KERAJAAN MALAYSIA v YONG SIEW CHOON - NO 01-5-2004 (W) [2005] MYFC 20 (14 October 2005)

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO 01-5-2004 (W)

BETWEEN

KERAJAAN MALAYSIA APPELLANT

AND

YONG SIEW CHOON RESPONDENT

(DALAM MAHKAMAH RAYUAN MALAYSIA DI KUALA LUMPUR

RAYUAN SIVIL NO W-01-150-98

BETWEEN

YONG SIEW CHOON APPELLANT

AND

KERAJAAN MALAYSIA RESPONDENT)

CORAM

PAJAN SINGH GILL, F.C.J.

RAHMAH HUSSEIN, F.C.J.

AUGUSTINE PAUL, F.C.J.

JUDGMENT OF THE COURT

The Government of Malaysia (the Appellant before us) had obtained judgment in the High Court for the sum of RM290,918.17 being tax due for the Years of Assessment 1984 and 1985 against Yong Siew Choon (the

Respondent before us), as the executor within the meaning of section 2 of the Income Tax Act 1967 (the Act) of the estate of her late husband Abdul Hamid bin Tun Azmi (the deceased). She appealed to the Court of Appeal which allowed her appeal on the ground that the Appellant had failed to comply with the provisions of Order 15 rule 6A of the Rules of the High Court 1980 (Order 15 rule 6A). Leave was granted to the Appellant to appeal to this Court for a determination of the following question of law:

> "Whether in view of the provisions of the Income Tax Act 1967, Order 15 rule 6(A) Rules of the High Court is applicable to an action or proceeding raised under section 106 of the Income Tax Act 1967 in relation to an assessment in the name of an executor as defined in the Act."

The Respondent married the deceased on 31 March 1961. He was a partner in the firm of Messrs Shook Lin and Bok and died intestate on 12 January 1984 leaving behind the Respondent and their son as dependents. Prior to his death the deceased had paid all the income taxes payable by him up to and including the Year of Assessment 1983. The Respondent did not apply for the grant of letters of administration. Notices of Assessment dated 25 August 1984 and 11 June 1986 for the Years of Assessment 1984 and 1985 were posted to the last known address of the Respondent who duly completed and returned the forms. However, she did not pay the tax that had become payable. Accordingly the Appellant commenced proceedings against her for the recovery of the tax due in her capacity as the "Wakil Sah Kepada Harta Pesaka Abdul Hamid bin Tun Azmi". The Respondent contended that she was not the wakil sah of the deceased and as such it was not her responsibility to make the payment to the Appellant. She also claimed that the sum of RM280,000 which she had received from the firm of Messrs Shook Lin and Bok upon the demise of her husband was in fact an ex gratia payment which is exempted from taxation.

In dealing with the objection of the Respondent that the Appellant had no legal right to sue her by merely describing her as "Wakil Sah Kepada Harta Pesaka Abdul Hamid bin Tun Azmi" the learned High Court Judge said:

> "Since the plaintiff's claim is based on section 74(1) of the Act, it is necessary to reproduce the same. It reads:
>
> > '74. (1) Where an individual dies in the basis year for a year of assessment, his executors shall be assessable and chargeable to tax for that of assessment, for the following year of assessment and, whenever necessary for any previous year of assessment in respect of the chargeable income of that individual for any such year of assessment; and, where they are so assessable and

> chargeable, they shall be assessable and chargeable to tax in like manner and to the like amount as the individual would be assessed and charged to tax if he had not died.'

Section 2 of the Act defined executor as the 'the executor, administrator or *other person administering or managing the estate of a deceased person'* . (emphasis provided)

I reject Mr Jagjit's contention that the words 'wakil sah' have not been referred to in the Act. The agreed documents in the CABD show that it was the defendant who had completed and signed Form B being the 'Return of Income by an Individual' for years of assessment 1984 and 1985. She had declared herself on signing the said forms as the wife of Abd Hamid bin Tun Azmi (deceased). She explained in Court that she signed the 2 forms because she was told by Ms Pang Siew Lan of Price Waterhouse, the firm of accountants, that prepared the accounts of her husband's estate that if she failed to sign the said forms she would be in trouble. However, this Ms Pang was never called to testify. In the absence of Ms Pang to explain to the contrary I must therefore infer that obviously Ms Pang must have meant that she ought to sign as the legal representative or 'wakil sah' of her deceased husband. To my mind the definition in section 2 clearly encompasses persons under the category of the defendant. Although she had neither taken probate nor letters of administration, she was clearly administrating the estate of her deceased husband when she signed the Form B for the years 1984 and 1985.

In *Kerajaan Malaysia v Dato' Hj Ghani Gilong*(1995) 2 MLJ 119 the Federal Court by way of*obiter* stated that the Special Commissioners are judges of fact and may consider issues which this Court is prohibited by section 106(3) of the Act from entertaining. Although these words are *obiter* I accept them as sound. In this case the defendant is disputing the fact that she is the 'wakil sah'. The Kamus Lengkap (1990 Edition) defines 'sah' as legal, justified, authoritative and defines 'wakil' as representative. It is clear therefore that until probate or grant of legal administration is obtained, the person most acceptable to manage the estate of the deceased until such time as the grant is obtained is the legal representative. In this case it is the wife. She contends that since there was nothing left in the estate she had nothing to administer and therefore she could not be the legal representative. The position of a legal representative does not impose itself only when there are assets to administer. That position unfolds itself immediately upon the death of the person concerned, until such time as probate or legal administration is obtained. Under section 39 of the Probate and Administration Act 1959 it shall be the Official Administrator Malaysia until administration is granted.

If, as contended by the defendant, the sum paid to her by the firm of Shook Lin & Bok was by way of ex gratia and paid to her personally and not as arising out of the estate of the deceased and thus exempted by Rule 14 of Schedule 6 of the Act, it is unfortunate that she did not say so in either of the Forms B that she had filled up. On the contrary under the paragraphs which required her to state the share of partnership income/loss, she had written as follows:

> 'refer to firm's file
> Shook Lin & Bok 802814/01'

Further no one from the firm of Shook Lin & Bok was called to confirm that the said payment was indeed an ex gratia payment and exempted under the Act. Surely the defendant must accept that the Court ought to draw an adverse inference against this omission. I have no hesitation in holding that the defendant clearly fell into the third category of person defined as executor, namely as a person administering or managing the estate of the deceased person."

In further considering the defence of the Respondent that the sum of money she received from Messrs Shook Lin and Bok is exempt from taxation as it is an ex gratia payment the learned Judge said:

"The plaintiff relied on section 103(1) of the Income Tax Act 1967 (the Act) which reads as follows:

> '103. (1) Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.'

Encik Abu Tariq for the plaintiff argued that pursuant to section 103(1) of the Act it becomes the liability of the defendant to pay the tax upon receipt of the Notice of Assessment. He also referred me to section 106(1) and (3) of the Act. The same are reproduced:

> '106. (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.
> …
> (3) In any proceedings under the section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4), (5) or (5A).'

Linking section 106 to section 142(1) of the Act he argued that the defendant who was named in the Certificate as shown in the Common Agreed Bundle of Documents (CABD) page 24, ought to

be held liable to settle the judgment sum. It is therefore necessary to reproduce section 142(1). It reads as follows:

> '142. (1) In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.'

Learned counsel for the plaintiff referred me to the Federal Court decision in *Sun Man Tobacco Company Ltd v Government of Malaysia* (1973) 2 MLJ 163 FC where the Court held that if the tax payer wished to contend that the amount of tax sought to be recovered was excessive, incorrectly assessed or incorrectly increased, he has to do by way of appeal to the Special Commissioner. The Federal Court held at page 164:

> ' … It is only in relation to any disputes on questions of law at the hearing before the Special Commissioners that the matter can be brought to the High Court by way of a case stated.'

The plaintiff argued that since the Special Commissioners are the proper persons to hear any question in relation to this matter the defendant ought to have appealed to the Special Commissioners. The plaintiff submitted that whether the defendant is the 'wakil sah' or not is a fact that ought to be decided by the Special Commissioners."

In entering judgment for the Appellant he said:

> "It is my judgment that once an assessment is made the plaintiff can invoke sections 103 and 106 of the Act. The effect of these sections is that the tax payable under the said assessments shall upon the service of the Notice of Assessment on the person assessed, be due and payable at the place specified in the Notice, whether or not that person appeals against the assessment. Such tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Under section 106(3) this Court cannot entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased (section 103(4) or (5) of Act). By section 142(1) of the Act the Certificate of the Director General is sufficient evidence of the amount due and is sufficient authority for the Court to give judgment for that amount.
>
> Since the defendant had conceded in her submission that the amount is not in dispute I hereby enter judgment for the plaintiff in the sum of RM290,918.87 with interest at 8% from date hereof to payment and costs.

I wish to add that had the defendant appealed to the Special Commissioners and even if such an appeal had not been heard as yet, I could have, on the basis of the decision of the Supreme Court in *Chong Woo Yit v Government of Malaysia* (1989) 1 MLJ 473 granted stay of execution of the judgment until determination of the appeal by the Special Commissioners."

` The Respondent appealed to the Court of Appeal. The Court, on its own motion, invoked Order 15 rule 6A and allowed the appeal. Order 15 rule 64 reads as follows:

"6A. (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A. B. deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in paragraph (1) or (3) –

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be

effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the deceased's estate, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings.

(6) Where an order is made under paragraph (4), rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings. … … … "

As Gopal Sri Ram JCA in writing for the Court said:

> "Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O 15 r 6A) to commence the action in the manner intituled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O 15 r 6A(4).
>
> It is our judgment that while O 15 r 6A is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it **must** comply with its terms before he or she may take advantage of any provision of substantive law. See, *Balachandran v Chew Man Chan* (1995) 4 MLJ 685, per Vincent Ng J; *Singapore Gems Co v The Personal Representatives for Akber Ali (deceased)* (supra). Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O 15 r 6A(7) makes it abundantly clear that if the terms of O 15 r 6A are complied with then an order or a judgment obtained in the action shall bind the estate of a deceased person.

> Conversely, therefore, if the provisions of O 15 r 6A are not complied with then any order or judgment is useless as it would be wholly unenforceable against the estate of the deceased. … … …
> To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and**only** after, letters of representation have been extracted. Ord 15 r 6A provides a very limited exception to that substantive rule by permitting the **commencement** of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in rule 6A (4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. Failure to observe the terms of rule 6A (4) of Order 15 will therefore deprive a plaintiff of the beneficial effect of rule 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity. As already stated in the preceding paragraph of this judgment that is what happened in the present case.
> The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this Court and in the court below. The deposit is to be refunded to the appellant."

There can be no dispute that the judgment of the Court of Appeal is on excellent exegesis on Order 15 rule 6A. But it is a misfortune that there has been no analysis of its inapplicability to proceedings for the recovery of tax in the light of relevant provisions in the Act itself. Such a discourse may have resulted in a different conclusion. The starting point for such a consideration is the object of Order 15 rule 6A which is described in the *Malaysian High Court Practice* 1998 Desk Edition Vol I p 361 in the following terms:

> "The purpose of this rule is to overcome the difficulties of suing the estate of a person who had died before the commencement of the action and in whose estate no grant of probate or of administration had been made. There is no person to sue."

In the case of *In re Amirteymour, Deceased* (1979) 1 WLR 63 Lord Diplock in explaining the object of their Order 15 rule 6A of the Rules of the Supreme Court, upon which our Order 15 rule 6A is based, said at p 66:

> "It has already been pointed out that proceedings against the estate of a deceased person that are authorised by section 2 of the Proceedings Against Estates Act 1970 and Ord 15 r 6A take the form of actions in personam. They are neither actions in rem, which are peculiar to the Admiralty jurisdiction of the Court, nor are they actions against an abstraction – a form of proceeding unknown to English law. As in

> all actions in personam there must be in existence some person, natural or artificial and recognised by law, as a defendant against whom steps in the action can be taken. If and so long as there is no such person the action, though it may not abate, cannot be continued, as, for example, where a sole defendant to a subsisting action dies and no executor or administrator has yet been appointed against whom an order to continue the proceeding can be obtained under Ord 15 r 7."

Thus the object of Order 15 rule 6A is to provide a remedy where there is no person in law who can be sued. It is therefore superfluous to state that even where no grant of probate or of administration has been made to the estate of a deceased person Order 15 rule 6A will have no application if there is, in law, a person who can be sued. An executor *de son tort* is such a person. As *The Law of Wills, Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu says at p 146:

> "When an executor has accepted office as an executor, he shall not thereafter renounce it. Acceptance does not mean only those executors appointed by the Court or authorised by the probate Court, to serve in that capacity. It includes an executor *de son tort* who, without having been appointed executor, or without having taken out letters of administration, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor or administrator. He has all the liabilities and none of the privileges of an executor (*Coote v Whittington* (1873) LR 16 Eq 534)."

In matters relating to the assessment and chargeability to tax of the estate of deceased persons there are specific provisions in the Act to make the executors liable. They are sections 64(1) and 74(1) of the Act. They read as follows:

Section 64

(1) For the purposes of this Act, any source forming part of the estate of a deceased individual and any income from that source arising after the day of the death of that individual shall be treated as the source and income of the executor of that individual.

Section 74

(1) Where an individual dies in the basis year for a year of assessment, his executors shall be assessable and chargeable to tax for that year of assessment, for the following year of assessment and, whenever necessary, for any previous year of

assessment in respect of the chargeable income of that individual for any such year of assessment; and, where they are so assessable and chargeable, they shall be assessable and chargeable to tax in like manner and to the like amount as the individual would be assessed and charged to tax if he had not died.

(2) For the purposes of subsection (1) –

(a) the reference therein to the chargeable income of any individual for any year of assessment shall be taken to be such chargeable income for that year as he would have had if he had not died in respect of any income of his arising before his death and in respect of any income received by his executors which if he had not died and if it had been received by him (at the time it was received by his executors) would have been taken into account in arriving at that last-mentioned chargeable income; and

(b) all rights and duties which would have attached to him with respect to that last-mentioned chargeable income as he would have so had shall pass to his executors.

(3) … … …

(4) The amount of any tax payable by the executors of a deceased individual by virtue of this section (together with any penalty which may be incurred under section 103 (4)) shall be debt due from and payable out of the estate of that deceased individual.

(5) The executors of a deceased individual shall not distribute any of the assets of his estate unless they have made provision (in so far as they are able to do so out of those assets) for the payment in full of any tax which they know or might reasonably expect to be payable by them under this section.

(6) Any executors who fail to comply with subsection (5) shall be jointly and severally liable to pay a penalty equal to the amount of the tax to which the failure relates.

It is therefore clear that the person assessable and chargeable to tax in the case of the estate of a deceased person is his executor. Proceedings can therefore be commenced against an executor for the recovery of tax due and payable. In its legal sense the word "executor" is a reference to a person who has obtained the grant of probate or of letters of administration of a deceased person. Such a person has the capacity to sue or to be sued. It is a general rule of construction that in construing Acts of Parliament words must be taken in their legal sense unless a contrary intention appears (see *Commissioner for Special Purposes in Income-tax v John Frederick Pemsel* (1891-94) All ER Rep 28; *Chesterman v Federal Commissioner of Taxation* (1926) AC 128; *Laurence*

*Arthur Adamson v Melbourne & Metropolitan Board of Works*AIR 1929 PC 181). Thus the word "executor" in the Act must be interpreted in its legal sense in the absence of any special meaning being ascribed to it. However, section 2 of the Act prescribes that an

> " 'executor' means the executor, administrator or other persons administering or managing the estate of a deceased person".

The reference to "executor" and "administrator" in the definition, being persons who are legally appointed, only means that the "person administering or managing the estate of a deceased person" is not one who is so appointed. The Act has therefore given an extended meaning to the word "executor" by including in its definition a person administering or managing the estate of a deceased person. As the definition is clear and unambiguous it cannot be ignored. As Bindra's *Interpretation of Statutes* 7 th Ed says at p 39:

> "When a Legislature defines the language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with the ordinary meaning of the word used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it (*Nand Rao v Arunachalam*AIR 1940 Mad 385). If the Legislature's intention is clear and unambiguous, it is obviously outside the jurisdiction of the Court to correct or amend the definition in the interpretation clause (*Mordhwaj Singh v State of UP* 24)."

Any reference in the Act to an "executor" must therefore be construed in the light of its definition in section 2. Such a statutory provision is not unusual. Section 7(8) of the Civil Law Act 1956 empowers the dependents of a deceased person to maintain a dependency claim even in the absence of letters of administration in certain circumstances. It reads as follows:

> "If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased been brought by the executor, the action may be brought by all or any of the persons, if more than one for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedures as nearly as may be as if it was brought by the executor."

It follows that the reference in sections 64 and 74 of the Act to an "executor" includes a person who is administering or managing the estate of a deceased person. Such a person is assessable and chargeable to tax and is therefore a person who can be sued in law. The corollary is that

Order 15 rule 6A will have no application to proceedings under the Act against such a person. The extension of the scope of Order 15 rule 6A by the Court of Appeal to proceedings under the Act cannot therefore be sustained. The answer to the question posed to us must therefore be in the negative.

It is the finding of the High Court that the Respondent is the person administering the estate of the deceased. The judgment obtained against her by the Appellant is thus correct in law. Under section 74(4) of the Act the tax due is payable from the estate of the deceased. In the upshot the appeal is allowed with costs both here and below. My learned brother P S Gill, FCJ has seen this judgment in draft and has expressed agreement with it while my learned sister Rahmah Hussein FCJ has since retired. Accordingly, this judgment is given pursuant to section 78 of the Courts of Judicature Act 1964.

Date: 14 October 2005

Sgd

(DATO' AUGUSTINE PAUL)

Judge

Federal Court

Malaysia

Counsel:

For the Appellant: Abu Tariq bin Jamaluddin

(Hazlina bt Hussain with him)

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