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Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–39 OF 2006(W)
B ABDUL HAMID MOHAMAD, ARIFIN ZAKARIA AND AUGUSTINE PAUL FCJJ
25 JULY 2007

C *Civil Procedure — Jurisdiction — Conflict of jurisdiction between the High Court and Syariah Court — Petition for letters of administration in civil High Court involving application of Islamic law of gifts — Whether High Court had jurisdiction to grant letters of administration — Procedure to be followed*

D *Islamic Law — Jurisdiction — Syariah Court — Conflict of jurisdiction between the High Court and Syariah Court — Petition for letters of administration in civil High Court involving application of Islamic law of gifts — Whether High Court had jurisdiction to grant letters of administration — Procedure to be followed*

E *Islamic Law — Succession — Administration of estate of a Muslim — Conflict of jurisdiction between the High Court and Syariah Court — Petition for letters of administration in civil High Court involving application of Islamic law of gifts — Whether High Court had jurisdiction to grant letters of administration — Procedure to be followed*

F

Following the death of the deceased, the first respondent, a daughter of the deceased with his second wife filed a petition for letters of administration of the deceased's estate. Later, another daughter of the second wife was made a joint petitioner. The third wife of the deceased, the appellant, and her two children were also included in the list of beneficiaries. Subsequently, the appellant entered a caveat in the deceased's estate. A dispute arose over the moneys in joint accounts of the deceased with the appellant in the Bumiputra Commerce Bank ('BCB') and the Standard Chartered Bank. These joint accounts were included among the assets of the estate of the deceased. However, the appellant claimed that the monies in the two joint accounts were hers, having been given to her by the deceased as a gift. The respondents claimed that they belonged to the estate of the deceased. The petition was converted to a writ. It was agreed between the parties that the principal issue to be tried was whether the monies in the joint accounts were the property of the caveator (appellant), such monies having been the subject of gifts inter vivos recognizable in Islamic law as 'hibah' by the deceased to the caveator. The learned High Court judge ruled that Islamic law applied for the determination of the issue. Applying what he found to be the Islamic law of 'hibah' and the facts before him he ruled that there had been no 'hibah' or gift of the monies in the joint accounts to the appellant. In the Court of Appeal, the court held that the subject matter of the

dispute, which was that of gifts inter vivos or hibah between Muslims, was not a probate and administration matter and was within the jurisdiction of the Syariah Courts. Having come to that conclusion, the court then, applying the provisions of art 121(1A) of the Federal Constitution held that the civil High Court had no jurisdiction over the dispute and the orders made were null and void and have to be set aside (see [2006] 4 MLJ 705). On 16 August 2006 this court granted leave to the appellant to appeal.

Held, dismissing the appeal:

(1) There was a petition for a letter of administration in the civil High Court. An issue arose whether the joint accounts form part of the estate of the deceased or not which depended on whether there was a gift inter vivos or not. That gift inter vivos here means 'hibah' (the Islamic law of gifts) was agreed by the parties in the agreed questions posed in the High Court for its decision. In the circumstances, the Court of Appeal was correct to hold that it is the Islamic law of 'hibah' that applies (see para 73).

(2) It was very clear that the determination whether the assets in question had been given as a valid 'hibah' by the deceased to the appellant was a matter that falls within the jurisdiction of the syariah court. The Court of Appeal was right on this point (see para 74).

(3) Where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a letter of administration in the civil High Court, the answer to which depends on whether there was a gift inter vivos or not, that question shall be determined in accordance with the Islamic Law of gift inter vivos or 'hibah'. The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the syariah court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate (see para 82).

[Bahasa Malaysia summary

Selepas kematian si mati, responden pertama, anak perempuan kepada si mati dengan isteri keduanya telah memfailkan satu petisyen untuk surat-surat pentadbiran harta pusakan si mati. Kemudian, seorang lagi anak perempuan isteri kedua telah dijadikan pempetisyen bersama. Isteri ketiga si mati, perayu, dan dua anaknya juga telah dimasukkan dalam senarai benefisiari. Berikutan itu, perayu telah memasukkan kaveat ke atas harta pusaka si mati. Satu pertikaian telah timbul berhubung wang dalam akaun-akaun bersama si mati dengan perayu di Bank Bumiputra Commerce ('BCB') dan Bank Standard Chartered. Akaun-akaun bersama tersebut termasuk antara aset-aset harta pusaka si mati. Namun, perayu telah mendakwa bahawa wang dalam kedua-dua akaun bersama tersebut adalah miliknya, yang telah diberikan kepadanya oleh si mati sebagai hadiah. Responden-responden telah mendakwa bahawa mereka termasuk dalam harta pusaka si mati. Petisyen tersebut telah ditukarkan kepada satu writ. Adalah dipersetujui antara pihak-pihak bahawa persoalan utama yang perlu dibicarakan adalah sama ada wang dalam akaun-akaun

bersama tersebut merupakan harta pengkaveat (perayu), di mana wang tersebut merupakan subjek hadiah inter vivos yang dikenalpasti dalam undang-undang Islam sebagai hibah oleh si mati kepada pengkaveat. Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa undang-undang Islam terpakai untuk penentuan persoalan ini. Dengan menggunapakai apa yang beliau dapati adalah hibah dalam undang-undang Islam dan fakta-fakta di hadapannya beliau memutuskan bahawa tidak ada hibah atau hadiah wang dalam akaun-akaun bersama tersebut kepada perayu. Di Mahkamah Rayuan, mahkamah memutuskan bahawa perkara pokok dalam pertikaian, iaitu hadiah inter vivos atau hibah antara orang Muslim, bukan satu perkara probet dan pentadbiran dan adalah dalam bidang kuasa Mahkamah Syariah. Setelah tiba kepada kesimpulan tersebut, mahkamah seterusnya, menggunapakai peruntukan perkara 121(1A) Perlembagaan Persekutuan, memutuskan bahawa Mahkamah Tinggi sivil tiada bidang kuasa ke atas pertikaian tersebut dan perintah-perintah yang telah dibuat adalah tidak sah dan terbatal dan hendaklah diketepikan (lihat [2006] 4 MLJ 705). Pada 16 Ogos 2006 mahkamah ini telah memberikan kebenaran kepada perayu untuk mengemukakan rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Terdapat satu petisyen untuk surat pentadbiran di Mahkamah Tinggi sivil. Satu persoalan yang timbul sama ada akaun-akaun bersama tersebut membentuk sebahagian daripada harta pusaka si mati atau tidak bergantung kepada sama ada terdapat hadiah inter vivos atau tidak. Hadiah inter vivos di sini bermaksud hibah (hadiah dari segi undang-undang Islam) yang telah dipersetujui oleh pihak-pihak dalam persoalan yang dipersetujui yang telah dikemukakan di Mahkamah Tinggi untuk keputusannya. Dalam keadaan sedemikian, Mahkamah Rayuan adalah betul untuk memutuskan bahawa undang-undang Islam berhubung hibah adalah terpakai (lihat perenggan 73).

(2) Adalah jelas bahawa penentuan sama ada aset-aset yang dipersoalkan telah diberikan sebagai hibah yang sah oleh si mati kepada perayu adalah perkara yang terangkum dalam bidang kuasa mahkamah syariah. Mahkamah Rayuan adalan betul dalam perkara ini (lihat pereggan 74).

(3) Di mana satu persoalan timbul berhubung sama ada suatu harta yang tertentu membentuk sebahagian daripada suatu harta pusaka si mati yang merupakan seorang Muslim dalam suatu petisyen untuk suatu surat pentadbiran di Mahkamah Tinggi sivil, jawapan yang mana bergantung kepada sama ada terdapat satu hadiah inter vivos atau tidak, persoalan itu hendaklah ditentukan menurut undang-undang Islam berhubung hadiah inter vivos atau hibah. Penentuan berhubung persoalan tersebut dan benefisiari atau benefisiari-benefisiari yang berhak terhadapnya dan dalam perkadaran apa, jika relevan, adalah dalam bidang kuasa mahkamah syariah dan mahkamah sivil hendaklah menguatkuasakannya dengan membenarkan satu surat pentadbiran, dan seterusnya, dalam pembahagian harta pusaka (lihat perenggan 82).]

Notes

For a case on administration of estate of a Muslim, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 652.

For cases on conflict of jurisdiction between the High Court and Syariah Court, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4360–4362.

For cases on Shariah Court jurisdiction, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 561–589.

Cases referred to

Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors [1999] 5 MLJ 618 (refd)

Abdullah Sani bin Jaafar (suing as administrator of the estate of the late Datuk Jaafar bin Hussain, deceased, and on behalf of himself as beneficiary) v Mohamad bin Bakar & Anor [1997] 5 MLJ 477 (refd)

Ali Mat bin Khamis v Jamaliah binti Kassim [1974] 1 MLJ 18 (refd)

Azizah bte Shaik Ismail & Anor Fatimah bte Shaik Ismail & Anor [2004] 2 MLJ 529 (refd)

Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors [1997] 4 MLJ 389 (refd)

Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222 (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Daud bin Mamat & Ors v Majlis Agama Islam& Anor [2001] 2 MLJ 390 (refd)

Daud bin Mamat dan lain-lain lwn Majlis Agama Islam Dan Adat Istiadat Melayu Kelantan dan satu lagi [2002] 3 MLJ 728 (refd)

G Rethinasamy lwn Majlis Ugama Islam, Pulau Pinang dan satu lagi [1993] 2 MLJ 166 (refd)

Jumaaton dan satu lagi lwn Raja Hizaruddin [1998] 6 MLJ 556 (refd)

Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain [2006] 1 MLJ 685 (refd)

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dan satu lagi [2002] 3 MLJ 657 (refd)

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi [2005] 1 MLJ 197 (refd)

Khoo Teng Seong v Khoo Teng Peng [1990] 3 MLJ 37 (refd)

Kung Lim Siew Wan (P) lwn Choong Chee Kuan [2003] 6 MLJ 260 (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2006] 4 MLJ 705 (refd)

Lee Ah Thaw & Anor v Lee Chun Tek [1978] 1 MLJ 173 (refd)

Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & satu kes yang lain [1996] 3 CLJ 231 (refd)

Lim Yoke Khoon lwn Pendaftar Muallaf, Majlis Agama Islam Selangor & Ors [2007] 1 MLJ 283 (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585 (refd)

Lord Sudeley & Ors v AG [1897] AC 11 (refd)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & satu yang lagi [1992] 2 MLJ 244 (refd)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705 (refd)

Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor [1989] 1 MLJ 106 (refd)

Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1998] 1 MLJ 681 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)
Mohd Hanif bin Farikullah v Bushra Chaudri [2001] 5 MLJ 533 (refd)
Myriam v Mohamed Ariff [1971] 1 MLJ 265 (refd)
Nedunchelian v Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306 (refd)
Ng Siew Pian lwn Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain [1992] 2 MLJ 425 (refd)
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor [1991] 3 MLJ 174 (refd)
Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)
Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor [1997] 1 MLJ 537 (refd)
Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor [1993] 3 MLJ 344 (refd)
Norlela bte Mohamad Habibullah v Yusuf Maldoner [2004] 2 MLJ 629 (refd)
Nuraisyah Suk Abdullah lwn Harjeet Singh [1999] 4 CLJ 566 (refd)
Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors [2003] 2 MLJ 302 (refd)
Puan Hajah Amin lwn Tuan Abdul Rashid Abd Hamid [1993] 2 CLJ 517 (refd)
Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors [1998] 1 CLJ 601 (refd)
Saravanan a/l Thangathoray v Subashini a/p Rajasingam [2007] 2 MLJ 705 (refd)
Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus [1991] 3 MLJ 327 (refd)
Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan [1999] 1 MLJ 504 (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266 (refd)
Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 2 MLJ 241 (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1 (refd)
Tan Sung Mooi v Too Miew Kim [1994] 3 CLJ 708 (refd)
Tegas Sepakat Sdn Bhd v Mohd Faizal Tan Abdullah [1992] 3 CLJ 679 (Rep); [1992] 4 CLJ 2297 (refd)
Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors [2004] 5 MLJ 40 (refd)
Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid, In the Estate of [1998] 4 MLJ 623 (refd)
Yusoff Kassim lwn Kamsiah Kassim [2001] 1 CLJ 175 (refd)

Legislation referred to

Administration of Islamic Law (Federal Territories) Act 1993 s 50
Administration of the Religion of Islam (State of Selangor) Enactment 2003 s 61(3)
Central Bank of Malaysia Act 1958 s 16B
Courts of Judicature Act 1964
Federal Constitution arts 74(1), (2), 75, 121(1A), 128, 130
Penal Code
Probate and Administration Act 1959

Subordinate Courts Act 1948
Wills Act 1959

Malik Intiaz Sarwar (Arthur Wang Ming Way and Amelly Kok with him) (Malik Intiaz Sarwar) for the appellant.
Pawancheek bin Marican (Suzilawati bte Ismail with him) (Wan Marican Hamzah & Shaikh) for the respondents.

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] The facts of this case have been meticulously narrated by Abdul Aziz Mohamad JCA (as he then was) in the judgment of the Court of Appeal — see [2006] 4 MLJ 705. I shall not repeat except to mention briefly what is relevant to the issue to be decided by this court.

[2] Following the death of Dato' Sharibun bin Wahab ('the deceased'), Rosmawati, the first respondent in the instant appeal, a daughter of the deceased with his second wife (Puan Buruk) filed a petition for letters of administration of the deceased's estate. Later, Roslinawati, another daughter of Puan Buruk was made a joint petitioner. Latifah, the third wife of the deceased, the appellant herein, and her two children were also included in the list of beneficiaries. Subsequently, the appellant entered a caveat in the deceased's estate.

[3] A dispute arose over the moneys in joint accounts. The first is the joint current account of the deceased with the appellant (Latifah), the Bumiputra Commerce Bank ('BCB') joint account. The second is the Standard Charted Bank ('SCB') joint account of the deceased with the appelant (Latifah). (This joint account was converted from the earlier joint account of the deceased with Puan Buruk after her death). As has been mentioned, these joint accounts were included among the assets of the estate of the deceased. However, the appellant claimed that the monies in the two joint accounts were hers, having been given to her by the deceased as a gift. The respondents claimed that they belonged to the estate of the deceased.

[4] The petition was converted to a writ. It was agreed between the parties that the principal issue to be tried was:

1 Whether the monies in the joint accounts of Dato' Sharibun bin Wahab (the Deceased) and Latifah bte Mat Zin (the Caveator) in Standard Chartered Bank Berhad (SCB) and Bumiputra Commerce Bank Berhad (BCBB) are the property of the Caveator, such monies having been the subject of gifts inter vivos recognizable in Islamic law as 'hibah' by the Deceased to the Caveator;

1.1 In the event that the answer to 1 (above) is in the affirmative, then such monies do not therefore fall within the estate of the deceased for distribution between the beneficiaries under Faraid.

1.2 In the event that the answer to 1 (above) is in the negative, then such monies therefore fall within the estate of the deceased for distribution between the beneficiaries under Faraid.

[5] The learned High Court judge ruled that Islamic law applied for the determination of the issue. Applying what he found to be the Islamic law of 'hibah' and the facts before him he ruled that there had been no 'hibah' or gift of the monies in the joint accounts to the appellant.

[6] In the Court of Appeal, it was argued by the learned counsel for the appellant that the applicable law was the Federal law of banking and contract. This argument was rejected by the court. It held that the applicable law was the law of gifts, not the law of banking or contract. The question would then be whether the applicable law in this case is the civil law of gifts inter vivos or the Islamic law of gifts inter vivos or 'hibah'.

[7] To the argument that because the dispute arose in a petition for administration, it was therefore a probate and administration matter the court held:

> We cannot agree that a dispute about gift is a dispute about probate and administration, just because it arises in the context of the administration of an estate.

and, the court further held:

> It is, therefore, our finding that the subject matter of the dispute in this case, which is that of gifts inter vivos or hibah between Muslims, is not a probate and administration matter and is within the jurisdiction of the Syariah Courts.

[8] Having come to that conclusion, the court then, applying the provisions of art 121(1A) of the Federal Constitution held that 'the civil High Court had no jurisdiction over the dispute and the orders made were null and void and have to be set aside.'

[9] The court then went on to consider the facts of the case and held that 'hibah' had been proved in respect of the joint accounts and that therefore the monies in the joint accounts were the property of the appellant.' On the same ground the court held that the money in the Higher Education Fund account was also the property of the appellant. However, in view of the court's decision on jurisdictional issue, the court dismissed the appeal and set aside the order of the High Court with no order as to costs.

[10] On 16 August 2006 this court granted leave to the appellant on the following questions:

> 1. where a question arises as to whether specific property fall within the assets of a deceased person who is a Muslim for the purpose of procuring a Grant of Letters of Administration of the estate of the deceased, whether the High Court is vested and/or otherwise seized with jurisdiction to determine that question;
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> 2. further to question 1, whether the High Court is seized with jurisdiction to determine the question where the specific property is monies held in joint accounts in connection with

which mandates had been issued jointly by the deceased and the surviving account holder to the bank concerned when opening the joint accounts;

3. whether the High Court is seized with jurisdiction to determine questions or issues:

(a) framed in Islamic law principles and/or with regard to Islamic law principles as an alternative to issues not pertaining to Islamic law principles;

(b) not wholly framed in Islamic law and/or with regard to Islamic law principles; and/or

(c) which though possibly relating to Islamic law principles, primarily or additionally relate to principles of Probate and Administration law, Banking law and Contract law;

4. whether the Syariah Court is seized with jurisdiction over actions involving matters:

(a) not entirely within jurisdiction of the Syariah Courts as provided for under item 1, List II, 9th Schedule, Federal Constitution; and/or

(b) in connection with which no specific law has been enacted; and/or

(c) pertaining to matters in relation to which both Federal law and State law have been enacted.

[11] Once again the issue of conflict of jurisdiction of the civil and the syariah courts has come to forefront. This problem has arisen and has become more serious over the last two decades. Courts, the civil courts as well as the syariah courts have had to grapple with this problem. While a judgment settles the case before the court, it creates other problems in subsequent cases.

[12] Being one of the judges who had to grapple with this problem since my High Court days and with the benefit of the many seminars and conferences that I have participated, I think I am now in a position to take a fresh look at the problem in a broader perspective than the specific issue arising in the instant appeal. Incidentally, it coincides with 50th year of independence and the Federal Constitution.

[13] While I am aware of the many judgments that have been delivered on the issue, to avoid this judgment becoming too long, more complicated and may be more difficult to comprehend, I shall not refer to or discuss them. I take note of all of them. However, for purpose of record, I hereby list them in chronological order:

- *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222 (FC);
- *Myriam v Mohamed Ariff* [1971] 1 MLJ 265 (HC);
- *Ali Mat bin Khamis v Jamaliah binti Kassim* [1974] 1 MLJ 18 (HC);
- *Mansor bin Mat Tahir v Kadi Daerah Pendang Kedah & Anor* [1989] 1 MLJ 106 (HC);
- *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 174 (HC);
- *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus* [1991] 3 MLJ 327 (HC);
- *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1 (SC);

- *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & satu yang lagi* [1992] 2 MLJ 244 (SC);
- *Ng Siew Pian lwn Abd Wahid bin Abu Hassan, Kadi Daerah Bukit Mertajam & satu yang lain* [1992] 2 MLJ 425 (HC);
- *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 (SC);
- *Tegas Sepakat Sdn Bhd v Mohd Faizal Tan Abdullah* [1992] 3 CLJ 679 (Rep); [1992] 4 CLJ 2297 (HC);
- *G Rethinasamy lwn Majlis Ugama Islam, Pulau Pinang dan satu lagi* [1993] 2 MLJ 166 (HC);
- *Puan Hajah Amin lwn Tuan Abdul Rashid Abd Hamid* [1993] 2 CLJ 517 (HC);
- *Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor* [1993] 3 MLJ 344 (SC);
- *Tan Sung Mooi v Too Miew Kim* [1994] 3 CLJ 708 (SC);
- *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 (HC);
- *Isa Abdul Rahman & satu lagi lwn Majlis Agama Islam, Pulau Pinang* [1996] 1 CLJ 283 (HC);
- *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & satu kes yang lain* [1996] 3 CLJ 231 (HC);
- *Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537 (HC);
- *Abdullah Sani bin Jaafar (suing as administrator of the estate of the late Datuk Jaafar bin Hussain, deceased, and on behalf of himself as beneficiary) v Mohamad bin Bakar & Anor* [1997] 5 MLJ 477 (HC);
- *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389 (HC);
- *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 (HC);
- *In the Estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid* [1998] 4 MLJ 623 (HC);
- *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266 (CA)
- *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (FC);
- *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (FC);
- *Sia Kwee Hin v Jabatan Agama Islam Wilayah Persekutuan* [1999] 1 MLJ 504 (FC);
- *Nuraisyah Suk Abdullah lwn Harjeet Singh* [1999] 4 CLJ 566 (HC);

- *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 (HC);
- *Yusoff Kassim lwn Kamsiah Kassim* [2001] 1 CLJ 175 (HC);
- *Daud bin Mamat & Ors v Majlis Agama Islam& Anor* [2001] 2 MLJ 390 (HC);
- *Mohd Hanif bin Farikullah v Bushra Chaudri* [2001] 5 MLJ 533 (HC);
- *Daud bin Mamat dan lain-lain lwn Majlis Agama Islam Dan Adat Istiadat Melayu Kelantan dan satu lagi* [2002] 3 MLJ 728 (CA);
- *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dan satu lagi* [2002] 3 MLJ 657 (CA);
- *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 MLJ 302 (HC);
- *Kung Lim Siew Wan (P) lwn Choong Chee Kuan* [2003] 6 MLJ 260 (HC);
- *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 (FC);
- *Azizah bte Shaik Ismail & Anor Fatimah bte Shaik Ismail & Anor* [2004] 2 MLJ 529 (FC);
- *Norlela bte Mohamad Habibullah v Yusuf Maldoner* [2004] 2 MLJ 629 (HC);
- *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648 (HC);
- *Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan dan satu lagi* [2005] 1 MLJ 197 (FC);
- *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors* [2004] 5 MLJ 40 (HC);
- *Neduncheliyan v Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 (HC);
- *Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain* [2006] 1 MLJ 685 (HC);
- *Lim Yoke Khoon lwn Pendaftar Muallaf, Majlis Agama Islam Selangor & Ors* [2007] 1 MLJ 283 (HC);
- *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 705 (CA);
- *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585 (FC).

[14] Let me begin from the beginning. By the time Malaya, then, obtained her independence in 1957, the 'civil court' (as the term has become to be commonly used now) had established itself as 'the court' in the country. Hence, the Federal Constitution, in the Chapter on the Judiciary talks about the 'civil courts'. However, the Constitution recognized the necessity to establish syariah courts as State

courts with jurisdiction over Muslims only in, substantially, personal law matters. Thus, in the Ninth Schedule, List II (State List) a provision is made, inter alia, for the creation of syariah courts.

[15] It must be emphasized that the Ninth Schedule is a schedule to the Constitution. Under the heading 'Ninth Schedule', we find the following words:

'[Article 74, 77]

Legislative Lists

List I - Federal List

[16] This is then followed by 'List II - State List'.

[17] The Ninth Schedule, as it says what it is, is a 'Legislative List.'

[18] The words 'Legislative Lists' are clear enough. They mean what they say: the matters contained in the two lists are matters that Parliament and the Legislature of a State may make law with respect thereto, respectively. Anyway, let me reproduce the two Articles:

Subject matter of federal and State laws

74.(1)Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Residual power of legislation

77. The Legislature of a State shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

[19] For our present purpose it is sufficient for me to make the following points. First, art 74(1) gives the Federal Parliament power to make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, ie the First or the Third List of the Ninth Schedule.

[20] Secondly, art 74(2) gives power to the Legislature of a State to make laws in respect of any of the matters enumerated in the State List.

[21] Among the matters enumerated in the Federal List are external affairs, defence, internal security and so on. However, item 4 should be reproduced:

4. Civil and criminal law and procedure and the administration of justice, including —

(a) Constitution and organization of all courts *other than Syariah Courts*;

(b) Jurisdiction and powers of all such courts;

(c) Remuneration and other privileges of the judges and officers presiding over such courts;

(d) Persons entitled to practise before such courts;

(e) Subject to paragraph (ii), the following:

(i) Contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; bona vacantia; equity and trusts; marriage, divorce and legitimacy; married women's property and status; interpretation of federal law; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; succession, testate and intestate; probate and letters of administration; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;

(ii) the matters mentioned in paragraph (i) do not include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate and intestate;

(f) ...

(g) ...

(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;

(i) ...

(j) ...

(k) *Ascertainment of Islamic law and other personal laws for purposes of federal law*; and

(l) ...

(Emphasis added.)

[22] At this stage, I shall only make a few points about this provision.

[23] First, this item enumerates matters that Parliament may make laws about. Item 4(a) allows Parliament to make laws for the constitution and organization of all courts other than syariah court and under item 4(b) to provide for jurisdiction and powers of such courts. Item 4(e) contains two paragraphs. Paragraph (i) enumerates matters that Parliament may make laws. However, it is subject to paragraph (ii), meaning that, even in respect of a matter that Parliament by virtue of paragraph (i) may make laws, if it falls under paragraph (ii), Parliament has no power to make such laws.

[24] To give one example, while Parliament may make law in relation to marriage and divorce, it is not permitted to make law on the same subject-matter affecting Muslims because it falls under paragraph (ii) as Islamic personal law relating to

marriage and divorce. The net effect is that marriage and divorce law of non-Muslims is a matter within the jurisdiction of Parliament to make, while marriage and divorce law of Muslims is a matter within the jurisdiction of the Legislature of a State to make.

[25] Another example, which in fact is the issue in the instant appeal is that paragraph (i) provides that 'succession, testate and intestate; probate and letters of administration.' However, paragraph (ii) excludes 'Islamic personal law relating to … gifts or succession, testate and intestate.' As this is one of the main issues that will have to be discussed in detail, I shall do so later.

[26] 'Criminal law' is a federal matter — item 4. However, State Legislatures are given power to make law for the 'creation and punishment of offences by persons professing the religion of Islam *against precepts of that religion, except in regard to matters included in the Federal List*' - item 1 of State List. The two qualifications at the end of that sentence (i.e. 'against precepts of that religion' and 'except in regard to matters included in the Federal List') limit the offences that can be created by a State Legislature. So, where an offence is already in existence in, say, the Penal Code, is it open to a State Legislature to create a similar offence applicable only to Muslims? Does it not fall within the exception 'except in regard to matters included in the Federal List' ie criminal law? To me, the answer to the last-mentioned question is obviously in the affirmative. Furthermore, Article 75 provides:

> 75 If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.

[27] Item 4(k) provides: 'Ascertainment of Islamic Law and other personal laws for purposes of federal law' is a federal matter. A good example is in the area of Islamic banking, Islamic finance and takaful. Banking, finance and insurance are matters enumerated in the Federal List, items 7 and 8 respectively. The ascertainment whether a particular product of banking, finance and insurance (or takaful) is Shariah-compliance or not falls within item 4(k) and is a federal matter. For this purpose Parliament has established the Syariah Advisory Council — see s 16B of the Central Bank of Malaysia Act 1958 (Act 519).

[28] We shall now look at List II — State List:

> List II — State List
>
> 1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, *creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List*; the constitution,

organization and procedure of Syariah courts which shall have jurisdiction *only* over persons professing the religion of Islam *and* in respect only of *any* of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

[29] The first point that must be reemphasized is that, like the Federal List, it is a legislative list and nothing more. It contains matters that the Legislature of a State may make laws for their respective States. [The Federal Territories are an exception]. So, to give an example, when it talks about 'the constitution, organization and procedure of Syariah courts', what it means is that the Legislature of a State may make law to set up or constitute the syariah courts in the State. Until such law is made such courts do not exist. The position is different from the case of the civil High Courts, the Court of Appeal and the Federal Court. In the case of those civil courts, there is a whole Part in the Constitution (Part IX) with the title 'the Judiciary'.

[30] Article 121(1) begins with the words '*There shall be* two High Courts of co-ordinate jurisdiction and status,' namely the High Court in Malaya and the High Court in Sabah and Sarawak. (Emphasis added.)

[31] Article 121(1B) begins with the words '*There shall be* a court which shall be known as the Mahkamah Rayuan (Court of Appeal) …' (Emphasis added.)

[32] Article 121 (2) begins with the words '*There shall be* a court which shall be known as the Mahkamah Persekutuan (Federal Court) ….' (Emphasis added.)

[33] So, the civil High Courts, the Court of Appeal and the Federal Court are established by the Constitution itself. But, that is not the case with the syariah courts. A syariah court in a State is established or comes into being only when the Legislature of the State makes law to establish it, pursuant to the powers given to it by item 1 of the State List. In fact, the position of the syariah courts, in this respect, is similar to the Session Courts and the Magistrates' Courts. In respect of the last two mentioned courts, which the Constitution call 'inferior courts', Article 121(1) merely says, omitting the irrelevant parts:

121(1) There shall be … such inferior courts as may be provided by federal law...

[34] This is, of course, followed by item 4 of the Federal List, which I have reproduced earlier. And to establish the Session Courts and the Magistrates' Courts we have the Subordinate Courts Act 1948 (Act 92), section 3, which provides:

3(1)...

(2) *There shall be established* the following Subordinate Courts for the administration of civil and criminal law:

(a) Sessions Courts;

(b) Magistrates' Courts...

(Emphasis added.)

[35] Coming now to the jurisdictions of the courts. In the case of the Federal Court, the Constitution provides that 'the Federal Court shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in arts 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.' — art 121(2).

[36] Note that while the jurisdiction in (a) and (b) are expressly stated, in the case of (c), we will have to look for them in the federal law.

[37] Of importance in this discussion is art 128(1) that provides:

128(1) The Federal Court shall, *to the exclusion of any other court*, have jurisdiction to determine...

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and'

(Emphasis added.)

[38] So, if for example, a question arises whether a particular provision of a law made by Parliament or the State Legislature is in contravention of the provisions of the Ninth Schedule, it is the Federal Court that has jurisdiction to decide.

[39] In respect of the Court of Appeal, cl (1B) provides that the Court of Appeal 'shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof …; and

(b) (b) such other jurisdiction as may be conferred by or under federal law.

[40] Here again we notice that while the jurisdiction in (a) is expressly stated, in (b) we will have to look for them in the federal law.

[41] However, regarding the jurisdictions of the High Courts and the 'inferior courts', the Constitution provides 'and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.' So, to

know the jurisdictions and powers of the High Courts, the Sessions Courts and the Magistrates' Courts we will have to look at the federal laws, in particular, the Courts of Judicature Act 1964 (Act 91) for the High Courts, and the Subordinate Courts Act 1948 (Act 92) for the Sessions and Magistrates' Courts.

[42] Similarly, in the case of the syariah courts. Item 1 of the State List, having stated 'the constitution, organization and procedure of Syariah courts', continues to provide 'which shall have jurisdiction *only* over persons professing the religion of Islam and in respect only of *any* of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam ….' (Emphasis added.)

[43] What it means is that, the Legislature of a State, in making law to 'constitute' and 'organize' the syariah courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the syariah courts. It can never be that once the syariah courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for. At the very least, the law should provide 'and such courts shall have jurisdiction over all matters mentioned in item 1 of List II — State List of the Ninth Schedule.' If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to 'constitute' and 'organize' the syariah courts. Would there be Syariah courts without such law? Obviously none. That is why such law is made in every State e.g. Administration of Islamic Law Enactment 1989 (Selangor).

[44] (The position in the Federal Territories is the same in this respect even though such law is made by Parliament because such law may only be made 'to the some extent as provided in item 1 of the State List …' — item 6(e) of the Federal List).

[45] The point to note here is that both courts, civil and syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the syariah court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the syariah courts in the States, by referring to the relevant State laws and in the case of the syariah court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the syariah court does not have jurisdiction over the case,

A even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject matter is not within its jurisdiction.

B **[46]** So, there may be cases over which neither court has jurisdiction. It may be said that it cannot be so. In my view, it can be so, because either court obtains its jurisdiction from statute, not from the fact that the other court does not have jurisdiction over the matter.

C **[47]** The problem is, everyone looks to the court to solve the problem of the Legislature. Judges too, (including myself), unwittingly, took upon themselves the responsibility to solve the problem of the legislature because they believe that they have to decide the case before them one way or the other. That, in my view is a mistake. The function of the court is to apply the law, not make or to amend law not made by the Legislature. Knowing the inadequacy of the law, it is for the Legislature D to remedy it, by amendment or by making new law. It is not the court's function to try to remedy it.

E **[48]** There are cases in which some of the issues fall within the jurisdiction of the civil court and there are also issues that fall within the jurisdiction of the syariah court. This problem too will have to be tackled by the Legislature. Neither court can assume jurisdiction over matters that it does not have just because it has jurisdiction over some of the matters arising therein. Neither court should give a final decision in a case only on issues within its jurisdiction.

F **[49]** Until the problem is solved by the Legislature, it appears that the only way out now is, if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the syariah court, the party raising the issue should file a case in the syariah court solely for the determination of that issue and the decision of the syariah court on that issue should then be applied by the civil court in the determination of G the case. But, this is only possible if both parties are Muslims. If one of the parties is not a Muslim such an application to the syariah court cannot be made. If the non-Muslim party is the would-be Plaintiff, he is unable even to commence proceedings in the syariah court. If the non-Muslim party is the would-be defendant, he would not be able to appear to put up his defence. The problem persists. Similarly, H if in a case in the syariah court, a civil law issue e.g. land law or companies law arises, the party raising the issue should file a case in the civil court for the determination of that issue which decision should be applied by the syariah court in deciding the case.

I **[50]** Something should be said about cl (1A) of art 121. This clause was added by Act A 704 and came into force from 10 June 1988. As explained by Professor Ahmad Ibrahim, who I would say was the prime mover behind this amendment in his article *The Amendment of Article 121 of the Federal Constitution: Its effect on the Administration of Islamic Law* [1989] 2 MLJ xvii:

One important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases before. For example, in *Myriam v Ariff* …

[51] Prior to the establishment of the syariah courts, custody of children, Muslim and non-Muslim, was within the jurisdiction of the civil courts. Then the syariah courts were established with jurisdiction regarding custody of Muslim children, pursuant to the provision of the State List. However, in *Myriam v Mohamed Arif*, the High Court held that it still had jurisdiction regarding custody of Muslim children. Hence the amendment.

[52] Actually if laws are made by Parliament and the Legislatures of the States in strict compliance with the Federal List and the State List and unless the real issues are misunderstood, there should not be any situation where both courts have jurisdiction over the same matter or issue. It may be that, as in the instant appeal, the granting of the letters of administration and the order of distribution is a matter within the jurisdiction of the civil court but the determination of the Islamic law issue arising in the petition is within the jurisdiction of the syariah court. But, these are two distinct issues, one falls within the jurisdiction of the civil court and the other falls within the jurisdiction of the syariah court. Still, there is a clear division of the issues that either court will have to decide. So, there is no question of both courts having jurisdiction over the same matter or issue.

[53] Of course, such a situation can arise where the Legislature of a State makes law that infringes on matters within the Federal List. I am quite sure that there are such laws made by the Legislatures of the States after the introduction of cl (1A) of art 121 even though I shall refrain from mentioning them in this judgment. In such a situation the civil court will be asked to apply the provision of cl (1A) of art 121 to exclude the jurisdiction of the civil court. The civil court should not be influenced by such an argument. Clause (1A) of art 121 was not introduced for the purpose of ousting the jurisdiction of the civil courts. The question to be asked is: Are such laws constitutional in the first place? And the constitutionality of such laws are a matter for the Federal Court to decide - Article 128.

[54] Coming back to the issue of jurisdiction in the instant appeal. We have seen that item 4(e)(i) of the Federal List, inter alia, provides that 'succession, testate and intestate; probate and letters of administration' are matters within the Federal jurisdiction. However, paragraph (ii) of item 4(e) removes 'Islamic personal law relating to … gifts or succession, testate and intestate' from the Federal jurisdiction. This is followed by item 1 of the State List that, inter alia, provides that 'Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate' are matters that fall within the State list.

[55] The following points should be made here. First, 'probate and administration' are within the Federal jurisdiction. 'Probate' is a certificate issued by the court on the application of executors appointed by the will, to the effect that the will is valid and the executors are authorized to administer the deceased's estate' — *A Concise*

Dictionary of Law: Oxford Reference. 'Administration', for the present purpose, means the granting of letters of administration to the estate of a deceased person to administer when there is no executor under the will - ibid. The application for the granting of Probate and Letters of Administration are governed by the Probate and Administration Act 1959, a federal law. (To simplify matters, 'small estates' are excluded in this discussion). It is the civil High Court that hears such applications. In the case of probate, among the questions that could arise are whether it is obligatory for Muslims to make a will, if he does, in accordance with Islamic law, and which court is to interpret it, whether a will made by a Muslim say, in accordance with the provisions of the Wills Act 1959 valid. These are all live issues.

[56] In the case of letters of administration (again I am only referring to non-small estates), an application is made to the civil High Court for the grant of a letter of administration. When the letter of administration is obtained, the administrator is appointed, and in case of an estate of a Muslim, the administrator will obtain a 'Sijil Faraid' from the syariah court which states who are the beneficiaries and their respective shares, in accordance with Islamic law. If the estate consists of immovable property, another application is made to the civil High Court for a vesting order. All that the civil High Court does in such an application is that, being satisfied with all the procedural requirements, the civil High Court makes a vesting order in accordance with the 'Sijil Faraid'. This second application is not necessary where the assets to be distributed are movable assets. However, the Administrator still requires a 'Sijil Faraid' for purpose of distribution.

[57] Since the case of *Jumaaton dan satu lagi lwn Raja Hizaruddin* [1998] 6 MLJ 556 has featured prominently in the arguments of both learned counsel and the judgments of both courts and also before this court, I shall deal with it first. It is a judgment of the Syariah Court of Appeal Kuala Lumpur.

[58] In that case, one Raja Nong Chik died leaving two wives and ten children. He died leaving, inter alia, shares in Arensi Holdings (M) Bhd. At the time of his death, 1,464,647 shares in Arensi Holdings (M) Bhd. were registered in the deceased's name while 11,095,666 shares were registered in the name of the respondent. The applicants had requested the respondent to distribute the shares held under the name of the respondent in accordance with 'faraid', on the ground that those shares formed part of the estate of the deceased. (There was no dispute regarding the shares registered under the name of the deceased: they belonged to the estate). The respondent refused to accede to the request.

[59] In a petition for the grant of a letter of administration in the civil High Court, the senior assistant registrar made a consent order that the Public Trustees Bhd be appointed as administrator of the estate of the deceased for a period of four months to administer the undisputed assets in list A of the petition without prejudice to any party wishing to challenge and dispute 'aset-aset dalam senarai A petisyen' ('assets in List A of the petition'. Could it be list B?) and without prejudice to any party wishing to challenge, dispute, add and/or amend the list of beneficiaries contained in the petition.

[60] With that background, the applicants made an application to the Syariah High Court:

(a) for a declaration the the 11,095,666 share (the disputed asset) registered in the name of the respondent are held by the respondent on behalf of the deceased and is part of the estate of the deceased;

(b) a declaration that all shares, dividend, bonus shares and/or issues received by the respondent from Arensi Holdings (M) Bhd., since the death of the deceased, were held by the respondent on behalf of the deceased are assets of the estate of the deceased;

(c) a declaration that all beneficiaries of the deceased are entitled to receive their respective shares (portions) in respect of the assets mentioned in (a) and (b) in accordance with 'faraid'.

[61] To me, the application made in both High Courts was in order. The petition for a letter of administration was made in the civil High Court. The application for the determination whether the disputed assets were assets of the estate and the proportion each beneficiary would receive, in accordance with faraid, was made in the Syariah High Court for its determination, that being issue of Islamic law. The final distribution will subsequently be made in accordance with the order of the syariah court (similar to 'Sijil Faraid').

[62] But, that was not to be.

[63] Going straight to what transpired at the Syariah Court of Appeal, two issues were argued:

(a) whether the syariah court had the jurisdiction to hear the case; and

(b) whether the appellants had locus standi to institute the proceedings as they had not obtained the letter of administration.

[64] The Syariah Court of Appeal held that syariah court had no jurisdiction 'in a probate and administration matter'. That is because probate and administration are matters in the Federal List and no exception was made in respect of Muslims. Therefore, the law applicable is the Probate and Administration Act 1959 which, if I may add, is within the jurisdiction of the civil High Court. To arrive at that conclusion the Syariah Court of Appeal referred to the provisions of item 1 of the State List, item 4(e) of the Federal List (but wrongly referred to as item 3(e)(ii)) and the Probate and Administration Act 1959.

[65] On the locus standi issue, the Syariah Court of Appeal decided that beneficiaries have no interest in an estate 'selama pentadbiran harta pusaka itu belum selesai' ('until the administration of the estate is completed' — my translation). The court relied on a number of cases decided by the civil courts in this country as well as in England for that proposition. The cases referred to are: *Lee Ah Thaw & Anor v Lee Chun Tek* [1978] 1 MLJ 173; *Khoo Teng Seong v Khoo Teng Peng* [1990] 3 MLJ 37; *Lord Sudeley & Ors v AG* [1897] AC 11; *Tan Heng Poh v Tan Boon Thong*

& Ors [1992] 2 MLJ 1; *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601. As a result the appeal was dismissed.

[66] The judgment has raised a number of important points. First, in holding that the case was not within the jurisdiction of the syariah court as it was a probate and administration matter, the court, in fact, gave effect to the provision of the Constitution, which is a matter within the jurisdiction of the civil court to do — art 128(2).

[67] Secondly, in my view and with respect, while the court was right in holding that probate and administration were outside its jurisdiction, it was wrong in thinking that the issue before it was an issue of probate and administration. It was not. From the judgment, at least it is very clear that the third declaration applied for (that all the 12 beneficiaries of the deceased were entitled to their respective shares in accordance with the 'faraid') was an Islamic law issue within the jurisdiction of the syariah court. However, from the judgment, we do not know whether the contradictory claims over the disputed shares concern the question of gift inter vivos or 'hibah' or on some other non-syariah legal ground eg under companies' law. If it was the former, then the syariah court should have decided whether there was a 'hibah' in accordance with Islamic law of those disputed shares and then proceed to determine the shares of the beneficiaries, respectively, according to 'faraid'. If it was the latter, of course the syariah court should not embark on civil law to determine the question whether those disputed shares were part of the estate of the deceased or not. That is a matter for the civil court. If that was the case, what the syariah court could do was to stay proceedings until that issue is determined by the civil court. Once that is determined, and if it forms part of the estate of the deceased, then the syariah court should proceed to determine the portion to which each beneficiary is entitled to, according to 'faraid'. That order is then filed in the civil court, which will give effect to it. Of course, this is very cumbersome. But, that is the only way out under the current law. That is why I call upon the Parliament to step in to remedy the situation. In any event, it is not right for syariah court to take the view that as probate and administration is within the jurisdiction of the civil court, it has no jurisdiction even to determine those Islamic law issues. This is in fact provided for by s 50 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505). I shall deal with this provision later.

[68] Coming now to the issue of 'locus standi'. The Syariah Court of Appeal held that as the administration had not been completed yet, the beneficiaries had 'no interest in the estate' to give them the locus standi to make the application. With respect, I think the Syariah Court of Appeal had misconceived the situation. Administration is only complete when the estate has been distributed. Here, even the Administrator had not been appointed yet. The civil High Court was in the process of granting the Letter of Administration. It was for that purpose that those issues had to be determined by the syariah court in accordance with Islamic law. Section 50 of the Administration of Islamic Law (Federal Territories) Act 1993 makes provision of such an application:

> 50. If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or

a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the Syariah Court may, on the request of such court or authority, or on the application of any person claiming to be a beneficiary or his representative and on payment by him of the prescribed fee, certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled.

[69] Note that 'any person claiming to be a beneficiary or his representative' may apply to the syariah court 'to determine the persons entitle to share in the estate, or the shares to which such persons are respectively entitled'. That is the answer to the locus standi issue, not the irrelevant judgments of the civil courts in Malaysia and/or England.

[70] The provision of s 50 was in fact reproduced in the judgment of the Syariah Court of Appeal. Unfortunately, the court took the view that that provision could not be resorted to 'selagi terdapat sekatan-sekatan yang telah disebutkan mengenai kuasa mahkamah sivil dalam perkara probet dan pentadbiran harta pusaka yang diberi kepadanya oleh Perlembagaan Malaysia dan Akta Probet dan Pentadbiran 1959.' (So long as there are limitations mentioned earlier regarding the jurisdiction of the civil court in probate and administration conferred to it (ie the civil court) by the Malaysian Constitution and the Probate and Administration Act 1959' — my translation).

[71] It is unfortunate that the provisions of the Constitution has been misunderstood.

[72] (I think I have to clarify one point here. It is not my intention to criticize the judgment of the Syariah Court of Appeal. However, as this court has been urged to accept and apply that judgment in deciding this appeal, I have no alternative but to give my reasons why, in my view, this court should not accede to the request. In any event, the issue involved in that case is not an ascertainment of Islamic law).

[73] Coming back to the instant appeal. There is a petition for a Letter of Administration in the civil High Court. An issue arises whether the joint accounts form part of the estate of the deceased or not which depends on whether there was a gift inter vivos or not. That gift inter vivos here means 'hibah' (the Islamic law of gift) was agreed by the parties in the agreed questions posed in the High Court for its decision. In the circumstances, I agree with the Court of Appeal that it is the Islamic law of 'hibah' that applies. We have seen that paragraph (ii) of item 4(e) of the Federal List excludes 'Islamic personal law relating to … gifts or succession.' This is further reinforced by item 1 of the State List which specifically provides that 'Islamic law … of persons professing the religion of Islam, including … gifts …' Section 61(3) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (the relevant law, in this case) also provides:

'(3) The Syariah High Court shall —

(a) ...

(b) (b) in its civil jurisdiction, hear and determine all actions and proceedings if all the

parties to the actions or proceedings are Muslims and the actions and proceedings relate to —

( ) ...

(vi) *gifts inter vivos*, or settlements made without adequate consideration in money or money's worth by a Muslim';

(Emphasis added.)

[74] So, it is very clear that the determination whether the assets in question had been given as a valid 'hibah' by the deceased to the appellant is a matter that falls within the jurisdiction of the syariah court. The Court of Appeal was right on this point.

[75] The argument by learned counsel for the appellant that the law on hibah must first be legislated before it can be applied is without merit. When jurisdiction is given to the syariah court with regard to 'hibah' it is up to that court to ascertain and apply the law. It is the same in the civil court in relation to common law. If the common law of England applies in a given situation, it is for the court to ascertain what it is and apply it. I do not think it can be argued that the common law must be legislated first before it can be applied in this country. That, in fact, is a contradiction in terms.

[76] This case is in fact similar to the case of *Jumaaton*. In this case, there is a petition for a Letter of Administration in the civil High Court. There is a dispute whether certain asset is part of the estate of the deceased, and who are the beneficiaries entitled to it and in what proportion according to the 'faraid'. That is a matter within the jurisdiction of the syariah court to decide, even though, in *Jumaaton*, the Syariah Court of Appeal held that the syariah court had no jurisdiction to do so. In case an application to the syariah court is resisted on the ground that the syariah court is bound by the judgment in *Jumaaton*, let me answer that question right now. Interpretation of the Federal Constitution is a matter for this court, not the syariah court. This court says that the syariah court has jurisdiction. It has.

[77] I have taken the liberty to take a wider look at the provisions of the Constitution relating to the jurisdictions of the civil and the syariah courts and to point out the problems that the litigants and the courts are faced with. This is because, I think, after 50 years, the provisions relating thereto will have to be reviewed and updated to meet the present circumstances.

[78] The Constitution was made 50 years ago at the time when the Muslims in the then Malaya were mostly Malays living in rural areas working mainly, as farmers, rubber tappers and fishermen. Marriages were usually within the village or the district. Inter-marriages were very rare. Conversions to Islam were equally rare. Indeed, at that time anyone who converted to Islam 'became a Malay' ('masuk Melayu'). 'Harta sepencarian' was confined to small plots of rice land or rubber small-holdings in the same District or State. The Constitution was drafted under those circumstances and it was to cater for such conditions that the syariah court was established. No one then could foresee the problems that would arise regarding the administration of the syariah court (eg as a result of it being a State court) and the

jurisdictional issues involving the syariah and the civil court and non-Muslims involved in a matter falling within the jurisdiction of the syariah court.

[79] Now, fifty years after independence during which period Malaya had become Malaysia. The country that was an agricultural country has transformed into an industrial country. With better education and economic development, the Malay-Muslim society itself has transformed. Inter-state population movement is common. Inter-state marriages and inter-marriages are a common occurrence. Conversion to Islam and re-conversion happen more frequently. 'Harta sepencarian' now includes shares and bank accounts. In other words, the conditions have drastically changed.

[80] As a result, jurisdictional problems that had not been envisaged have arisen. Some require double proceedings, one in the civil court and another in the syariah court before a final decision may be made. This causes delay and incurs unnecessary expenses. Others are outside the jurisdiction of both courts. These are not matters that the courts can solve as the courts owe their jurisdiction to statutes. It is for the Legislature to step in, to decide as a matter of policy what should be the solution and legislate accordingly.

[81] At least, as far as the instant appeal is concerned, all the parties being Muslims, there is a way out even though it involves double proceedings, delay and more expenses.

[82] I do not think it is necessary for me to try to answer the questions as they are framed. It is sufficient and clearer that I answer the question that touches the crux of the case which disposes of the appeal in my own way and it is this: where a question arises as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in a petition for a Letter of Administration in the civil High Court, the answer to which depends on whether there was a gift inter vivos or not, that question shall be determined in accordance with the Islamic law of gift inter vivos or 'hibah'. The determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the syariah court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate.

[83] I would dismiss the appeal with costs and order that the deposit be paid to the Respondents to account of taxed costs.

[84] My learned brothers YA Dato' Arifin Zakaria FCJ and YA Dato' Augustine Paul FCJ have read this judgment in draft and have agree with it. I am grateful to both my learned brothers for their comments and contributions in finalizing the judgment.

Appeal dismissed.

Reported by Loo Lai Mee