

**DALAM MAHKAMAH TINGGI MALAYA KUALA LUMPUR
(BAHAGIAN SIVIL)**

GUAMAN NO: S6-22-576-2002

ANTARA

MOHD YUSOF BIN IBRAHIMPLAINTIF

DAN

**1. PALANISAMY A/L RAMASAMY
2. BIOGRAFIK (MALAYSIA) SDN BHD DEFENDAN**

GROUND OF JUDGMENT

This is the application by the 1st defendant to set aside the Judgment in default entered against him on 6.5.2004 as well as a stay of proceedings.

The grounds of this application are that:

- the said Judgment in Default was irregular and that the 1st defendant had filed his defence on 9.8.2002 and Plaintiff had filed its reply to the defence on 1.7.2003. The 1st defendant alleges that the Plaintiff had filed notice of case management out of time.

- On the day the Plaintiff entered Judgment in default against the 1st defendant it was actually fixed for hearing of Enclosure 15 i.e. the application for discharge of the 1st defendant's solicitors. The 1st defendant's solicitors was not present on the said day, therefore the correct procedure is for the court to strike out the application in Enclosure 15 only, and not to enter Judgment in default against the defendant.
- The 1st defendant has defence on the merits.

Issue of delay on the part of the Plaintiff in setting the case for case management.

From the Courts records, the Defendants had filed its Defence on 9.8.2002 and the Plaintiff had filed its reply to the Defence on 13.6.2003. The case was set down for case management on 1.7.2003. The submission by the 1st defendant that the Plaintiff took a year to set the case for case management is not correct, although the Plaintiff is still considered to be outside the 14 days requirement after close of pleadings. (Refer 0 34 r 2 (1) RHC).

However this was never objected to by the 1st defendant and the issue of delay was never raised by the 1st defendant until the present submission for the application herein. Therefore the 1st Defendant is not estopped from raising this issue of delay on the part of the Plaintiff in setting the case for management.

Issue of delay in making this application by the 1st Defendant

Plaintiff had vide his solicitors letter dated 17.11.2004 served a copy of the sealed order of the Default Judgment dated 6.5.2004

on the 1st Defendant. The 1st Defendant filed his application to set aside the Judgment in Default on 13.3.2006.

This is clearly in contravention of O 42 r 13 RHC in that the application is well outside the time requirement of 30 days from the date of the sealed order being served on the 1st Defendant. No application was filed by the 1st Defendant for extension of time to file the said application, hence no explanation was forwarded to the court for the delay in making the application to set aside. Refer to the cases of :

- Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209;
- Ng Han Seng & Ors v Scotch Leasing sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647;
- Tan Chong Soon v Ng Kin Hwa [2002] 5 CLJ 195,

Where the courts had dismissed an application to set aside Judgment in Default entered on the basis that it failed to comply with O 42 r 13 RHC.

Whether Judgment in Default entered on 6.5.2004 was irregular

The 1st Defendant submits that on 6.5.2004 the case was fixed for the hearing of Enclosure 15 i.e. for the hearing of the application by the 1st defendant's solicitors to discharge from representing the 1st defendant. However the 1st Defendant solicitors was not present in court which resulted in Judgment in Default entered against the 1st Defendant. The 1st defendant submits that the court

should have just struck out the application in Enclosure 15 and not entered Judgment in Default.

I disagree with the contention of the 1st Defendant. O 34 r 3 and 7 RHC empowers the court with wide discretion upon failure of parties to attend court on the date set for hearing, including entering Default Judgment. In our present case the date of 6.5.2004 was well within the knowledge of the 1st defendant's solicitors. In fact the Plaintiff's counsel was informed of the said date of 6.5.2004 by the 1st Defendant's counsel. This is derived from the minutes in the courts file.

Therefore the Judgment in Default entered on 6.5.2004 was a regular judgment. Premise on this alone, the application by the 1st Defendant is dismissed with costs.

For completeness I venture to address on the issue of whether the 1st defendant had shown defence on its merits.

Whether there is defence on merits

a) Loan was not given to the 1st Defendant

The 1st Defendant submits that the loan was given to the 2nd Defendant and not him.

This argument is without merits as the Plaintiff's claim against the 1st Defendant was premised on the Settlement Agreement wherein the 1st Defendant guaranteed the repayment of the said loan which was given to the 2nd Defendant.

b) “PALANISASAMY” does not refer to the 1st Defendant

The next issue brought up by the 1st Defendant is that paragraph 1 (b) of the Settlement Agreement refers to one “PALANISASAMY” which the 1st Defendant claims to be not him. Therefore the Plaintiff should commence against this “PALANISASAMY” not him who bears the name of “PALANISAMY”.

This is clearly misleading, as in the defence dated 8.8.2002 the 1st Defendant had not pleaded this as a defence. Moreover from the Defence there is no denying that the Agreement was entered between the 1st Defendant and the Plaintiff. Hence there is no mistake as to the identity of the 1st Defendant.

c) the absence of 2 signatories in the Settlement agreement

The 1st Defendant submits that the Agreement does not contain the signatures of 2 persons i.e. Dr. Govindaraju a/l Ramasamy and madam Kamachee Ammal @ Mangayammal as additional security.

These issues are not relevant, as it is not denied by the 1st Defendant that he had entered into the Agreement with the Plaintiff and has made part payment in pursuant to the terms of the agreement.

d) The loan by the Plaintiff is a money lending transaction.

The 1st Defendant have not shown to this court how is it that this is a money lending transaction or that the Plaintiff is in the business of lending money to the public. The 1st defendant allegations are

mere assertions which is not substantiated with facts or cogent evidence. (Refer to the case of ***Floral Trends Limited v Li Onn Floral Enterprise (M) Sdn Bhd & Anor*** [2006 MLJU 39 ; ***Teck Leong Trading Company (Suing as a Firm) v Mohd Tamrin bin Abdul Ghafar*** [1994] 4 CLJ 772). From the Settlement Agreement, this is a friendly loan of a “one off” transaction and cannot be categorized as a money lending transaction. Although there is interest charged, that by itself cannot be termed as a money lending transaction. (Refer to the case of ***Lee Tian Hua v Chan Moi Hiong*** [1988] 3 MLJ 406):

Conclusion:

Therefore, the application by the 1st Defendant had not complied with O 42 r 13 RHC 1980. There was no leave applied and no reasons given for the delay.

The Judgment in Default entered on 6.5.2004 was a regular judgment.

The 1st Defendant has failed to show defence on its merits.

The application by the 1st Defendant herein to set aside the Judgment in Default entered on 6.5.2004 is hereby dismissed with costs.

Datin Zabariah Mohd Yusof
Tarikh 3.7.2009

Bagi pihak Plaintiff : Encik S. Rampal
(Tetuan Norendra & Yap)

Bagi pihak Defendan : John Henry
(Tetuan Lamin & Co.)