Hee Chee Yong @ Raymond Hee & Anor v Coolrich Engineering (M) Sdn Bhd & Anor
[2018] MLJU 1455

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD FIRUZ J

CIVIL APPEAL NO WA-12ANCVC-193-11 OF 2017

28 September 2018

(JS Pillay & Mohd Haaziq) for the appellants.
*(**Joel & Co**) for the respondent.*

Mohd Firuz J:

GROUNDS OF JUDGMENTIntroduction

[1]This is an appeal filed by the Appellants/Garnishees against the decision by the learned Session Court Judge in granting the Garnishee Order Absolute dated 2.11.2017.

Salient Facts

[2]The 1st Respondent/Judgment Creditor had entered a Judgment in Default against the 2nd Respondent/Judgment Debtor on 27.2.2017 for the amount of RM396,659.50, interest upon the judgment sum at the rate of 5% per annum calculated from 20.1.2017 until date of full settlement and the costs of RM1,484.00 to be paid by the 2nd Respondent/Judgment Debtor to the 1st Respondent/Judgment Creditor.

[3]Following that, on 29.8.2017, the 1st Respondent/Judgment Creditor had filed an application under Order 49 *Rules of Court 2012* which is a garnishment proceeding. After hearing submission by both parties, the learned Session Court Judge then granted the Garnishee Order Absolute on 2.11.2017 with costs of RM1,000.00 to be paid by the Appellants/ Garnishees to the 1st Respondent/Judgment Creditor.

[4]Dissatisfied with the decision of the learned Session Court Judge, the Appellants/ Garnishees filed this appeal.

Appellants'/Garnishees' Brief Submission:

[5]The learned Session Court Judge had erred in law in granting the Garnishee Order Absolute notwithstanding that there is no accruing due to be paid by the Appellants to the Judgment Debtor. The Judgment Debtor have not taken any step to prescribe any term for repayment of the debt nor issue any letter demanding for the repayment of the debt to the Appellants to indicate that the debt is due and payable by the Appellants to the Judgment Debtor.

[6]Therefore, at all material times, the debt owed by the Appellants is still premature and not due to be paid to the Judgment Debtor as of the date of service of the Ex- Parte Order to Show Cause. Hence, the debt owed by the Appellants to the Judgment Debtor does not amount to a "debt accruing due" to warrant an attachment by the Court.

[7]Until and unless the repayment for the debt to be paid is prescribed by the 2nd Respondent/Judgment Debtor and matures, the debt (if any) would not crystallize and/or become payable by the Appellants/Garnishees and /or become actionable by law by the 2nd Respondent/Judgment Debtor.

[8]If this appeal is dismissed, the 1st Respondent/Judgment Creditor would be put in a position of having greater right of payment than the 2nd Respondent/Judgment Debtor.

1st Respondent's Brief Submission:

[9]The decision and the grant of the Garnishee Order Absolute was made correctly. The learned Sessions Court Judge had dealt with Garnishee Proceeding based on settled principles as those laid down by the Federal Court.

[10]The inaction of Appellants/Garnishees to safeguard the 2nd Respondent's /Judgment Debtor's financial and legal interest was perplexing.

[11]The Appellants/ Garnishees are neither dispute their loan liability to the 2nd Respondent/ Judgment Creditor, nor show real grounds for disputing their loan liability, as required under Order 49 rule 5 of the *Rules of Court 2012*.

[12]The Appellants/ Garnishees failed to show why they should not be garnished. There was no reason or ground to suggest that the Appellants/ Garnishees owed no money to the 2nd Respondent/Judgment Debtor.

Court's Analysis

[13]Having considered submissions of parties and the relevant background facts and the circumstances of this appeal, this appeal is duly allowed with cost of RM3,000.00 (subject to allocator).

[14]The following are my grounds of decision for deciding so:

a) Order 49 Rule 1 of the *Rules of Court 2012* stated as follows:

> *"Attachment of debt due to judgment debtor* (O. 49, r.1)
>
> 1. (1) *Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings".*
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> The term "debt accruing due" has widely been defined as a debt that is actionable, due and payable to the Judgment Debtor.

b) In this regard, I am guided by the decision in the case of *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* *[2016] 2 MLJ 457*, where the Federal Court decided as follows:

> *"TSR appealed before Abdul Aziz Mohamad J arguing that as the retention sum was not due and payable, Binamin (JC) had no right to it. TSR also argued that as it was entitled to withhold the retention sum, it was thus not 'a debt due or accruing due' to Way Soon (JD) pursuant to* O. 49 r. 1 of the *RHC*. *The High Court held the view that Binamin (JC) should not have a greater right to the payment of the debt than Way Soon (JD) as it would not be entitled to claim the debt before it became due and payable. In short, the retention sum was not a debt due and accruing from TSR to Way Soon. As time would be a factor on the outcome of the retention sum, no part of the retention should be ordered paid to Binamin. The appeal was allowed and the SAR's order was set aside.*
>
> [66] *In Saw Swan Kee v. Sim Lim Finance (M) Berhad* *[1985] 1 MLJ 221* *there was no crystallized actionable debt against the developer judgment debtor by the garnishee. The garnishee therefore could not to take the money to set off secured and non - actionable debts. Had there been an actionable debt, the garnishee there could set off the RM25,000.00 but not in the circumstances of the case. Pursuant to the facts in that case the garnishor was entitled to garnish the money (RM25,000.00) held by the garnishee. An absolute order therefore could be given.*

[68] *From the above cases, the common thread is that a debt due and payable to the JD must exist on the day the garnishee application was filed, in order to obtain the garnishment order nisi.*

[69] *As it were in this case, when the garnishment application was filed at the ex-parte stage, the pre-condition of a 'debt due or accruing due' to the judgment debtor was non - existent. There was no actionable 'debt due or accruing due' to the JD. The facilities were still running smoothly. The Respondent would only be having a debt due to the JD upon the termination of the facilities and the securities, either wholly or partially (ie balance after settling any sum due) to be returned to the JD.*

c) In this present case, the Loan Agreements dated 4.9.2013 among others, stated as follows:

"2. ADALAH DIPERSETUJUI BAHAWA tempoh pembayaran balik pinjaman tersebut akan ditentukan oleh syarikat mengikut persetujuan ahli Lembaga pengarah."

It is apparent that the debt is yet to be considered as " due or accruing due" as the JD have not taken any step to prescribe any term and/or any procedure for the repayment of the debt nor did the JD ever demand for the repayment of the debt to the Appellants to indicate that the debt is due and payable by the Appellants to the JD.

In this regard, reference made to the case of *Saw Swan Kee v Sim Lim Finance (M) Berhad* *[1985] 1 MLJ 221* whereby Azmi FJ (as his lordship then was) elucidated the principle underlying on the same issue as follows:

"Such authorization at the insistence of the charge cannot in our view create an actionable debt due from the judgment debtor to the charge/garnishee under the legal charge for the simple reason that the balance of secured loan does not become due and payable until the charge/garnishee has taken some positive step to crystallize the debt.

In the circumstances of this case there was no debt due and payable to the garnishee at the relevant date, capable of being set off against the debt attached by the garnisher."

Based on the above principle, I am of the view that nothing to be garnished by the 1st Respondent/Judgment Creditor against the Appellants/ Garnishees at the time of the filing of the garnishment proceeding.

d) Apart from that, I am in agreement with the Appellants submission that that the learned Sessions Court Judge had erred in ordering the Appellants to pay the attached debt to the Judgment Creditor on an immediate basis. In the case of *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd; TRS Bina Sdn Bhd (Garnishee); Hong Leong Finance Bhd (Intervener)* [2001] 6 CLJ 213, it was decided as follows:

"I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as it falls due.

It is important to note from that statement that because the debts were payable in the future, the garnishee was ordered to pay them to the judgment creditor only when they would fall due, and not immediately."

The above decision was affirmed by the Federal Court in the case of *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* *[2016] 2 MLJ 457* whereby Suriyadi FCJ in referring to the Binamin's case held that:

> *"The High Court held the view that Binamin (JC) should not have a greater right to the payment of the debt than Way Soon (JD) as it would not be entitled to claim the debt before it became due and payable. In short, the retention sum was not a debt due and accruing from TSR to Way Soon. As time would be a factor on the outcome of the retention sum no part of the retention should be ordered paid to Binamin. The appeal was allowed, and the SAR's order was set aside."*
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> As the above precedent is binding upon me, I ruled that the Garnishee Order Absolute that ordering the Appellants/Garnishees to pay the 1st Respondent/ Judgment Creditor on an immediate basis is clearly erroneous.

e) On the other hand, it is essential to highlight another term of the Loan Agreements between the Appellants/Garnishees and the 2nd Respondent/ Judgment Debtor. The relevant term is as follows:

> "3. ADALAH DIPERSETUJUI BAHAWA pembayaran balik pinjaman tersebut boleh dilakukan melalui pembayaran secara tunai dan bukan tunai."
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> From the abovementioned term, it is always the intention of the parties to the said Agreement that the Appellants/Garnishees have a right to elect whether to repay the debt to the 2nd Respondent/ Judgment Debtor by monetary means or by non - monetary means.
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> If the Appellants/Garnishees elected to repay the debt to the 2nd Respondent/ Judgment Debtor by way of non-monetary means, for example, by returning the 2nd Respondent/Judgment Debtor ***company*** shares worth RM1,500,000.00 each, it would be sufficient in discharging the Appellants'/Garnishees' debt to the 2nd Respondent/ Judgment Debtor.
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> Having said that, I hold the view that the Garnishee Order Absolute should not be allowed at the first place to the effect of compelling the Appellants/ Garnishees to pay monies to the 1st Respondent/ Judgment Creditor.

[15]To my mind, based on the documentary evidence and the circumstances of this case, there was no actual loan between the Appellants/Garnishees and the 2nd Respondent. The transaction was meant to increase paid up capital of the 2nd Respondent/ Judgment Debtor. Whilst this transaction does contravene *Section 67* of the ***Companies** Act 1950*, and is illegal, it was still open to the Appellant whether to repay the debt in cash or in kind.

[16]I hereby order so accordingly.

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