TEH WEE KHIANG & ORS A

v.

TEH WEE CHYE & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER J
[COMMERCIAL TRIAL NO: D6-22-1010-2003]
23 OCTOBER 2009

***CIVIL PROCEDURE**: Action - Part-heard case assigned to be heard before another judge - Application to have it continue to completion before previous trial judge who heard case - Whether s. 20 Courts of Judicature Act 1964 permitted application to be made - Judges' Code of Ethics 2009, s. 11* C

The Chief Judge of Malaya ('CJM') had assigned the trial of this part-heard case to continue until completion before this court pursuant to s. 20 of the Courts of Judicature Act 1964 ('CJA'). The first defendant made an application to have it heard before the previous trial judge who had since been transferred to another jurisdiction. The reason being that the previous trial judge had heard the case for 27 days between the years 2004 and 2008 wherein the cross-examination of the 1st plaintiff who was a crucial witness to the case was completed. The plaintiffs submitted that the law did not permit such an application in view of s. 20 CJA and s. 11 of the Judges' Code of Ethics 2009 ('the Code'). Also, the defendants' application by letter to the CJM to have the matter heard before the previous judge was rejected. D E F

Held (dismissing the application): G

(1) The case involved material facts and the demeanour of witnesses was crucial to determine the fate of the case. In such circumstances, it would be most appropriate for the previous judge to complete hearing the case or the parties agree that this court should hear it *de novo*. Support for the proposition could be garnered from the Privy Council decision in *Chua Chee Chor v. Chua Kim Yong & Ors*. However, s. 20 CJA did not permit this court to make an order for the previous judge to hear the case until completion. Nevertheless, that did not mean that the case could not be heard *de novo*. (para 6) H I

(2) If the parties objected to a part-heard case being heard by another judge, the sentiment expressed in the Privy Council's decision was applicable. Section 20 CJA also did not deal with problems relating to objections to administrative directions or assignments. (para 6)

(3) Section 11 of the Code was not applicable to part-heard cases as rights, interest and/or legitimate expectation of the parties were already triggered when the trial commenced. The direction could not *per se* be treated as administrative as it would be in violation of the relevant provisions of the Federal Constitution. Additionally, if a part-heard matter and the parties for good reasons want the matter to be heard before the earlier trial judge, s. 20 must not be treated as purely administrative. That would be in breach of natural justice. The case must be heard in full before a decision could be made. (para 6)

(4) The phrase "distribution of business" in s. 20 CJA could not *per se* be said to deal with all part-heard matters. Once a matter had been given to a judge at the first instance, he was required to hear it until completion, unless it fell within s. 18(2) CJA which dealt with matters relating to death, illness or other cause. The phrase "other cause" could not literally include the transfer of the judge to other administrative jurisdictions of the High Court. It would, therefore, be constitutionally unsafe to give an interpretation to categorise s. 20 as an administrative direction as asserted by the plaintiffs as the act of assignment would deprive the trial judge from completing his constitutionally duty to hear the case in full. The end result might invite public criticism and adverse imputation which must be avoided at all costs for impartial and better administration of justice. (para 6)

(5) In view of the fact that the defendants had made a second appeal to the CJM, the parties should fix an appointment with the CJM and present their concern and respective arguments in full for the CJM to make an informed decision. The decision of the CJM might be final and binding, unless there was an authoritative pronouncement of the apex court. (para 6)

[Stay granted subject to undertaking by respective counsel that a notice of appeal would be filed immediately against decision or an appointment would be sought with CJM within one week of order. If filing an appeal, counsel must undertake to expedite appeal and get it heard within next three months.]

Case(s) referred to:
Chong Siew Choong v. Public Prosecutor [1995] 5 MLJ 65
Chua Chee Chor v. Chua Kim Yong & Ors [1963] 29 MLJ 1
Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor [2004] 3 CLJ 44 HC
Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC

Legislation referred to:
Courts of Judicature Act 1964, ss. 18(2), 20
Judges Code of Ethics 2009, s. 11

For the plaintiffs - Lavinia Kumaraendran; M/s Thomas Philip

For the 1st defendants - Teh Boon Eng Teh; M/s Teh & Assocs

For the 2nd defendant - M/s Isharidah Ho Chong & Menon (not present for hearing and decision)

For the 3rd to 11th defendants - M/s Khiru & Yong (not present for hearing and decision)

For the 12th to 18th defendants - Anad Krishnan; M/s Anad & Noraini

Reported by Usha Thiagarajah

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the 1st defendant's application to have the trial continue to completion by the previous trial judge who has been now transferred to Shah Alam High Court. The Chief Judge of Malaya (CJM) in the instant case had assigned the part-heard case to continue before me, pursuant to s. 20 Courts of Judicature Act 1964 (CJA 1964).

[2] When I called the case for case management with a view to continue the trial part heard, as per the CJM's assignment, the defendants made an oral application of similar nature. The reason being that the trial judge had heard the case for about 27 days between the years 2004 and 2008 where the cross-examination of

A the 1st plaintiff, a crucial witness has been completed. At the case management stage, I informed the parties that if both parties consent I can hear the matter part-heard or *de novo*. An agreement was not reached. In consequence of the constitutional significance relating to the relevant provisions of the CJA 1964 and Judges
B Code of Ethics, I ordered a formal application to be made. And the 1st defendant undertook to do so; and has made this application.

[3] I must also say that pursuant to the various assignments
C pursuant to s. 20 CJA 1964 by CJM, I have heard a number of part-heard matters where the trial judge had either passed away or transferred to other stations. In all those cases, the parties have agreed for me to hear the part-heard. In the instant case there is strong objection by the defendants on *bona fide* grounds. In
D consequence, I am compelled to write this judgment, to ensure in the event that I continue to hear the matter to completion that parties do not raise as a point of appeal that there was a miscarriage of justice, in relation to hearing which was part-heard before another judge, and bring into the issue of constitutionality
E of administrative directions and seek a retrial. (see *Chua Chee Chor v. Chua Kim Yong & Ors* [1963] 29 MLJ 1).

Brief Facts

[4] The plaintiff is seeking a declaration that deed of gift
F executed by the 2nd defendant is valid. It relates to shares in several companies. It is the 2nd defendant's case that the 2nd defendant had repudiated and disaffirmed the said deed. The facts and circumstances *prima facie* appear to be complex which I do not wish to set out at this stage. The plaintiff says the law does
G not permit the court to grant the order as prayed by the applicant. Section 20 of CJA 1964 specifically says:

> the distribution of business among the judges of the High Court shall be made in accordance with such directions, which may be
H of a general or a particular nature, as may be given by the Chief Judge.

[5] And asserts that the defendants' application by letter to the CJM to have the matter heard before the previous judge was rejected and the CJM has assigned the matter to be heard before
I me, again.

[6] I have heard the application, affidavits and the submission of

parties in detail. I take the view that the application must be dismissed with directions. My reasons *inter alia* are as follows:

(a) From the affidavits filed I have no hesitation to conclude that the issue involves material facts and the demeanour of witnesses is crucial to determine the fate of the case. In such circumstances it will be most appropriate, either for the previous judge to complete the hearing of the case, or the parties agree that I should hear the matter *de novo*. Support for the proposition can be garnered from the Privy Council decision in *Chua Chee Chor (supra)*. In that case the trial lasted for nine days and the judgment was reserved. Before judgment, the trial judge retired. And the matter with consent of the parties was brought to conclusion by Neal J. It was argued that the cause adopted by Neal J was contrary to the principles of justice and the judgment should be set aside and a new trial ordered. The Privy Council on the facts held as follows:

(i) the evidence in this case had been "taken and recorded by a judge" within the meaning of s. 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further, the hearing was being "continued" before Neal J, who in fact, heard further submissions by counsel;

(ii) while the course adopted by Neal J considered *in vacuo* was plainly undesirable and a precedent not to be followed, the circumstances were very unusual, and the material before the judge, although a very insecure foundation for disputed questions of fact, was that on which the parties had asked to have the case decided, and its inadequacy affected each party alike;

(iii) the procedure which the defendant had requested, and of which he had made no complaint in the courts below, could not be regarded as a denial of justice.

Lord Pearce had this to say:

> The learned judge had before him a full note of the sworn evidence of witnesses who had been examined and cross-examined. It was a very insecure foundation for disputed questions of fact. Nevertheless it was a material on which the parties, in the unhappy state of affairs, asked to have their case decided, and its inadequacy affected each party alike. The defendant sought the hazard and, having lost, complains of it. Their Lordships cannot now regard as a denial of justice the procedure which the defendant himself

(together with the plaintiffs) requested and of which he has made no complaint in the courts below.

(b) In *Chong Siew Choong v. Public Prosecutor* [1995] 5 MLJ 65, it was held that only the CJM could direct a judge of the High Court to take and dispose of the case from another judge and such power as entrenched within the words of s. 20 CJA could not be circumvented even by the inherent powers of the High Court. In *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113, it was stated:

> Now, section 20 of the Courts of Judicature Act 1964 provides that the distribution of business among the judges of the High Court is at the discretion of the Chief Judge (*Chong Siew Choong v. PP* [1996] 2 CLJ 823; [1996] CLJ JT(14)). It goes without saying that there can be no appeal against any direction given by the Chief Judge.

Further s. 18(2) CJA 1964 states:

> Whenever any Judge after having heard and recorded the whole or part of the evidence in proceeding is unable through death, illness or other cause to conclude the proceeding, another Judge may:
>
> a. Continue with the proceeding from the stage at which the previous Judge left it and
>
> (i) Act on the evidence already recorded by the previous Judge; or
>
> (ii) Act on the evidence partly recorded by the previous Judge and partly by himself; or
>
> b. Resummon the witnesses and recommence the proceeding.

In *Merita Merchant Bank Singapore Ltd v. Benatulin Timur Sdn Bhd & Anor* [2004] 3 CLJ 44, the court held:

> (1) By reason of s. 4 of the Courts of Judicature Act 1964 ('CJA'), s. 18 of the same as amended by Act A940 prevails over O. 35 r. 11 RHC. The courts with effect from the date when Act A940 came into force, ie, 2 February 1996, must disregard O. 35 r. 11 RHC. Even without recourse to s. 4 CJA, s. 18 prevails over O. 35 RHC since an Act of Parliament prevails over a subsidiary legislation. It follows that a judge is not required to obtain the consent of both

parties in order to continue with a trial from the stage at which it was left by the previous judge.

(2) The general rule is that a judge taking over the conduct of a trial that has been part heard by another judge ought to continue with the trial from the stage at which it was left by the previous judge. This is in the interest of justice so as to avoid delays in the proceedings and unnecessary costs to the parties. Hearing the case *de novo* should only be an exception to the general rule. The exceptional situation is where a substantial likelihood of injustice will result if the case is not heard *de novo*.

(3) The onus is on the party requesting that the trial be heard *de novo* to satisfy the court that the case merits a *de novo* hearing. It is not for the party submitting that the subsequent judge should continue from the stage at which it was left by the previous judge to convince the court that the case should not be heard *de novo*.

(c) The 1st defendant's counsel asserts that I should not hear it part-heard or *de novo* and he gives his reasons *inter alia* in the affidavit as follows:

(i) Continuation of New Trial Judge

The opinion formed by the trial judge as to the demeanour of the 1st plaintiff when giving evidence will not be enjoyed by the new trial judge who will only have the benefit of the printed notes of evidence as taken down by the trial judge.

(ii) If heard *de novo*

Quite apart from the loss of the court's time which has been deployed to hear the evidence of the 1st plaintiff and the costs and expense incurred by the parties thus far, there is also the very real danger of the 1st plaintiff improving or changing his evidence when cross examined again; now that he has been alerted by the cross examination that has been undertaken. This will be most unfair to the defendants. Further evidence which is favourable to the defendants which has emerged from the 1st plaintiff's cross examination will be lost forever.

I am in total agreement in what the 1st defendant says but the learned counsel for the plaintiff asserts that s. 20 CJA 1964 and the case laws do not permit me to allow the

application. In addition the plaintiff says s. 11 (Part III) of the Judges Code of Ethics 2009 (CE 2009) states:

> A judge shall comply with any administrative order or direction issued by the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts from time to time

I agree with the plaintiff that s. 20 CJA 1964 does not permit me to make an order for the previous judge to hear as proposed by the applicant but that does not mean that I cannot hear the matter *de novo*. Further, if it is a part-heard case and the parties object, the sentiment expressed in the Privy Council's decision will apply and it must be asserted that s. 20 CJA 1964 does not deal with problems relating to objection to administrative directions or assignments. Further, the provision of s. 11 CE 2009 will not apply here, in relation to part-heard cases as rights, interest and/or legitimate expectation of the parties have already been triggered when the trial commenced and in consequence direction under the Code cannot *per se* be treated as administrative as it will be in violation of the several provisions in the Federal Constitution. In addition, I will say that if it is a part-heard matter and the parties for good reasons want the matter to be heard before the trial judge, s. 20 CJA 1964 must not be treated as purely administrative as it will be in breach of natural justice and they must be heard in full before a decision is made. If it is purely treated as administrative it will impinge on the Federal Constitution. And in addition I will say the phrase "distribution of business" cannot *per se* be said to deal with all part-heard matters, as once a matter has been given to a judge at the first instance he is required to complete, unless it falls within the spirit and intent of s. 18(2) of CJA which deals with matters relating to death or illness or incapacity of such nature and the phrase "other cause" cannot literally include where the judge has only been transferred to other administrative jurisdiction of the High Court. It will be constitutionally unsafe to give an interpretation to categorize s. 20 CJA 1964 as a provision for administrative direction as asserted by the plaintiff as the act of the assignment will deprive the trial judge from completing his constitutional duty of hearing the case in full and the end result may invite public

criticism, and adverse imputation, which at all costs must be avoided, for impartial and better administration of justice.

(d) I also understand that the defendants had made a second appeal to the CJM. On the facts of the case I can only suggest that the parties fix an appointment with the CJM and present their concern and their respective arguments in full for the CJM to make an informed decision. And the decision of the CJM may be final and binding, unless there is any authoritative pronouncement of the apex court to say otherwise.

[7] For reasons stated above I dismiss the application with no order as to costs. I will readily grant a stay of my decision subject to the undertaking of the respective counsels that they will immediately file notice of appeal against the decision or seek an appointment with the CJM within 1 week of this order. In the event they are filing an appeal they must undertake to expedite the appeal, and get it heard within the next six months. These directions are necessary and expedient on the facts of the case and in the interests of justice, and for reasons stated above.

[8] I hereby order so.