

Date and Time: Thursday, 9 September, 2021 11:07:00 AM MYT

Job Number: 152461727

Document (1)

1. [Wong Meng Chow v RHB Bank Berhad \[2011\] MLJU 1215](#)

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| [2011] MLJU 1215

Wong Meng Chow v RHB Bank Berhad [2011] MLJU 1215

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHAMAD ARIFF BIN MD YUSOF J

BANKRUPTCY NO D-29-3053-2010

16 December 2011

Lim Fang Say (Ilyani with him) (Loh Poh Seng & Co) For the judgment debtor

***Hizri** bin Hasshan (Muhammad **Akram** bin Abdul Aziz with him) (Che Mokhtar & Ling) For the judgment creditor*

MOHAMAD ARIFF BIN MD YUSOF J

In this appeal against the decision of the Deputy Registrar, who dismissed the Appellant's application to set aside the Bankruptcy Notice and the Creditor's Petition, the Appellant (the Judgment Debtor) raised three short grounds for the appeal:

- (1) He is not resident in Malaysia;
- (2) He is not domiciled in Malaysia; and
- (3) He is solvent.

Section 5(1) (d) of the *Bankruptcy Act 1967* was raised:

"5. Conditions on which Creditor may petition.

- (1) A Creditor shall not be entitled to present a Bankruptcy Petition against a Debtor unless -

....

- (d) the Debtor is domiciled in Malaysia or in any state or within one year of the date of the presentation of the petition is ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which is carried on business in Malaysia by means of a partner or partners or an agent or manager."

As for the third ground, based on the alleged solvency of the Judgment Debtor, section 6 was marshalled in support, and this provision reads:

"6. Proceedings and order on Creditor's Petition.

- (1) A Creditor's Petition shall be verified by the affidavit of the Creditor or some other person on his behalf having knowledge of the facts, and shall be served as prescribed.
- (2) At the hearing the court shall require proof of -

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- (a) the debt of the petitioning Creditor; and
- (b) the act of Bankruptcy or, if more than one act of Bankruptcy is alleged in the same petition, some one of the alleged acts of Bankruptcy; and
- (c) if the Debtor does not appear, the service of the petition,

and if satisfied with the proof may make a receiving order in pursuance of this petition.

- (3) If the court is not satisfied with the proof of the petitioning Creditor's debt or the act of Bankruptcy or the service of the petition, or is satisfied by the Debtor that he is able to pay his debts, or that some other sufficient cause no order ought to be made, the court may dismiss the petition, ii

I found the grounds for the appeal unsubstantiated on the facts as well as on the law, particularly in relation to ground (3). An issue of "solvency" of the Judgment Debtor is to be raised at the hearing of the Creditor's Petition, not at the hearing of any application to set aside the Bankruptcy Notice of the Creditor's Petition. Subsection (2) of section 6, and its reference to the court shall require proof of, "the debt of the petitioning creditor", and subsection (3) with its reference to the court being satisfied "by the Debtor that he is able to pay his debts", all point to the requirement of the law that this is a matter which must be raised at the hearing of the petition and not earlier.

Having perused the record and the grounds provided by the Deputy Registrar in support of the decision to dismiss the Judgment Debtor's application, I could find no error of law or any misapplication of the law on the facts, and thus dismissed the appeal with costs of RM 2000 to be paid by the Judgment Debtor to the Judgment Creditor.

The Judgment Debtor argued that he was presently not domiciled or resident in Malaysia, but had moved to Cambodia to work in the country since 2008. The evidence relied in support of his argument consisted of the following:

- (1) Two letters of appointment (executed as "WMC - 2" and "WMC -3" to his affidavit affirmed on 19.7.2011) to show that he had commenced employment in Cambodia since 12.6.2008.
- (2) A Lease Agreement dated 1.9.2009 to show that he was currently residing in Cambodia, which period of tenancy was for three years from 1.2.2010 until 1.2.2013 (Exhibit "WMC - 5" to his affidavit affirmed on 19.9.2011).
- (3) Evidence of his income tax payments to the Cambodian authorities by tendering in two documents described as "Tax On Salary Certification" (Exhibit "WMC - 3").
- (4) Evidence of endorsements on his Malaysian passport to show that the Cambodian Government had allowed him to reside in Cambodia for an extended period of time, the latest extension being until 15.8.2012 (see Exhibits WMC - 1", "WMC - 6" and "WMC - 9").

These combined factors, it was argued, showed clearly that the Judgment Debtor had changed his domicile from Malaysia to Cambodia. The following authorities were cited to lend legal support to his argument on change of residence and domicile: *Ang Geok Choo (P) v Wong Tiew Yong* [1997] 1 CLJ Supp 201; *Pen Kong Wan, Re* [1992] 3 CLJ (Rep) 195; *Re Chua Chun Eng ex parte Tractors Malaysia Sdn Berhad*; *Fong Poh Yoke & Others v The Central Construction Co (Malaysia) Sdn Berhad* [1998] 4 CLJ supp 112; and *Re Benjamin Taine & Another* [2010] 4 CLJ 126. All these cases clarify that there are two necessary conditions to show a change of domicile or residence, namely (1) the factum to show the change in status, and (2) the animus or the intention to change the status. As stated in, inter alia, *Ang Geok Choo*, supra:

"There are two essential elements involved in determining the domicile of choice, namely, the factors of residence and the intention to reside permanently for an indeterminate period in the country where it is alleged that the Petitioner has adopted the domicile of choice."

Thus, on the law the evidence of any change from "domicile of origin" to a "domicile of choice" has to be clear both in respect of the fact of the change of domicile and the intention to do so. In respect of "residence", it has to connote "residence in one place with some degree of continuity and apart from accidental or temporary absences" (see *Re Benjamin Taine*, supra, and its adoption of the tests employed in *Levene v Commissioner of Inland Revenue* [\[1928\] AC 217](#)).

Counsel for the Judgment Creditor highlights another decision of the High Court (*Re James Kuok Khoon Huai, ex parte Lim & Tan Securities Pte Ltd* [2002] 5 CLJ 186) which, on the facts, also dealt with an argument on change of domicile from Malaysia to Cambodia. Low Hop Bing J (as his Lordship then was) applied in that case the very relevant passage in Halsbury's Laws of England (fourth edition), reading:

"There is a presumption against change of domicile. The burden of proving any change rests therefore on the person alleging it. The change of domicile is serious matter, not to be lightly inferred, and it must be clearly and unequivocally proved..." (At page 191 of the report).

His Lordship very pertinently observed at page 192 of the report:

"In my considered view, the principle that may be culled from the above authorities is that in order to succeed in establishing a domicile of choice, there must be both the fact and the intention of acquiring a domicile of choice. Examples of these two elements may be provided by a person's acquisition in the host country of a permanent resident status, uprooting one's family in the country of origin, purchase of a dwelling house in the host country and non-retention of a dwelling house in the country of origin, and an intention of continuing to reside in the host country for an unlimited time. A mere length of residence by itself is sufficient to infer the animus or intention. Therefore, the two essential elements are, first, residence and, secondly, the intention to reside permanently for an indeterminate period in the host country."

On the facts of the present appeal, and bearing in mind the principles in the authorities above cited, the evidence presented by the Judgment Debtor, I felt, was insufficient to discharge that burden of proof which was on him to show both the factum and the animus necessary to show the change of domicile and/or to support his argument that he was presently resident in Cambodia. On the facts, there was clear and incontrovertible evidence that the Bankruptcy Notice was personally served on him at his residential address in Malaysia, and all his affidavits filed in support of the application to set aside service of the Bankruptcy Notice and the Creditor's Petition were affirmed before a Commissioner of Oath in Malaysia. Even the alleged "income tax statement" issued by the Cambodian tax authority was in fact a withholding tax treatment, and in this document his nationality is maintained as "Malaysian" with the Malaysian address of residence. It was beyond doubt that the Judgment Debtor was still maintaining his Malaysian passport and had made return trips to Malaysia, where he still maintained a business. On the facts therefore this was a case of a Judgment Debtor who had found employment in Cambodia, but there was no evidence that he had changed his residence status and/or his domicile. A Tenancy Agreement tendered in support allegedly to show otherwise was simply not good enough by way of evidence and proof.

For these reasons, I felt there were no merits in the appeal and thus dismissed it with costs.