepas ditubuhkan, akan mempunyai bidangkuasa hanya atas orang-orang yang mengganut agama Islam dan berkenaan hanya dengan sebarang perkara-perkara yang termasuk dalam perenggan itu. Dengan itu, sebuah mahkamah syariah mendapat bidangkuasanya di bawah undang-undang negeri atau bagi Wilayah Persekutuan, suatu Akta Parlimen, di atas sebarang perkara yang dinyatakan dalam Senarai Negeri di bawah Jadual Sembilan Perlembagaan Persekutuan.

(2) Sekiranya undang-undang negeri tidak memberi mahkamah syariah sebarang bidangkuasa untuk berurusan dengan sebarang perkara yang dinyatakan dalam Senarai Negeri, mahkamah syariah adalah terhalang daripada berurusan dengan perkara itu. Bidangkuasa tidak boleh didapati melalui implikasi.

(3) Isu utama dalam permohonan ini ialah penentuan sama ada simati adalah seorang Islam atau bukan pada masa kematiannya. Seksyen 45(2) dan (3) Enakmen Pentadbiran Undang-Undang Islam Selangor 1952 memberi bidangkuasa kepada mahkamah syariah di atas perkara-perkara yang dinyatakan di situ dan ini tidak termasuk bidangkuasa untuk memutuskan sama ada seseorang adalah mengganut dan mengamalkan agama Islam atau tidak.

(4) Oleh kerana tidak ada apa-apa untuk menunjukkan bahawa mahkamah syariah mempunyai bidangkuasa yang diberi kepadanya oleh sebarang undang-undang bertulis untuk memutuskan isu sama ada seseorang adalah seorang Islam atau bukan pada masa kematiannya, Mahkamah Tinggi tidaklah terhalang daripada memutuskan isu itu.]

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 02-207-91.]

#### Case referred to

1 *Eeswari Visuvalingam v Government of Malaysia* [1990] 1 MLJ 86 (refd)

#### Legislation referred to

Courts of Judicature Act 1964 ss 23, 24  
Federal Constitution art 121(1A), Ninth Schedule List II  
Administration of Muslim Law Enactment (Selangor) s 45(2), (3)

*Karpal Singh* (*Oh Choong Ghee* with him) for the plaintiff.  
*Pawancheek Merican* for the first defendant.  
*Jalaluddin bin Salleh* (Senior Federal Counsel) for the second defendant.

*Cur Adv Vult*

**A Eusoff Chin J:** The plaintiff is the widow of Lee Siew Kee who died on 2 May 1991. The plaintiff seeks the following orders:

- (1) a declaration that Lee Siew Kee, deceased, was a Buddhist during his lifetime and at the time of his death on 2 May 1991;
- B** (2) an injunction ordering the second defendant and/or his agents and servants to deliver the remains of the deceased to the plaintiff and/or next of kin of the deceased and/or to her/their agents or servants;
- (3) an injunction restraining the first defendant from taking or claiming possession of the remains of the deceased or in anyway whatsoever interfering with the delivery to the plaintiff of her possession of the said remains;
- C** (4) damages;
- (5) costs; and
- (6) such further or other relief deemed fit and proper by this honourable court.

**D** On 16 May 1991, the first defendant filed an application to set aside the writ and claims of the plaintiff. However, after discussion, the first defendant decided not to proceed with this, and instead to raise this issue as a preliminary objection at the hearing of an application for interlocutory injunctions against the second defendant not to deliver the remains of the deceased to anyone but to her (plaintiff), and against the first defendant not to take possession of the remains of the deceased or interfere with the delivery of the remains of the deceased by the second defendant to the plaintiff.

**E** From the submissions of Encik Pawancheek Merican for the first defendant, I find that the first defendant is challenging the jurisdiction of the High Court to entertain the plaintiff's claim.

**F** His main ground is that this is a cause or matter which falls within the jurisdiction of the syariah court, of the Federal Territory of Kuala Lumpur. He cited the amendment to art 121 of the Federal Constitution which came into effect on 10 June 1988, which states that the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law, and a new cl 121(1A) was introduced by the amendment which states:

**G** The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

**H** The amendment made a major change in the jurisdiction of the High Courts and the lower courts which, effective from 10 June 1988, would appear to deprive state legislatures from conferring any jurisdiction and power on the High Courts or inferior courts which are the sessions or magistrates' courts. The amendment also appears to deprive the High Courts and the inferior courts from exercising any jurisdiction and power con-

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ferred by state laws contained in their ordinances or enactments which existed before 10 June 1988 unless in respect of both situations federal law extends the jurisdiction and powers of the High Court or the sessions courts to include the exercise of jurisdiction and powers conferred by state laws on the High Court of inferior courts.

However, at the moment in respect of the High Courts, there are provisions in federal law, which for our purpose here, is Part II of the Courts of Judicature Act 1964, and in particular s 23 of that Act which confer jurisdiction on the High Courts 'to try all civil proceedings'. Sections 23 and 24 of the Court of Judicature Act 1964 states:

23 Civil jurisdiction — general.

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try *all civil proceedings* where —

- (a) the cause of action arose, or
- (b) the defendant or one of several defendants resides or has his place of business, or
- (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
- (d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

24 Civil jurisdiction — specific.

Without prejudice to the generality of section 23 of the civil jurisdiction of the High Court shall include —

- (a) jurisdiction under any written law relating to divorce and matrimonial causes;
- (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act, 1981;
- (c) jurisdiction under any written law relating to bankruptcy or to companies;
- (d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants;
- (e) jurisdiction to appoint and control guardians and keepers of the person and estates of idiots, mentally disordered persons and persons of unsound mind; and
- (f) jurisdiction to grant probates of wills and testaments and letters of administration of the estates of deceased persons leaving property within the territorial jurisdiction of the Court and to alter or revoke such grants.

A However, art 121(1A) states that the High Courts and inferior courts shall have no jurisdiction in respect of any matter within the jurisdiction of the syariah courts.

B It is therefore necessary for the first defendant to show positively that the matter before me is one which is within the jurisdiction of the syariah court to inquire and to decide.

C The Federal Constitution, Ninth Schedule List II — State List, specifically gives powers to state legislatures to constitute Muslim courts and when constituted, 'shall have jurisdiction only over persons professing the Muslim religion *and in respect only* of any of the matter included in this paragraph'.

Therefore, a syariah court derives its jurisdiction under a state law, (for Federal Territories — Act of Parliament) over any matter specified in the State List under the Ninth Schedule of the Federal Constitution.

D If state law does not confer on the syariah court any jurisdiction to deal with any matter stated in the State List, the syariah court is precluded from dealing with the matter. Jurisdiction cannot be derived by implication.

E In this case, I have asked learned counsel, Encik Pawancheek, to show me whether there is any provision under the Administration of Muslim Law Enactment 1952 (Selangor) (which is applicable to the Federal Territory of Kuala Lumpur vide PU(A) 44/74) or the Islamic Law (Federal Territory) Act 1984 or any other state law giving jurisdiction to the syariah court to determine whether a person who had converted to the religion of Islam is presently, or if he has died, at the time of his death was, Muslim or not.

F The jurisdiction of the syariah court (kadi besar or kadi) are over matters enumerated under s 45(2) and (3) of the Administration of Muslim Law Enactment 1952 (Selangor), and the matters there *do not* include the jurisdiction to determine if a person is professing and practising the Muslim religion or not.

G Encik Pawancheek had answered that he is unable to point out the provision, as presently, there is none. The reason is obvious. If the syariah court has such jurisdiction then the High Court shall not, under art 121(1A) of the Federal Constitution, have the jurisdiction to deal with this application. This is because the *main issue* in this application is the determination of whether the deceased was or was not a Muslim at the time of his death. If it is determined that the deceased was professing the Muslim religion at the time of his death, the application for injunctions against the defendants must be refused. But that is something else which the parties have not fully argued before me.

H As regards whether the plaintiff is entitled or competent to bring this suit, the case of *Eeswari Visuwal-*

*ingam v Government of Malaysia*<sup>1</sup> should settle the issue. It was held there that where a husband converted to Islam, he could go to the syariah court to get his marriage dissolved, but that does not dissolve the marriage as far as the wife was concerned as the wife had not converted to Islam. Section 4 of the Law Reform (Marriage and Divorce) Act 1976 requires her marriage to be dissolved by an order of the High Court, and she could do this on the ground that the husband had converted to Islam — s 51 of the Law Reform (Marriage and Divorce) Act 1976.

There is no evidence that the deceased had obtained any dissolution of his marriage in the syariah court after his conversion to Islam, and the widow had never petitioned for or obtained, a divorce in the High Court. In *Eeswari's* case,<sup>1</sup> Hashim Yeop A Sani CJ held that the widow could bring a suit and was entitled to the husband's pension under the Pensions Act 1980.

On the preliminary objection, I would make a ruling that since there is nothing to show that the syariah court has the jurisdiction conferred on it by any written law to determine the issue of whether a person is or is not a Muslim at the time of his death, this High Court is not precluded from determining that issue, and consequently to hear this application.

In the event of any appeal to the Supreme Court, I reserve the right to elaborate on this judgment.

*Preliminary objection dismissed.*

Solicitors: *Karpal Singh & Co; Pawancheek & Co.*

Reported by *Zarinah Marican*

## A **Utama Wardley Bhd & Anor v Lenggang Laut Development Sdn Bhd & Ors**

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-23-1358-88  
SITI NORMA YAAKOB J  
26 SEPTEMBER 1990

B *Companies and Corporations — Sale and purchase of company's shares — Financing of purchase — Syndicated facilities granted by plaintiffs to first defendant — Loan facilities secured by pledge of company's shares — Joint and several guarantee by first defendant's shareholders — Negative pledge of company's landed properties — Titles to lands deposited with plaintiffs — Whether negative pledge of company's properties financial assistance to enable its own shares to be purchased — Whether loan transaction contravened the Companies Act 1965 — Actual securities for loan — Companies Act 1965, s 67(1)*

C *Civil Procedure — Summary judgment — Appeal — Merits of case — Whether loan transaction illegal — Amendment of defence — To plead details of securities — Securities contained in documents sufficiently identified in original defence — Amendment redundant and unnecessary — Rules of the High Court 1980, O 20*

D These were two matters filed by the defendants: one was a notice of appeal to set aside an O 14 judgment and the other was an application to amend their statement of defence after the judgment so as to adduce further and fresh evidence at the hearing of the appeal by the admission of an affidavit of the fourth defendant. The facts of the case were that, by a sale and purchase agreement, Asiatic Development Ltd ('Asiatic') agreed to sell its 16,793,260 shares in Paya Kamunting Development Sdn Bhd ('Paya Kamunting') to the first defendant for a consideration of \$16.8m. The first defendant paid \$100,000 on the date of the agreement and the balance thereof was to be settled by the first defendant in a certain manner. To finance the purchase, the first defendant obtained syndicated facilities from the plaintiffs who provided two forms of facilities: a bank guarantee for \$16.7m and a loan facility for \$11.7m. The loan facility was secured, inter alia, by (1) a pledge of the entire Paya Kamunting shares, (2) a joint and several guarantee by the first defendant's shareholders, and (3) a negative pledge of Paya Kamunting's landed properties for which the titles to such lands were deposited with the plaintiffs. The first defendant subsequently defaulted in its obligation to make the scheduled repayments and hence the instant action to recover sums due and owing to the plaintiffs from the first defendant as principal borrower and from the second to fifth defendants as guarantors. The defendants contended that the negative pledge of Paya Kamunting properties was a form of financial assistance to enable the Paya Kamunting shares to be purchased, hence the loan transaction on which the plaintiffs' cause of action was founded was illegal as being contrary to s 67(1) of the Companies Act 1965.

Held, dismissing the defendants' appeal and application for amendment:

I (1) The proposed amendments were nothing more than to plead details of the securities provided by the defendants for the loan facilities granted by the plaintiffs. From the pleadings, it was clear that whatever securities that were given in connection with the loan facilities were all contained in documents which had been sufficiently identified in the original statement of defence. The court considered that the amendments sought for by the defendants were redundant and unnecessary as the manner of the illegal transaction which the