Date and Time: Monday, 17 April 2023 11:42:00AM MYT

Job Number: 195049371

Document (1)

1. *Mohd Ismail bin Abdul Hamid & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2023] MLJU 281*

Client/Matter: -None-

Search Terms: [2023] MLJU 281

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
MY Cases	-None-

Mohd Ismail bin Abdul Hamid & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2023] MLJU 281

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

JAMHIRAH ALI JC

SAMAN PEMULA NO BA-24NCvC-16-01/2021

10 January 2023

Audrey Tan (with Gurjit Jasgal) (Adnan Rahim & Co) for the applicant.
Afifi Ahmad (with Nurul Hazwani) (Azrul Aiffi & Azuan) for the respondent.

Jamhirah Ali JC:

GROUNDS OF JUDGEMENTINTRODUCTION

[1]This is the Applicants' application by way of Originating Summons (OS) for, inter alia, the following orders:

a. a declaration that the Respondent has no right to impose the travel ban/restriction to leave the country;

b. a declaration that the Summary Judgment dated 29.09.2010 that was filed in the High Court of Shah Alam bearing Suit No.MTI-22-1829-2007 and the Summary Judgment dated 14.05.2009 that was filed in the High Court of Kuala Lumpur bearing Suit No. S7-21-147-2003 is illegal and defective;

c. that the Respondent furnishes and provides all proof of payment of the Applicants from the year payment and/or information of the account holders and/or monies credited by the Applicants.

[2]At the hearing on 19.10.2022, two solicitors appeared on behalf of the Applicants. The solicitor on record is Miss Audrey Tan of Messrs Audrey Tan Law Chambers and a new solicitor, Mr Krishnasamy, of Messrs Krishna Bhakta & Associates. Mr Krishnasamy applied for an adjournment because he had just filed the Notice of Change of Solicitor on 14.10.2022 and therefore has not obtained the cause papers.

[3]The Respondent objected to the last minute adjournment as the date of the hearing was fixed much earlier. The Court did not allow the application for adjournment. Subsequently, Mr Krishnasamy made an oral application to withdraw as the solicitor for the Applicants and the Court allowed his application. The hearing continued with Miss Audrey Tan representing the Applicants.
BRIEF FACTS

[4]The Applicants were the directors of the Andalas Medical Centre Sdn. Bhd. (Andalas Medical Centre) since 2002. The Andalas Medical Centre has since been wound up and dissolved.

[5]The Respondent had obtained two (2) Summary Judgments against the Applicants-

a. Order dated 14.05.2009 vide suit No. S7-21-147-2003 in the High Court at Kuala Lumpur, for non-payment of statutory contribution towards the Employees Provident Fund (EPF) of the employees of the Andalas Medical Centre for the month of February 1999 and December 1999 till July 2002 for an amount of RM448,691.00.; and

b. Order dated 29.09.2010 vide suit No. MT1-22-1829-2007 in the High Court at Shah Alam, non-payment of statutory contribution towards the EPF of the employees of the Andalas Medical Centre from February 1998 to November 1999 for the sum of RM393,520.00.

[6]The Applicants have since made some payments, amounting to RM54,500.00.

[7]The Applicants did not file an appeal against both the Orders dated 14.05.2009 and 29.10.2010.

[8]Based on the judgement entered on 29.10.2010 and pursuant to *section 39(1)(a)* of the *Employees Provident Act 1991 (EPF Act)*, the Respondent issued a certificate dated 17.04.2013 to the Director General of Immigration requesting that the Applicants be prevented from leaving Malaysia. A copy of the said certificate was also given to the Applicants.

[9]The Applicants contended that they have repeatedly requested the Respondent to provide and furnish proof of payment and/or information pursuant to *section 73* of the EPF Act, about the employees' account details, i.e. their names, account numbers and the monies that were credited by the Applicants. However, the Respondent had failed and/or ignored the said information requested by the Applicants.

[10]At the hearing the learned counsel for the Applicants had informed the Court that prayer (a) in this OS was heard and dismissed vide suit No: BA-24NCVC-261-03/2021 by Justice Alice Loke. The Applicants' appeal at the Court of Appeal was also dismissed. Therefore, prayer (a) is *res judicata* before this Court. Hence, the learned counsel applied to withdraw prayer (a) of enclosure 1.
SUBMISSIONS BY THE PARTIES

[11]The Applicants proffered two grounds in this application.

11.1 There is a duplicity of claims by the Respondent. The reasons are:

a. The Respondent had filed two separate claims on the same subject matter at two different courts for a similar relief which include the amount of the contributions owed for the same assessment period.

b. The first suit was in the High Court at Kuala Lumpur (suit No: S7-21-147-2003) for the assessment period of February 1999 and December 1999 to July 2002. The Summary Judgement was obtained on 14.05.2009.

c. After having obtained the said Order, the Respondent commenced another suit against the Applicants in the High Court at Shah Alam (suit No: MT1-22-1829- 2007) allegedly for the same period and which was overlapping, from the assessment period of February 1998 to November 1999 and obtained another Summary Judgement on 29.09.2010.

d. The Applicants alleged that the Respondent was aware that the company is in Selangor and the Summary Judgement should have been filed in the High Court at Shah Alam and not in the High Court at Kuala Lumpur. Therefore, it was unnecessary to file another action and it was an abuse of the court process.

e. The Applicants contended it is clearly a tactical manoeuvre by the Respondent to impose the travel ban against the Applicants all these years. The Applicants have suffered prejudice, apart from irreparable damage to the medical practice, operations and goodwill as well as the reputation of the Applicants.

f. Therefore, the Applicants sought a declaration that the Summary Judgements obtained on 14.05.2009 and 29.09.2010 are illegal and defective.

11.2 The Applicants were not provided with proof that the sum paid by the Applicants had been correctly credited into the specific employee's account.

a. The Applicants' main grievance is the Respondent had unreasonably neglected and refused the Applicants' repeated requests for particulars in relation to the names and account numbers of the employees for which the partial contributions paid by the Applicants have been credited. The Applicants had requested the Respondent to provide a list of the contributors and account numbers and/or EPF registered account holders and the particulars as to whether the foreign employees were still in the country at that time.

b. The Applicants further alleged that at the material time, most of Andalas Medical Centre's employees were foreigners, who either did not have or were not required to contribute to EPF account.

c. Therefore, the Applicants contended that they have a legitimate interest in knowing where the monies paid were credited hence, this application was made pursuant to *section 73* of the *EPF Act*.

[12]The Respondent objected to the Applicants' application and raised the preliminary issue that the Applicants' application is *res judicata*. The Respondent contended that the Summary Judgments dated 14.5.2009 and 29.9.2010 are valid and enforceable judgements against the Applicants since no appeal was filed by the Applicants against those judgments.

[13]Further, the Respondent also contended that the issues raised here in this OS are the same issues that had been raised and decided by the High Court at Shah Alam in suit No: MT1-22-1829- 2007 vide the Applicants' application dated 17.04.2018 (see exhibit NF-3 enclosure 5), 8 years after the Summary Judgement on 29.10.2010 was granted, for an order *inter alia*, that the said Order be stayed and that the Respondent to furnish detailed accounts and receipts for the contributions paid by the Applicants and further to provide a list of names and the account numbers of the recipients of the employees' contribution paid by the Applicants. On 09.08.2018, Justice Mohamad Shariff Bin Haji Abu Samah dismissed the Applicants' application with costs and the Applicants did file an appeal against the said decision.

[14]Therefore, the Respondent asserted that the OS filed herein is an abuse of the court process and it is a collateral attack by the Applicants to set aside the final judgements of another Court of competent jurisdiction.

[15]Further, the Respondent also alleged that the Applicants have no legal right to obtain the particulars in relation to the names and account numbers of the employees to which the partial contributions paid by the Applicants have been credited. The EPF Act does not impose any duty on the Respondent to provide such particulars to the employers, in this case, the Applicants.
FINDINGS OF THE COURTWhether the Applicants can seek a declaration that the Orders dated 14.05.2009 and 29.10.2010 as illegal and defective

[16]In the present case the Orders dated 14.5.2009 and 29.9.2010 are valid, enforceable and final judgements which are binding on the Applicants as it has been adjudicated by courts of competent jurisdiction. It is undisputed that the Applicants did not appeal against those judgments. It is long established principle of law that a High Court judge has no jurisdiction to set aside an order of another High Court judge regularly granted in the exercise of concurrent jurisdiction as enunciated in the classic Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* *[1981] 1 MLJ 143*, unless, if the final judgment is proved to be null and void on the ground of illegality or lack of jurisdiction, the such final judgement may be set aside by another High Court (see: *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* *[1998] 1 MLJ 393*).

[17]The threshold to declare a final judgement illegal and defective, and subsequently, be set aside is high. In the present case before this Court, the Applicants' basis to declare the final judgements illegal and defective were issues and facts in relation to the alleged duplicity of claims, i.e that the assessment period was overlapping between the two claims; and that the two separate claims ought not to have been filed at two separate High Courts with regard to the same subject matter for similar reliefs. However, these facts were available at the time the respective Summary Judgement applications were made. The claim in suit S7-21-147-2003 in the High Court at kuala Lumpur was for the assessment period of February 1999 and December 1999 to July 2002. The Summary Judgement was obtained on 14.05.2009. Whilst, the second claim in suit MT1-22-1829-2007 in the High Court at Shah Alam was the claim for the assessment period of February 1998 to November 1999 and obtained another Summary Judgement on 29.09.2010. The issue of the alleged overlapping (if any) existed at the time the second claim was filed. These are not new pieces of evidence which were unavailable at the time the Summary Judgement proceedings took place. Therefore, the Applicants cannot now urge this Court to revisit these facts, regardless, of whether or not it was raised at the said Summary Judgment proceedings. The Applicants' attempt to re-open these facts and issues would not be and cannot be considered by this Court and it would be unfair, uncalled for and unconscionable for the Applicants to raise the issues again in this OS. As such, the ground of illegality and defective raised by the Applicants would not be a consideration of this Court.

[18]The learned counsel for the Respondent had also informed that the said issues regarding the overlapping of the assessment period were raised at the Summary Judgement proceedings, nevertheless, the court had allowed the Respondent's applications for Summary Judgement and the Applicants chose not to file an appeal against the said Orders. Yet again, the same issues were raised by the Applicants in suit BA-24NCVC-261- 03/2021, in the High Court at Shah Alam, in an application for a declaration that the Respondent has no right to impose the travel ban/restriction to leave the country, which is illegal and defective, and for it to be set aside. The said action was dismissed by the High Court and the Court of Appeal affirmed the decision on appeal. The same issues had been raised multiple times in multiple proceedings and therefore it is *res judicata*.

[19]I agree with the learned counsel's submission. When the issues have been raised and ventilated in the Summary Judgement proceedings, and when the same issue was raised in this OS, it is *res judicata*. The two (2) limbs in the doctrine of *res judicata* have been explained by Peh Swee Chin FCJ in the Supreme Court case of *Asia Commercial Finance (M) Berhad v Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783:

> **"What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action *nemo debet bis vexari proeadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.**
>
> **…**
>
> **Thus, there are in fact two kinds of estoppel *per rem judicatum*. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.**
>
> **The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*.**
>
> **In order to prevent multiplicity of action and also in order to protect the underlying rationales of *estoppel per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.**
>
> **On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. …"**

[20]Further, '*res judicata* in the wider sense also applies to issues which should have been raised, but not, raised in the previous proceeding save for exceptional circumstances' as stated in the case of *Nordin Bin Mohd Zain v Glomac Alliance Sdn. Bhd.* *[2021] 7 MLJ 574*. Hence, even if these issues were not raised, when they should have been raised in the Summary Judgement proceedings, it would be *res judicata* and this Court has no reason to re-open the same issues.

[21]Therefore, the Applicants had failed to substantiate their allegation that the said Summary Judgements obtained by the Respondent are illegal and defective and the allegations are without merit.
Whether the Respondent ought to furnish and provide all proof of payment of the Applicant from the year payment and/or information of the account holders and/or monies credited by the Applicants (the said information)

[22]It is noted that subsequent to the Summary Judgement in suit MT1-22-1829-2007 in the High Court at Shah Alam, the Applicants had filed a Notice of Application on 17.04.2018 to seek the following reliefs, *inter alia*:

1. *Defendan diberi kebenaran untuk memfailkan permohonan ini dan kebebasan untuk memfailkan permohonan ini di luar jangka masa;*
2. *satu deklarasi bahawa segala prosiding perlaksanaan penghakiman bertarikh 29.09.2010 digantung sehingga perintah muktamad Mahkamah yang mulia ini;*
3. *satu deklarasi bahawa Plaintif dan Defendan telah mencapai persetujuan penyelesaian untuk bayaran secara ansuran bagi penghakiman bertarikh 29.09.2010;*

4. *Plaintif diarahkan memberi akaun terperinci dan resit-resit berkenaan dengan bayaran-bayaran yang telah dibuat oleh Defendan.*
5. *Plaintif dalam masa 14 hari daripada tarikh Perintah ini memberi butir lengkap berkenaan dengan senarai lengkap nama dan nombor akaun penerima wang caruman pekerja- pekerja sah yang menerima caruman bayaran Defendan menurut Akta KWSP 1991.*
6. *Plaintif diarahkan menarik balik dengan serta merta permintaan bertarikh 17.04.2013 untuk menghalang Defendan-Defendan daripada meninggalkan negara sehingga suatu masa yang diberitahu oleh Plaintif yang diberikan kepada Ketua Pengarah Jabatan Imigresen Malaysia."*

[23]The said Notice of Application was heard and dismissed by the learned High Court Judge on 09.08.2018 and there was no further appeal.

[24]Perusal of prayer (c) in this OS and the facts and grounds advanced in support of prayer (c) in the Affidavit of Support filed herein and prayers (3) and (4) in the said Notice of Application and facts and grounds advanced in support for the said prayers in the Affidavit in Support filed therein, I find they are similar (I refer to paragraphs 8 till 14 of the Affidavit in Support affirmed by the 1st Applicant on 09.04.2018 and paragraphs 12 till 19 of the Affidavit in Support affirmed by the 1st Applicant on 31.12.2020). Therefore, it is obvious the Applicants are once again attempting to re-litigate the issues which had been decided by the High Court in suit MT1- 22-1829-2007, which is again *res judicata*. For this reason alone, the Applicants' application in prayer (c) of this OS ought to be dismissed.
The Applicants have no legal right to obtain the said information

[25]Notwithstanding, the Applicants' request for the said information is *res judicata*, I also find the application lack merit. The learned counsel for the Applicants submitted that the Applicants had made RM54,500.00 so far. As such the Applicants have a legitimate interest in knowing where the monies paid by them have been channelled and the names and account numbers of the account holders that have received the payments (the said information), as provided in *section 73* of the *EPF Act* and in particular subsection 73(b). The Applicants alleged that the Respondent had repeatedly neglected, ignored and failed to provide any proof of receipts for the payments and the details of the accounts as to whom the monies were credited. The Respondent had only exhibited the *"Perkiraan Dividen Dan Faedah oleh Cawangan"* as of 01.12.2020 without any proof that all monies paid by the Applicants have been correctly credited into the specific employee's account.

[26]Hence, the learned counsel contended that the Applicants were denied their rights under the EPF Act. The Respondent's refusal to provide the said information was clearly arbitrary and violates the basic principle of transparency as mandated by *section 73* of the *EPF Act*. I find the said contention by the Applicants is misconceived. *Section 73* of the *EPF Act* is a provision that empowers the EPF Board to make rules. It is not a provision imposing a duty on the Respondent to provide the information sought by the Applicants. The Applicants relied on subsections 73 (a) and (b) which reads as follows:

> **"73. The Board may, in addition to the other duties imposed and powers conferred upon it under this Act, make rules-**
>
> **(a) to provide for the payment of all contributions under this Act or any part thereof, omitted to be paid;**
>
> **(aa) to prescribe any matter relating to the taking up of an insurance policy under Part VIA, including the procedures on the taking up of an insurance policy;**
>
> **(b) to provide for the keeping of books, accounts or records by employers;**
>
> **…"**

[27]The learned counsel for the Applicants also relied on *section 44* of the *Specific Relief Act 1950*, a mandamus order by the Court to order the Respondent to provide the said information to the Applicants. The learned counsel nevertheless, later admitted that there were no specific provisions in the EPF Act that require the Respondent to provide the said information to the Applicants, hence, the learned counsel urged this Court to exercise its discretion under *subsection 44(1)(a) and (d)* of the *Specific Relief Act*. The relevant part of the provisions read as follows:

> **"44 Power to order public servants and others to do Certain specific acts**
>
> **(1) A judge may make an order requiring any specific act to be done or forborne, by any person holding a public**

office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that-

(a) **an application for such an order be made by some person whose property, a franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;**

(b) **…**

(c) **…**

(d) **The applicant has no other specific or adequate legal remedy; and**

(e) **…"**

[28]The learned counsel for the Applicants submitted that this Court can exercise its discretion to grant the mandamus order under *section 44* of the *Specific Relief Act* as the Applicants had fulfilled the four (4) pre-requisites explained by Sharma J (as his Lordship was then) in the case of *Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180***B**, that states as follows:

"There are four prerequisites essential to the issue of an order under section 44 or of a mandamus: -

(1) **Whether the applicant has a clear and specific legal right to the relief sought;**

(2) **Whether there is a duty imposed by law on the respondent;**

(3) **Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and**

(4) **Whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him."**

[29]The Applicants contended that the Applicants' property, franchise, or personal rights would be injured if the Respondent fails to carry out its statutory duties as prescribed under the law; and that there were no other specific and adequate legal remedies which have to be exhausted by the Applicants.

[30]The learned counsel also referred to the Supreme Court case of *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346*, which held as follows:

"Then there is the important question of the appellant's standing. He must have a specific legal right to ask the court to exercise its discretion to issue the order of mandamus. Such discretion must be exercised judicially. If the appellant has no such right then he is not entitled to mandamus. As has been pointed out he has a right of appeal against the decision of the High Court in refusing to hear the reference. He has failed to avail himself of the alternative remedy. This point was not seriously contended by the parties before the learned Judge. We think it is too late for him to say he has no alternative remedy. Accordingly, we are of the view that he has no specific legal right to apply for mandamus in this case."

[emphasis added]

[31]I agree with the principles of law quoted by the learned counsel with regard to the discretion of the Court to grant the mandamus order as stated in the above two authorities. However, I find the Applicants had not fulfilled the pre-requisites stated in the said cases.

[32]Firstly, for this Court to exercise its discretion to grant the mandamus order, the Applicants must show that the EPF Act had imposed a legal duty on the Respondent to provide the said information which would provide the Applicants with the legal right to obtain such information. As such, if the Respondent fails to do so, this Court may exercise its discretion to compel the Respondent to comply with such duties. In this case, the Applicants tried to rely on *section 73* of the *EPF Act* contending that the Respondent may pursuant to the said section provide the said information. As I have mentioned above, *section 73* imposes no duty on the Respondent to provide any such information requested by the Applicants. In fact, the EPF Act did not impose any such legal duty on the Respondent, therefore, I am of the view the Applicants do not have the legal right to the information sought.

[33]Secondly, as decided in the case of **Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan** (supra), the Applicants did not appeal against the decision of the High Court on 09.08.2018, dismissing their application for the said information. They have failed to avail themselves of the alternative remedy. Therefore, it is too late for them to say they have no alternative remedy. Hence, the Applicants have no specific legal right to urge this Court to grant the mandamus order.

[34]Therefore, I find the Applicants are not entitled to the information sought under *section 44* of the *Specific Relief Act*.

[35]Thus, for the foregoing reasons, I, therefore, ordered that the Applicants' application vide the Originating Summons (enclosure 1) be dismissed with costs of RM8000.00.

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