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1. [Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie \[2020\] MLJU 304](#)

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LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA v EDWIN CASSIAN A/L NAGAPPAN @ MARIE

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[2020] MLJU 304

Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie [2020] MLJU 304

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

VERNON ONG LAM KIAT, ZALEHA YUSOF AND MOHAMAD ZABIDIN MOHD DIAH JJCA

RAYUAN CIVIL NO W-03(IM)(NCC)-97-08/2018

20 February 2020

*Afifi bin Ahmad (Nurul Huda bt Razali with him) (Azrul Afifi & Azuan) for the appellant.
Nadaraja a/l Gopalakrishnan (G Raja & Co) for the respondent.*

Vernon Ong JCA:

GROUND OF JUDGMENT INTRODUCTION

[1] This appeal relates to the construction of a consent judgment, and in particular to the question of whether the judgment should be interpreted to mean that the defendants' liability under the judgment is joint or joint and several.

[2] The consent judgment was recorded in the Sessions Court in a suit filed by the Lembaga Kumpulan Wang Simpanan Pekerja (KWSP) against three defendants. The 1st defendant was sued as the employer and the 2nd and 3rd defendants as directors of the 1st defendant company. Under the consent judgment, the defendants were required to pay to KWSP the arrears of KWSP contributions of the 1st defendant's employees in the sum of RM133,697.00 together with interest and costs. The pertinent terms of the consent judgment read as follows:

MAKA ADALAH PADA HARI INI DIHAKIMI SECARA PENGHAKIMAN PERSETUJUAN bahawa Defendan-Defendan hendaklah membayar kepada Plaintiff...

[3] On 24.9.2016, KWSP issued a Bankruptcy Notice (BN) against the 2nd defendant (the respondent in this appeal) demanding payment of the judgment sum together with interest and costs. On 2.3.2017, KWSP presented a Creditor's Petition (CP) against the 2nd defendant on the same premise.

[4] In response thereto, the 2nd defendant filed a Summons in Chambers on 15.9.2017 applying to set aside the BN and CP. The 2nd defendant's application was allowed by the Senior Assistant Registrar who heard the same. KWSP's appeal to the Judge in Chambers was dismissed.

FINDINGS OF THE HIGH COURT

[5] The learned judge found that even though [s 46\(1\)](#) of the *Employees Provident Fund Act 1991 (EPF Act 1991)* provided for joint and several liability of directors of a company for unpaid EPF contributions, the joint and several liability should have been recorded in the judgment. It was not so recorded in the consent judgment. The

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Bankruptcy Court cannot look behind the judgment citing the Court of Appeal decision in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and anor* [2017] 6 MLJ 753. Accordingly, the learned judge agreed with the SAR that the amount claimed under the BN is incorrect, excessive and not in accordance with the terms of the consent judgment.

SUBMISSION OF COUNSEL

[6] Learned counsel for KWSP argued that *Sumathy* (supra) could be distinguished on the facts. In that case, even though the judgment did not provide for joint and several liability there was no mention of joint and several liability in the friendly loan agreement.

[7] Learned counsel argued that in this case, it is a statutory claim under the EPF Act 1991. As such, the 2nd and 3rd defendants being directors of the 1st defendant company were liable jointly and severally pursuant to [s 46](#) of the *EPF Act 1991*. The Statement of Claim in the suit against the defendants clearly showed that the defendants were sued jointly and severally (*Lembaga KWSP v Agni Energie Sdn Bhd & Ors* [2014] 8 MLJ 565).

[8] Learned counsel for the 2nd defendant relied on his written submission and submitted that the decisions of the SAR and the learned judge was correct. Further, this case is on all fours with *Sumathy* (supra).

DECISION

[9] In our considered view, this case falls squarely within the principles enunciated in *Sumathy* (supra). We appreciate the fact that the action against the defendants was filed on the basis that the defendants would be jointly and severally liable for unpaid contributions pursuant to [s 46](#) of the *EPF Act 1991*. However, what the learned counsel for KWSP is asking this court to do is to read the words 'jointly and severally' into the consent judgment when such words are plainly absent. We do not think that we can do that as the judgment was a consent judgment entered by the parties and the parties must be taken to know the terms and conditions of the same. During the course of KWSP's counsel's submission, we asked if they had the option to apply to amend the consent judgment to add the missing words. Learned counsel said that they had the option to do so but to date have not taken any steps to amend or vary the consent judgment.

[10] Given the present situation, we are only concerned with the wordings of the consent judgment, which was the basis for the issuance of the BN and the CP. It is clear that under the terms of the consent judgment, the defendants were not stated to be jointly and severally liable. The only question being whether absent 'jointly and severally' in the consent judgment, the liability of the defendants are joint.

[11] As a starting point, we do not think that we can import joint and several liability into the consent judgment notwithstanding [s 46](#) of the *EPA Act 1991*. A consent judgment is a contract between the parties and when it is recorded, it is presumed that both parties have understood and accepted the terms and conditions, and that such agreement binds the parties to the performance and obligations thereunder. KWSP's counsel's concession that they had the option to apply to amend or vary the consent judgment fortifies our view.

[12] Turning to the consent judgment, we can do no better than reiterate the settled law in the words of Mary Lim JCA in *Sumathy* (supra) at para [12] of the judgment:

[12] It is the argument of both appellants that while the respondent may be entitled to enter judgment for the same single sum, which the respondent did, the liability of each of them is necessarily joint. This is because, the summary judgment that was entered has not specified that both appellants are jointly and severally liable for that single sum. Where the judgment is silent or has not specified that liability is joint and several. The liability is necessarily joint. Where liability is joint, each of the appellants as defendant, shares that liability equally - see *In Re Dato Elamaran M Sabapathy; ex p RHB Bank Bhd* [2011] 10 CLJ 262. And so, when it comes to enforcing the judgment, the respondent has a right to enforce only half the judgment sum against each appellant. The respondent is not entitled to enforce the full sum against both of them, certainly not at the same time.

[13] In this case, the BN and CP were premised on the 2nd defendant's liability in respect of the whole sum under the consent judgment; which premise was founded on the joint and several liability of the 2nd defendant under the consent judgment.

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[14]Applying the settled law to these facts, it can only be concluded that the foundation underlying the BN and CP was defective as the amount claimed in question is for the whole judgment sum and not for the portion owed by the 2nd defendant pursuant to the consent judgment. Shorn of that foundational basis, the BN and CP cannot stand and were correctly set aside by the SAR and whose decision was correctly affirmed on appeal by the learned judge.

[15]For the foregoing reasons, we affirmed the decision of the High Court and dismissed the appeal with costs.

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