
**RES JUDICATA IN THE MALAYSIAN SYARIAH
COURT WITH SPECIAL REFERENCE TO THE
CASE OF *S OSMAN BIN S KARIM & ANOTHER
V AK OTHMAN SHAH BIN PG MOHD YUSSOF
& ANOTHER***

Res Judicata is a fundamental doctrine of all courts that there must be an end of litigation.¹ Where this doctrine is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the entire legal rights and obligations of the parties are concluded by the earlier judgment. It is however interesting to note whether the doctrine of Res Judicata is applicable in a Syariah Court? Does it require similar elements² which are necessary to support the defence of Res Judicata as in civil courts? Is there a limitation to this defence in Islamic law? It is the main aim of this paper to discuss the suitability of the application of the doctrine of Res Judicata in the Syariah Court. The whole discussion in this paper will be based on the case of *S Osman bin S Karim & Another v AK Othman Shah bin Pg Mohd Yussof & Another*³ which shall be referred to as the "Karambunai" case.

¹*Halsbury Law Of England*, Volume 16, Reissue 1995, paragraph 973, at page 858.

²That is, (i) The subject matter in dispute was the same, namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit; (ii) it came into question before a court of competent jurisdiction; and (iii) the result was conclusive so as to bind every other court.

³[1998] 5 MLJ 597.

The Facts in the *Karambunai* Case

A piece of land (the 'said land') was given by the Sultan of Brunei to Pg. Abdul Rauf ('PAR'). The said land was then inherited by Pg Mohd Jalaluddin ('PMJ'). PMJ executed an agreement with one of British company ('BNBC') where the said land was transferred to BNBC. According to the administration of BNBC, the said land was owned personally by PMJ. Then, the said land was transferred to Pg Siti Fatimah ('PSF') and was registered by the land registrar according to the Sessions Court's Order. When PSF died, the said land was transferred to her children via the order of the Native Court and upon their death, the High Court had appointed the Public Trustee as a trustee for the said land and later transferred the said land to the defendants. For a period when the said land was entrusted to the public trustee, none of the descendants of PAR or PMJ identified themselves to the public trustee as valid beneficiaries who are entitled to the said land. The plaintiffs served the summons and statement of claims to the defendants. They claimed the distribution of the estate including the said land according to the Muslim law of inheritance (*faraid*) on the ground that they were the legal beneficiaries of PAR and PMJ. It is contended that the transfer of the said land to PSF was invalid and there existed an element of fraud of the said transfer. The defendants filed an application to revoke the summons and the plaintiff's statement of claim on the grounds that: (i) it does not establish any reasonable cause; (ii) it is vexatious, frivolous, and scandalous; or (iii) abuse the process of the court. The issues raised were: (i) whether the Syariah High Court has jurisdiction to hear an application to revoke a summons; (ii) whether the case of the land dispute between PMJ and PAR was settled; and (iii) whether this court has the jurisdiction to hear cases which have been settled.

The First Issue: Whether the Syariah High Court has Jurisdiction to Hear an Application to Revoke a Summons ?

It is clear that sections 69, 116,⁴ 244⁵ and 251⁶ of the Syariah Civil Procedure Enactment 1993 empower the court to hear the application to revoke a summons. Hence, the first issue was settled. With regards to the second issue, it is necessary to look at whether the issue of the land dispute was settled.

The Second Issue: Whether the Case of the Land Dispute between PMJ and PAR was Settled?

In this case, the court decided that the land dispute was settled by two ways: firstly, by the agreement; and secondly, by the order of the court.

(a) The Agreement and the Order of the Court

The agreement entered into by PMJ and BNBC in 1898 required PMJ to give the land that was under his jurisdiction, that is, Karambunai to BNBC. Consequently, the estate of PAR which was claimed by PL1 ceased to exist and therefore PL1 had no locus standi to claim the distribution even though he was the beneficiary of PAR.

The estate of PMJ was also settled via the court's order which was executed by the registrar in 1935. Even though at this point it can be argued that the transfer of the said land to PSF was invalid as it was not unanimously agreed to by the other beneficiaries at that time and

⁴Section 116 states that the stay, withdrawal, striking out or dismissal of the plaintiff's claim shall not prevent the hearing and determination of a counterclaim.

⁵Section 244 states that the court may at anytime order that any scandalous, irrelevant or vexatious suit be struck out and may award expenses of any application in that behalf.

⁶Section 251 states that nothing in this Act shall be deemed to limit or affect the inherent power of the court to make such orders as may be necessary to prevent injustice or to prevent abuse of the process of court.

therefore it contravened the Islamic law of inheritance, the court held that since there was no objection by the other beneficiaries at that particular time, the implied consent could be assumed.

(b) Res Judicata and Islamic Law of Inheritance

The court went on to say that the solution before the court should be based solely on the earlier judgment and the court's order on the estate. In the absence of other applications to set aside the order of the court as regards to the transfer to PSF, the proper approach to be adopted was that the matter was *res judicata* and this was supported by section 28⁷ of the Sabah Syariah Evidence Enactment⁸ and thus, the parties were estopped from challenging the validity of the earlier order. The plaintiffs then wisely applied section 32 of the Enactment. The section allows any party to a suit or other proceeding to show that any judgment, order or decree which is relevant under sections 28, 29 or 30 and which has been proved by the adverse party was delivered by a court not competent to deliver it or was obtained by fraud or collusion. Unfortunately, the allegation of fraud was not proved by the plaintiffs and the allegation that there was a fraud in the transaction was refused.

The learned judge, Mat Jakir, stated that there are three situations where one particular case is assumed to have been settled and where *res judicata* would apply in subsequent proceedings:

- (a) by the order of the court;
- (b) settlement through an arbitrator;⁹ and

⁷Section 28 of the Sabah Syariah Court Evidence Enactment 1992 states that: "The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial".

⁸16/1992.

⁹Section 88 of the Syariah Civil Procedure Enactment 1993 states that: 1) Whereby agreement of the parties an action has been settled, (i) the court or the registrar may, at any time by consent of the parties, record the fact of such settlement with or without recording the terms thereof, or (ii) any party to the settlement may apply to have the settlement recorded and the court, if satisfied after hearing the parties that the action has been settled, shall record the settlement and the terms thereof; and 2) The record of settlement shall afford a defence by way of *res judicata* to subsequent proceedings.

- (c) withdrawal of the case without permission from the court where the defendant has filed the defence.¹⁰

Since the estate of PMJ was settled by the earlier court's order, consequently, the Syariah court cannot hear the present case unless according to the learned judge, the Syariah court is given the power to revise those cases.

We now turn to the next point, that is, whether the order by the earlier court is in accordance with the Islamic law of inheritance. Even though the allegation of fraud was not proved in this case, regard should be had to the principles of the distribution of estates in the Islamic law of inheritance. As valid beneficiaries of PMJ, the said Karambunai land should be distributed to the them according to the Islamic principles of inheritance and PSF cannot solely inherit it.

The Main Purpose of Estoppel and Res Judicata - To Uphold Justice - Defeated

The rationale of the doctrine is that it creates an estoppel per *rem judicatum*. In other words, when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata issues, *because the judgment becomes the truth between such parties, or in other words the parties should accept it as the truth.*¹¹ However, if the decision or order of the previous court was not in accordance with the Islamic principles of inheritance as in the present case and consequently causing injustice to one of the parties, must the parties accept it as the *truth*? In the present circumstances, justice requires the non-application of the estoppel or res judicata on the party who suffered as a result

¹⁰Section 91, *ibid*, states that the withdrawal shall afford a defence by way of res judicata to subsequent proceedings unless: (a) it occurred before the filing of the defence, or if no defence is filed, before the proceeding or; (b) the court has granted leave to institute a fresh proceeding.

¹¹Per Peh Swee Chin FJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, at page 197.

of the previous judgment and therefore, the plaintiffs should not be prevented or shut out from re-opening the issue in the next proceeding.¹² Furthermore, if plaintiffs are estopped from re-opening the issue, or if the doctrine of res judicata applies, it defeats the main purpose of the doctrine of res judicata or estoppel, that is, to uphold justice.

Conclusion

For all of the above reasons, even though the requirements of res judicata have been fulfilled in the present case, the most important thing is that there is a limitation to this defence in the Syariah court. If the previous judgment contravenes the principle of Islamic law itself, the parties must not in any way be caught or bound by the said principles of res judicata or estoppel.

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¹²See per Vincent Ng J in *Richland Trade & Development Sdn. Bhd. & Ors v United Malayan Banking Corp Bhd.*[1996] 4 MLJ 233, at page 249.

***BERJASA INFORMATION SYSTEM SDN. BHD.
V TAN GAIK LEONG (T/A JURUKUR BERJASA)
& ANOR***

Introduction

The High Court of Kuala Lumpur delivered the first decision in Malaysia that estoppel is applicable in copyright. In *Berjasa Information System Sdn. Bhd. v Tan Gaik Leong (t/a Jurukur Berjasa) & Anor*¹ (hereafter referred to as the '*Berjasa case*'), the court held that the conduct of the defendants and their act of silence had estopped them from claiming ownership of the copyright.

The judgment in the *Berjasa case* is a marked and questionable application of estoppel in copyright. A year earlier, the Federal Court in *Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysian Merchant Bank Bhd.*² took a broad view that the doctrine of estoppel is a flexible principle and the circumstances where the doctrine may operate are endless.³

Prior to the decision in the *Berjasa case*, there was reluctance in the Malaysian court to invoke estoppel in copyright cases. No special reasons are evident but possibly, estoppel was thought to be irrelevant in copyright or the cases could be decided without applying estoppel. In other areas of Intellectual Property, estoppel and acquiescence have been adopted as a defence.⁴

¹[1996] 1 MLJ 808.

²[1995] 3 MLJ 331.

³*Ibid*, per Gopal Sri Ram JCA, at page 344.

⁴See for example *Smith Kline & French Laboratories Ltd. v Salim (Malaysia) Sdn. Bhd.* [1989] 2 MLJ 380.