

Mohamed Yusoff bin Mohd Haniff v Umi Kalsom bte Abas (Attorney-General, non-party)
[2010] SGHC 114

Case Number : Originating Summons No 422 of 2009/B
Decision Date : 15 April 2010
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Peter Pang (Peter Pang & Co) for the applicant; Mohd Muzammil bin Mohd (Muzammil & Company) for the respondent; Low Siew Ling (Attorney-General's Chambers) for Non-Party.
Parties : Mohamed Yusoff bin Mohd Haniff — Umi Kalsom bte Abas (Attorney-General, non-party)

Administrative Law – Judicial Review

15 April 2010

Tan Lee Meng J:

1 The applicant, Mr Mohamed Yusoff bin Mohd Haniff ("Mr Yusoff"), who was divorced in the Syariah Court from the respondent, Mdm Umi Kalsom binte Abas ("Mdm Umi"), sought leave to apply for judicial review of the Syariah Court's decision with respect to the division of their matrimonial property. I dismissed the application and now give the grounds for my decision.

2 The parties, who were married in accordance with Muslim law on 2 March 1985, were divorced in the Syariah Court on 18 August 2003. On that day, the Syariah Court made the following order in relation to their matrimonial home at Block 587, Hougang Avenue 4, #03-646 (the "matrimonial property"):

The matrimonial flat ... be sold in the open market and the sale proceeds be apportioned as:

- i. To refund with accrued interest the [parties'] CPF monies used in the purchase of the said flat;
- ii. To make full payment of the outstanding HDB loan;
- iii. ... [N]et proceeds – less (i) and (ii) shall be divided 55% to [Mdm Umi] and 45% to [Mr Yusoff];
- iv. Both parties shall equally bear all expenses arising from the sale, including payment of commission to a housing agent.

3 After the divorce, Mdm Umi and her daughter left the matrimonial property. Mr Yusoff continued to occupy the matrimonial property.

4 More than two years after the divorce, Mdm Umi instructed a housing agent in September 2005 to sell the matrimonial property. As Mr Yusoff declined to sign the option form, Mdm Umi applied to vary the Order of Court of 18 August 2003 to provide for the signing of documents pertaining to the

sale of the matrimonial property on Mr Yusoff's behalf. On 28 December 2005, the Syariah Court ordered Mr Yusoff to sign the documents required to effect the sale of the matrimonial property and further ordered that if he did not do so, the President or Registrar of the Syariah Court could sign the said documents on his behalf. What merits attention is that on the same day, the Order of Court dated 18 August 2003 was varied by consent and replaced by the following order ("first consent order"):

By consent, paragraph 7 of the Order of Court dated 18 August 2003 shall be varied as follows:-

The matrimonial flat ... shall be sold in the open market. The proceeds of sale shall be apportioned as follows:-

- (i) To make full payment of the outstanding loan with HDB.
- (ii) To refund with accrued interest the [parties'] CPF monies used towards the purchase of the flat.
- (iii) To refund [Mr Yusoff's] cash payment to the mortgage.
- (iv) The net proceeds – less (i) (ii) and (iii) – shall be divided 55% to [Mdm Umi] and 45% to [Mr Yusoff].

5 The sale of the matrimonial property for \$320,000.00 was completed on 29 March 2006. As Mr Yusoff had already reached the age of 55, the age when a member of the Central Provident Fund ("CPF") may withdraw a major part of the amount in his or her CPF account, he was not required to refund to his CPF account the entire sum that he had withdrawn from the account for the purchase of the matrimonial property. Instead, he was only required to refund \$44,571.61 to his CPF account while Mdm Umi had to refund around \$180,000.00 to her CPF account. After deducting the amount due to the Housing and Development Board, the balance of the sale proceeds was \$92,164.35.

6 A dispute arose between the parties as to who was entitled to the \$92,164.35. Mr Yusoff contended that he was entitled to the \$92,164.35 as he would have had to refund the said sum to his CPF account had he not reached the age of 55. However, Mdm Umi, who wanted a share of the \$92,164.35, sought a variation of the first consent order to ensure that this sum was split between her and Mr Yusoff. She relied on s 52(6) of the Administration of Muslim Law Act (Cap 3, 1999 Rev Ed) ("AMLA"), which allows the Syariah Court, on the application of any interested person, to vary or rescind any order where it is satisfied that the order was based on misrepresentation or mistake of fact or where there has been any material change in circumstances or for other good cause being shown to the satisfaction of the Court. She contended that when the first consent order was made, Mr Yusoff did not disclose to the Court the amount that had to be refunded to his CPF account when the matrimonial property was sold as well as the fact that he had already reached the age of 55.

7 Mdm Umi's application to vary the first consent order was heard on 7 August 2006 by the Syariah Court, which varied the first consent order. This new order on 7 August 2006 need not be considered when Mr Yusoff appealed against this Order, the Appeal Board of the Syariah Court ("the Appeal Board") recorded yet another consent order ("the second consent order") on 31 January 2007, which is as follows:

[I]t is adjudged *by consent* that the Order of the Syariah Court dated 7th August 2006 and paragraphs 7 and 8 of the Order of the Syariah Court dated 18th August 2003 in this matter be set aside and the issue of the parties entitlement to the sale proceeds of the matrimonial flat ...

be remitted back to the Syariah Court for its determination.

[emphasis added]

8 On 27 November 2007, the Syariah Court made a new order ("the final order") in relation to the distribution of the proceeds of sale of the matrimonial property. In essence, the Court rejected Mr Yusoff's claim that he was entitled to the \$92,164.35 and ruled that he and Mdm Umi were to share the net profits of sale equally.

9 Dissatisfied with the new ruling, Mr Yusoff appealed to the Appeal Board. On 9 January 2009, his appeal was dismissed. The Appeal Board explained:

We have reviewed the learned President's grounds of decision and note that the learned President had carefully considered all of the relevant circumstances in determining the fair amount to be given to each party. The learned President was well aware of the total CPF funds contributed by [Mr Yusoff], as well as the cash contribution made by [Mr Yusoff].... He even reduced [Mdm Umi's] initial share of the net profit from 55% to 50% to reflect in his view a fair assessment of how the proceeds were to be distributed.

It was clear to the learned President's mind that only the sum representing the minimum sum should be refunded to [Mr Yusoff]. The learned President clearly intended that [Mdm Umi] should receive some monies from the proceeds of the sale. To us, the learned President had made a proper evaluation of all the matters before he came to his conclusion.

10 Mr Yusoff sought leave from the Syariah Court to commence civil proceedings in the High Court pursuant to s 35A(1) of AMLA, which provides as follows:

Any person who, on or after the commencement of proceedings for divorce in the [Syariah Court] or after the making of a decree or order for divorce by the [Syariah Court] or on or after the registration of a divorce under section 102, intends to commence civil proceedings in any court involving any matter relating to the disposition or division of property on divorce or custody of any child where the parties are Muslims or were married under the provisions of the Muslim law, shall apply to the [Syariah Court] for leave to commence the civil proceedings.

11 After the Syariah Court dismissed Mr Yusoff's application on 20 March 2009, he applied to the High Court for leave for judicial review of the final order of the Syariah Court.

The court's decision

12 The test as to whether leave should be granted for judicial review of a decision of a public authority was outlined by the Court of Appeal in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294. In that case, Karthigesu JA, who delivered the judgment of the Court, said at [25] that what the applicant has to prove "is not a *prima facie* case, but a *prima facie* case of reasonable suspicion". Subsequently, in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133, the Court of Appeal held at [22] that leave "would be granted if there appears to be a point which might, on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed".

13 Mr Yusoff attacked the decision of the Syariah Court on 28 December 2008 on the ground that that it was not within that court's jurisdiction to re-open the issue of division of matrimonial property once the first consent order had been made on 28 December 2005. He also asserted that the final

order of the Syariah Court on the division of the matrimonial property was “totally unfair and wrong”.

First consent order was varied by consent

14 Mr Yusoff has no basis whatsoever for complaining about the setting aside of the first consent order as that order was set aside with the consent of both parties on 31 January 2007. Mr Yusoff was represented by counsel at the material time.

15 A consent order can be set aside on grounds which would invalidate an agreement between the parties: see *Huddersfield Banking Co Ltd v Henry Lister & Son Limited* [1895] 2 Ch 273. It can also be varied or set aside with the consent of the parties: see *Captain Rudolf Adrian Joseph v Malaysian Airline System Bhd & Anor* [2008] 5 MLJ 392, *Zainuddin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369 and *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705. There is no reason why these general principles under the common law would not apply to cases falling within the ambit of AMLA. In fact, s 52(6) of AMLA provides that the Syariah Court may “vary or rescind *any* order where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances, or for other good cause being shown to the satisfaction of the Court”. As effect must be given to the words “*any* order” in s 52(6), there is no reason to exclude consent orders from the ambit of s 52(6).

16 When the first consent order was set aside by consent on 31 January 2007, the parties specifically agreed that the dispute regarding the parties’ entitlement to the sale proceeds of the matrimonial property would be remitted back to the Syariah Court for its determination. After having accepted the terms of the second consent order, Mr Yusoff cannot resile from his position merely because the Syariah Court’s final order on the division of the proceeds from the sale of the matrimonial property is, in his view, less advantageous to him than the first consent order. It follows that his application for leave for judicial review must be dismissed.

Whether the Syariah Court exceeded its jurisdiction

17 The fact that the first consent order was set aside with the consent of both parties escaped the attention of Mr Yusoff’s counsel, Mr Peter Pang, who merely argued that the Syariah Court had no jurisdiction to deal with the matrimonial property after the first consent order had been made. For the sake of completeness, his argument will be considered, if only to show that even if the first consent order had not been set aside by consent, Mr Yusoff’s application for leave lacked a solid foundation.

18 The relevant part of s 35(2) of AMLA, which concerns the jurisdiction of the Syariah court, provides as follows:

The Court shall have jurisdiction to hear and determine all actions and proceedings in which all the parties are Muslims or where the parties were married under the provisions of the Muslim law and *which involve disputes* relating to —

....

(b) divorces known in the Muslim law as fasakh, cerai taklik, khuluk and talak;

...

(d) the disposition or division of property on divorce or nullification of marriage;

....

[emphasis added]

19 Section 35(2) of AMLA should be read with s 52(3) of AMLA, which outlines the powers of the Syariah court and provides as follows:

The Court may, at any stage of the proceedings for divorce or nullity of marriage or after making a decree or order for divorce or nullity of marriage, or after any divorce has been registered under section 102 before 1st March 2009, on the application of any party, make such orders as it thinks fit with respect to —

....

(d) the disposition or division of property on divorce or nullification of marriage.

20 Mr Pang argued that as s 35(2) of AMLA gives the Syariah Court jurisdiction to deal with “disputes”, the said court lost its jurisdiction after the first consent order was made because there was no longer any “dispute” between the parties once that order had been made. He added in his “Points of Submission” at (1)(b) that the effect of the decision of the Court of Appeal in *Madiyah bte Atan v Samsudin bin Surin* [1998] 2 SLR(R) 327 (“*Madiyah*”) is that “[j]urisdiction over the subject matter pursuant to a settlement reached by the parties did not lie with the Syariah Court”. This is an erroneous reading of the decision in that case, which must now be read in the context of the amendments to AMLA in 1999, which introduced, *inter alia*, s 52(3) – (6) to empower the Syariah Court to vary or rescind any order on the grounds specified therein.

21 In *Madiyah*, the parties’ consensual divorce was registered by a kadi, who had no power to make any order on the division of the parties matrimonial flat. There was no “dispute” on the disposition of the flat as the husband had voluntarily agreed to transfer the flat to the wife. However, he disappeared before the flat was transferred as he was wanted by the Central Narcotics Bureau in connection with a drug offence, and the wife sought a declaration from the High Court that she was the sole beneficiary of the flat. The Court of Appeal held that the High Court could grant the declaration because an express pre-condition to the Syariah Court’s jurisdiction under s 35 of AMLA was the existence of a dispute on the disposition of property on divorce and as there was no dispute between the parties regarding this matter, s 35 of AMLA was inapplicable. The rationale for the decision of the Court of Appeal is thus completely different from that suggested by Mr Pang.

22 In the present case, both Mr Yusoff and Mdm Umi had a dispute regarding the division of the matrimonial property upon their divorce in the Syariah Court and that was why they appeared in the Syariah Court on several occasions in relation to their said dispute. The Syariah Court’s power under s 52(6) of AMLA to set aside or vary any orders has been mentioned above at [\[15\]](#) and would be relevant even if the first consent order had not been set aside by consent. In my view, once the Syariah Court has jurisdiction in relation to any dispute regarding the dissolution of a marriage and the division of matrimonial property, it is entitled to deal with all relevant issues pertaining to these matters, including disputes regarding the effect of an order and whether or not there are reasons for setting it aside. When the consent order in the present case was set aside, the dispute between the parties remained unresolved and the Syariah Court had jurisdiction to make the final order on the division of the matrimonial property.

23 It is also pertinent to note that a number of High Court decisions concerning the variation of consent orders emanating from the Syariah court do not support Mr Pang’s interpretation of s 35(2) of

AMLA. In *Hafiani bte Abdul Karim b Mazlan bin Redzuan* [1995] 3 SLR(R) 738, the parties, who were divorced in the Syariah Court, obtained a consent order from that Court, which awarded custody of their child to the father. Two years later, the child's mother, relying on the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), applied to the High Court for custody of the child. Kan Ting Chiu J agreed with the child's father that the matter should be dealt with by the Syariah Court. He explained at [16] that where a custody order has been made by the Syariah Court under AMLA, "the variation of the order should be decided under the same legal regime of [AMLA] and the Syariah Court rather than be transposed to the High Court to be decided under the Guardianship of Infants Act".

24 Kan J's approach was adopted by GP Selvam J in *Lathibaby Bewvi v Abdul Mustapha* [1996] 3 SLR(R) 698.

25 Finally, it ought to be pointed out that Mr Yusoff's assertion that the decision of the Syariah Court was unfair need not be considered as s 56A of AMLA provides that subject to the Act, a decision of the Syariah Court or the Appeal Board is final and conclusive and "no decision or order of the Court or the Appeal Board shall be challenged, appealed against, reviewed, quashed or called into question in any court and shall not be subject to any Quashing Order, Prohibiting Order, Mandatory Order or injunction in any court on any account".

Conclusion

26 For the reasons stated, Mr Yusoff did not meet the relatively low threshold for the granting of leave for judicial review. As such, his application was dismissed.

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