

Lee Fat Khong
Lee Fatt Shoon

... 1st Appellant
... 2nd Appellant

AND

Baiduri Bank Berhad

... Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 28 of 2008)

Before: Power, P; Mortimer and Davies, JJ.A.
3 June, 2009.

Prohibitory order discharged. The court's substantive power to order the seizure of land is to be found in Sections 17 to 20 of the Debtors Act Cap.195. A judgment debtor seeking a prohibitory order proceeding under O.47 r.6 of the RSC must satisfy these provisions of the Debtors Act.

Mr Rudi Lee of Messrs. Fathan, Rudi Lee & Associates for the Appellant.
Mr Geetha V. Janardhanan of Messrs. Abrahams, Davidson & Co. for the Respondent.

Cases cited in the Judgment:

Application of Laws Act.
6(5) of the Supreme Court Act 1963.
Cl. 22 (2)(h) of the Sarawak, North Borneo and Brunei (courts) Order in Council, 1951.
Malaysian Rules of the Supreme Court.
National Land Code Act 56 of 1965 sections 334-339.
Rules of the Supreme Court.
Section 2 of the Application of Laws Act, Cap 21.
Section 6 and 16(1) of the Supreme Court Act Cap.5
Section 12(2) of the Supreme Court Act.
Sections 17 to 20 of the Debtors Act, Cap. 195.
Section 26 of the Code.
Sections 26 and 31 of the Land Code Cap. 40.
Section 31 of the Land Code.
Section 34(1) and 35 of the Administration of Judicature Act 1956.
Section 146 of the Bankruptcy Act 1883.
Statute of Westminster The Second (1285).
The Debtors Act.

Mortimer, J.A.:

On 26 April 2007, the judgment creditor, the Baiduri bank, applied ex parte for a prohibitory order to seize land belonging to the judgment debtors (the debtors). The registrar dispensed with the parties attendance and made the order in terms.

The Prohibitory Order

The only grounds advanced for the making of the order were that the bank was a judgment creditor and the debtors were judgment debtors by reason of a summary judgment on 6 February 2007; that the judgment sum of B\$4,066,913.58 was outstanding; and that the debtors were beneficial owners of the land concerned. The order prohibited the debtors from “selling, transferring, charging, leasing, or otherwise dealing with the properties or interests therein pursuant to O47 r.6 of the *Rules of the Supreme Court*.”

The Decisions below

On 18 August 2008 the debtors applied to set the prohibitory order aside on the grounds that the court had no legal authority or power to make such an order for the seizure of land. The application came before the Registrar on 14 October 2008. She held that the court had power to make the order as the making of such orders had long been recognized in practice in Brunei, and that this was supported by *section 31 of the Land Code* which enabled His Majesty in Council to make and publish rules “not inconsistent with the general purposes of the Code” and for “all other purposes whether similar or not to the above.” She also held that the orders were clearly recognized and registered in the land office under *section 26 of the Code*.

The debtor’s appeal came before Lugar-Mawson J on 1 December 2008. He dismissed the appeal holding that the court’s powers are to be found in *section 6 and 16(1) of the Supreme Court Act Cap.5* which adopted into Brunei Law the jurisdiction and authority of the High Court in England and in particular its inherent jurisdiction which he held included the power to enforce judgments by execution proceedings against real and personal property.

Order 47 rule 6 RSC

The prohibitory order was made pursuant to O.47 r.6 of the RSC. This provides:

“6. *Where the property to be seized consists of immovable property or any registered interest therein the following provisions shall apply –*

(1) Seizure shall be made by an order prohibiting the judgment debtor from transferring, charging or leasing such property or interest. For the purpose of the rule “charging” shall include the creation of a lien by deposit or a document of title.”

The Rules of the Supreme Court are procedural not substantive. In other words the above order provides the procedure to be adopted by a party seeking to obtain a prohibitory order but not the court’s power or authority to make the order. This must be found elsewhere. It must be found either at Common Law or under statute. The court has no inherent power to make such a draconian order.

History

The rule with which we are concerned was adopted verbatim from the *Malaysian Rules of the Supreme Court*. In Malaysia the court’s authority to seize land under a prohibitory order is found in the *National Land Code Act 56 of 1965 sections 334-339*. Here is to be found the origin of the term “prohibitory”. There is no equivalent of the National Land Code in Brunei and it is unnecessary to dwell on it further.

Ms Janardhanan, who appears for the bank, suggests that the court’s authority to make a seizure order was originally provided in *Cl. 22 (2)(h) of the Sarawak, North Borneo and Brunei (courts) Order in Council, 1951* the effect of which was preserved in section 6(5) of the *Supreme Court Act 1963*. Both the above Order in Council and section 6(5) have since been repealed.

The Respondent’s case

Ms Janardhanan, however, suggests that in spite of the repeals the court’s powers under the Order in Council are preserved in *section 12(2) of the Supreme Court Act* which provides:

(2) All Laws or Rules of Court in force in Brunei Darussalam immediately before this Act came into force relating to practice and procedure in the courts referred to in section 6(5) of this Act shall, except, insofar as they may be inconsistent with the provisions of this Act or any Rules of Court made thereunder or amended, or revoked by any such Rules of Courts, apply in relation to the practice and procedure of the High Court and Court of Appeal established by this Act and for that purpose shall be construed subject to such modifications as may be necessary to bring them into conformity with the provisions of this Act.

We cannot agree. This subsection preserves the power to make rules “relating to practice and procedure” of the courts not to substantive law. As such it does not confer even indirect power or authority on the court to make an order to seize land.

Ms Janardhanan also seeks to support the registrar's reliance upon *sections 26 and 31 of the Land Code Cap. 40* but they do not assist her. Section 26 deals exclusively with the registration of interests in land and not with any power of seizure. Section 31 provides for His Majesty and Council to make and publish rules under the Code but no such rules have been made.

She must fall back therefore upon *section 2 of the Application of Laws Act, Cap 21* which provides:

2. Subject to the provisions of this Act and save insofar as other provision has been or may hereafter be made by any written law in force in Brunei Darussalam, the common law of England and the doctrines of equity, together with statutes of general application, as administered or enforced in England at the commencement of this act, shall be enforced in Brunei Darussalam: [emphasis supplied]

Provided that the said common law, doctrines of equity and statutes of general application shall be enforced in Brunei Darussalam so far only as the circumstances of Brunei Darussalam and of its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary.

This Act commenced on 25 April 1951. Ms Janardhanan therefore submits that the power to seize land in the execution of a judgment is adopted from the English law, then in force, and is provided by the Writ of Elegit. Even though this Writ has been abolished and replaced by charging orders in England she contends that it remains in force in Brunei.

In brief, the Writ of Elegit was created by the *Statute of Westminster The Second (1285)* and was part of English law for nearly 700 years. This Writ was addressed by the court to the sheriff requiring him to seize half the judgment debtor's land and his immovables to secure or satisfy the debt. The Statute was amended by section 11 of the Judgments Act 1838 to apply the Writ to all a judgment debtor's land and was further amended to exclude movables by *section 146 of the Bankruptcy Act 1883*. Eventually the Writ was abolished by *section 34(1) of the Administration of Judicature Act 1956*. *Section 35 of the Act* provided for charging orders to replace it. Successive legislation in England has maintained this position.

The debtor's answer to this submission, advanced by Mr. Rudi Lee, is to be found in *sections 17 to 20 of the Debtors Act, Cap. 195*. His research led to these provision only the day before the present hearing. Rightly he put it before the court although it is partly against his interest. We are obliged to him. One consequence of his recent research is that neither court below had the advantage of considering the effect of the sections.

The relevant sections are as follows:

“17. (1) If it is shown to the satisfaction of the court or a judge, at any time after the issue of a writ of summons, or summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and that –

(a) the defendant is absent from Brunei Darussalam and his whereabouts cannot be discovered;

(b) service of the writ of summons or summons cannot without great delay or difficulty be effected; or

(c) the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, is about to remove, has concealed, is concealing, making away with, or handing over to any other person, any of his movable or immovable property,

the court or judge may order that the property of the defendant, or any part thereof, be forthwith seized by the sheriff as a pledge or surety to answer the claim of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant; but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt:

Provided that any property of the defendant, if in the custody of any public officer or any member of any visiting forces lawfully present in Brunei Darussalam, in his official capacity, shall be seized only with the consent in writing of the Attorney General.

(2) In case land is subsequently seized in execution in satisfaction of any judgment in the action, the order of court registered under this section pursuant to such seizure shall have priority as though it had been registered upon the date on which the order was made.

Court may release property

18. The court or a judge may at any time, on reasonable cause being shown and upon such terms, if any, as to security or otherwise as seem just, release the property seized and order any movable property to be returned.

Order for sale of perishable goods.

19. The court or a judge may, at any time pending the trial of the action, order the sale of any property seized under this Part which is of a perishable nature, or which for any other reason it is desirable to sell without delay, and direct the

proceeds of such sale to be retained by the sheriff or paid into court pending the trial of the action.

Property liable to execution.

20. *Any property so seized, or the proceeds of sale thereof, shall be liable to execution in satisfaction of any judgment in the action against a defendant; but it shall be subject to the prior claims of any judgment creditor whose judgment was obtained within one year before the seizure thereof under this Part if that judgment creditor had issued execution against the defendant's property before the making of any order under this Part."*

Conclusion

The answer to the question put before the court is to be found in these sections. They provide a comprehensive Brunei law on seizure of movable and immovable property. It includes the circumstances in which the court may exercise the power, its limitations, the priorities in bankruptcy, a provision for perishable goods and one for the release of land and for the return of movable property.

The saving provision in the *Application of Laws Act*, "save insofar as other provision has been or may hereafter be made by any written law in force in Brunei Darussalam" clearly is in point. *The Debtors Act* is 'a provision which has been made in a written law in force in Brunei Darussalam'. The *Application of Laws Act* does not apply.

It follows that although the term 'prohibitory' to describe the order in O.47 r.6 is anomalous as a description of the power, Mr. Rudy Lee's initial submission in the appeal that the court had no power to order seizure of a judgment debtor's land must fail. The substantive law providing this power is to be found in the *Debtor's Act*. O.47 r.6 only provides the procedural rules under which it is exercised.

That leaves the question whether the power was lawfully exercised in this case. A judgment creditor must bring itself within the provisions of the *Debtor's Act* in order to obtain the order. But here the bank failed to establish any of the matters required to be proved by *Sections 17 (1) (a), (b) or (c)*. The only grounds advanced were those we have already set out. This is insufficient and the order must be discharged.

For these reasons the appeal is allowed and the prohibitory order is discharged.

Costs

In these circumstances what is the just order for costs? The judgment debtors have succeeded on the appeal by demonstrating that the court had no power to make the order. The grounds put forward upon which the debtors have succeeded were not advanced

below. However, we are satisfied that both the registrar and the judge were in error and it was necessary for the judgment debtors to come to this court in order to have the order discharged.

In the circumstances we make an order nisi that the judgment debtors should have the costs of the appeal but only half their costs in front of the Registrar and the Judge.

Orders

1. The appeal is allowed.
2. That prohibitory order is discharged.
3. An order nisi that the appellants shall have the costs of the appeal and half their costs for the hearings before the registrar and the judge below. The costs to be taxed if not agreed. This order for costs to be made absolute at 10:30 a.m. on 4 June 2009 unless a prior application is made.

Power, P.

Mortimer, J.A.

Davies, J.A.