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LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA v. EDWIN CASSIAN NAGAPPAN

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
B NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 03-3-10-2019(W)]
19 JULY 2021

C ***CIVIL PROCEDURE:*** *Liability – Joint and severally – Company failed to make employer contributions on behalf of employees – Employees' Provident Fund Board commenced suit against company and directors – Parties entered into consent judgment – Consent judgment did not include phrase that defendants would be 'jointly and severally' liable for judgment sum – Whether failure to include 'jointly and severally' meant each defendant would be only liable for portion of judgment* D *sum, proportionate to share/interest/obligation – Whether court should give effect to liability on 'joint and several' basis – Employees Provident Fund Act 1991, ss. 44 & 46*

E The appellant, the Employees' Provident Fund Board ('EPF Board'), commenced a suit against a company and its directors, Edwin and Bernard ('defendants'), premised on the company's failure to make employer contributions on behalf of its employees. The parties recorded a consent judgment where the defendants agreed to pay the EPF Board, *inter alia*, the arrears. The consent judgment, however, did not include the phrase that the defendants would be 'jointly and severally' liable for the judgment sum. F When the defendants failed to comply with the terms of the consent judgment, the EPF Board proceeded to issue a bankruptcy notice against Edwin alone and presented the latter with a creditor's petition. Edwin applied to set aside the bankruptcy notice and the creditor's petition and the Senior Assistant Registrar ('SAR') allowed the application. The EPF Board G appealed to the judge-in-chambers but the appeal was dismissed. The High Court Judge affirmed the decision of the SAR, ordered the defendants to pay the sum in equal proportions and further held that if the words 'jointly and severally' liable were not inserted into the consent judgment, the court could not look behind the judgment. The EPF Board's appeal to the Court of H Appeal was similarly unsuccessful as the Court of Appeal, in agreement with the High Court, was of the opinion that it could not import into the enforcement or bankruptcy order, the phrase 'joint and several'. Both the High Court and Court of Appeal were of the view that the failure to include the phrase 'jointly and severally' in a court order would mean that each defendant would be only liable for a portion of the judgment sum, I proportionate to his share/interest/obligation. Hence, the present appeal.

The question of law that arose for the court's determination was whether the court should give effect to the liability on a 'joint and several' basis as provided under s. 46 of the Employees Provident Fund Act 1991 ('Act') in a situation where the words 'joint and several' were not specifically stated in the judgment.

Held (allowing appeal)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) Section 46 of the Act imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect as they comprise statutory laws. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in a manner which is not consonant with the Act. In short, the Act prevails over the terms of the judgment. Section 44 of the Act is also relevant. The liability of the judgment debtors in the present appeal was both joint and several by operation of law. (paras 36 & 38)

(2) The courts below erred in law in invoking the presumption that joint liability meant liability for only half the debt and not the full amount. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promises. The promisee, the EPF Board, was therefore entitled to proceed against one promisor or the other or both in order to procure full performance, as evident from s. 44 of the Act. (para 39)

(3) There was notable absence of terms creating 'joint' liability in the judgment itself. Even if such a term had been inserted, that would not entitle the courts to conclude that liability was somehow halved between the two obligors or promisors. Given the prevailing interpretation of s. 44 of the Act, merely inserting the word 'jointly' in the consent judgment would not suffice to halve liability as there must be express words to that effect to state that the liability of the joint promisors is to be borne in equal proportions. Moreover, such halved liability should take root from the original promise where the liability of a promisor for a debt owed to a creditor is expressly stated to be only half of the debt. If the premise that 'joint and several liability' could not be read into the judgment due to an absence of such words were to be accepted, it similarly follows that a silent judgment could not automatically be inferred to impose 'joint' liability where there is no such mention. This is especially so when the liability that arises is explicitly stipulated by statute. In the circumstances, liability under the consent judgment must necessarily be both joint and several. The question of law was answered in the affirmative and the matter was remitted to the High Court. (paras 40 & 42)

A ***Bahasa Melayu*** *Headnotes*

Perayu, Lembaga Kumpulan Wang Simpanan Pekerja ('Lembaga KWSP'), memulakan tindakan terhadap sebuah syarikat serta pengarah-pengarahnya, Edwin dan Bernard ('defendan-defendan'), berlandaskan kegagalan syarikat tersebut membuat caruman majikan bagi pihak pekerja-pekerjanya. Pihak-
B pihak merekodkan penghakiman persetujuan dan defendan-defendan bersetuju membayar, antara lain, tunggakan kepada Lembaga KWSP. Penghakiman persetujuan ini, walau bagaimanapun, tidak menyertakan ungkapan bahawa defendan-defendan bertanggungan secara 'bersama atau berasingan' untuk jumlah penghakiman. Apabila defendan-defendan gagal
C mematuhi terma-terma penghakiman persetujuan, Lembaga KWSP terus mengeluarkan notis kebankrapan terhadap Edwin sahaja dan menyampaikan petisyen pemiutang kepadanya. Edwin memohon mengetepikan notis kebankrapan dan petisyen pemiutang dan Penolong Kanan Pendaftar ('PKP') membenarkan permohonan ini. Lembaga KWSP merayu pada hakim dalam
D kamar namun rayuan tersebut ditolak. Hakim Mahkamah Tinggi mengesahkan keputusan PKP, memerintahkan defendan-defendan membayar jumlah tersebut secara sama rata dan seterusnya memutuskan bahawa jika perkataan-perkataan 'bersama dan berasingan' bertanggungan tidak dinyatakan dalam penghakiman persetujuan, mahkamah tidak boleh melihat
E sebalik penghakiman tersebut. Rayuan Lembaga KWSP ke Mahkamah Rayuan juga tidak berjaya kerana Mahkamah Rayuan, menyetujui Mahkamah Tinggi, berpendapat bahawa mahkamah tidak boleh mencedok masuk ungkapan 'bersama dan berasingan' dalam perintah pelaksanaan atau kebankrapan. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan
F berpendapat bahawa kegagalan menyertakan ungkapan 'bersama dan berasingan' dalam perintah mahkamah akan bermaksud setiap defendan hanya bertanggungan untuk sebahagian jumlah penghakiman, bertepatan dengan bahagian/kepentingan/kewajipannya. Maka timbul rayuan ini. Soalan undang-undang yang timbul untuk diputuskan oleh mahkamah adalah sama ada mahkamah harus memberi kesan pada tanggungan atas dasar
G 'bersama dan berasingan', bawah s. 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta') dalam situasi apabila perkataan-perkataan 'bersama dan berasingan' tidak dinyatakan secara khusus dalam penghakiman mahkamah.

H **Diputuskan (membenarkan rayuan)**

Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Seksyen 46 Akta mengenakan tanggungan bersama dan berasingan pada pengarah-pengarah syarikat untuk caruman-caruman yang tidak
I berbayar. Peruntukan-peruntukan ini mesti diberi kesan penuh kerana kesemuanya terdiri daripada undang-undang statutori. Tidak terbuka

buat mahkamah untuk membuntu, mengubah atau mengurangkan peruntukan-peruntukan nyata yang diisytiharkan oleh Parlimen berkaitan tanggungan caruman KWSP, dengan mentafsir penghakiman menggunakan kaedah yang tidak selaras dengan Akta. Pendek kata, Akta mengatasi terma-terma penghakiman. Seksyen 44 Akta juga relevan. Tanggungan penghutang penghakiman dalam rayuan ini adalah bersama dan berasingan melalui operasi undang-undang.

(2) Mahkamah bawahan terkhilaf dalam undang-undang apabila membangkitkan anggapan bahawa tanggungan bersama dan bermaksud tanggungan untuk separuh hutang dan bukan jumlah penuh. Tanggungan bersama dan berasingan membangkitkan kewajipan bersama hingga sebanyak beberapa kewajipan kerana wujud janji bersama dan berasingan. Oleh itu, penerima janji, iaitu Lembaga KWSP, berhak meneruskan tindakan terhadap satu pemberi janji atau satu lagi atau kedua-duanya demi memperoleh pelaksanaan penuh, berdasarkan s. 44 Akta.

(3) Ketiadaan terma membentuk tanggungan 'bersama' adalah nyata dalam penghakiman itu sendiri. Jika pun terma tersebut dimasukkan, mahkamah tidak berhak menyimpulkan bahawa tanggungan terbahagi antara dua pemberi kewajipan dan janji. Berdasarkan tafsiran s. 44 Akta yang mengatasi, sekadar memasukkan perkataan 'bersama' dalam penghakiman persetujuan tidak cukup untuk membahagi dua tanggungan kerana mesti terdapat perkataan-perkataan nyata yang memberi kesan sedemikian untuk menyatakan bahawa tanggungan pemberi-pemberi janji bersama dipikul sama rata. Tambahan lagi, tanggungan yang terbahagi dua sedemikian mesti berasaskan janji asal yang tanggungan pemberi janji untuk jumlah yang dihutangi pada pemiutang jelas dinyatakan sebanyak separuh hutang. Jika tanggapan 'tanggungan bersama dan bertanggungan' tidak boleh dibaca dalam penghakiman akibat ketiadaan perkataan-perkataan sedemikian diterima, diikuti bahawa penghakiman diam tidak boleh secara automatik disimpulkan mengenakan tanggungan 'bersama' apabila tidak disebut. Ini khususnya apabila tanggungan yang timbul jelas diperuntukkan dalam statut. Dalam hal keadaan ini, tanggungan bawah penghakiman persetujuan semestinya kedua-dua bersama dan berasingan. Soalan undang-undang dijawab secara afirmatif dan hal perkara ini dikembalikan ke Mahkamah Tinggi.

Case(s) referred to:

Balgobin v. South West Regional Health Authority [2012] UKPC 11 ***(refd)***
Blyth v. Fladgate [1891] 1 Ch 337 ***(refd)***
Dhanki Mahajan v. Rana Chandubha Vakhatsing AIR 1969 SC 69 ***(refd)***
Drake v. Mitchell [1803-13] All ER Rep 541 ***(refd)***
In Re Vallibhai Adamji 1933 Indlaw MUM 179 ***(refd)***
Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong [2021] 5 CLJ 1 CA ***(refd)***
Kendall v. Hamilton (1879) 4 App Cas 504 ***(refd)***

A *King v. Hoare (1844) 13 M & W 494* ***(refd)***
Lechmere v. Fletcher (1833) 1 Cr & M 623 ***(refd)***
Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal [2018] 2 CLJ 305 CA ***(refd)***
Tang Min Sit v. Capacious Investments Ltd [1996] AC 514 ***(refd)***
Union of India v. East Bengal River Steamer Service Limited 1963 Indlaw Cal 177 ***(refd)***
B *Young v. Bristol Aeroplane Co Ltd [1944] KB 718* ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 44(1), (2)
Employees Provident Fund Act 1991, ss. 44, 46

Contract Act 1872 [Ind], s. 43
C

Other source(s) referred to:
Chitty on Contracts: Vol 1, General Principles, 33rd edn, (London: Thomson Reuters, 2018), para 1391-1403, p 1391
Halsbury's Laws of England, 4th edn, Vol 9, 1974, Contract, '9. Joint and Several Promises', para 624
D *Halsbury's Laws of England,* 5th edn, Vol 22, 2012, Contract, '9. Joint Promises', para 648
Peel, Edwin, Trietel: The Law of Contract, 14th edn, (Great Britain: Sweet & Maxwell, 2015), paras 13-007, 13-008
Pollock & Mulla: Indian Contract and Specific Relief Acts – Vol 1, 13th edn, (India: LexisNexis, 2009), pp 1043-1044
E

For the appellant - Afifil Ahmad & Nabila Rosli; M/s Azrul Afifi & Azuan
Respondent not present

[Editor's note: For the Court of Appeal judgment, please see Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2020] 1 LNS 226 (overruled).]

F *Reported by Najib Tamby*

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

G

[1] The issue before the Federal Court turned on what is meant by "joint liability" as opposed to "joint and several liability". In the instant appeal, judgment was obtained against the appellant here, and one other, premised on their personal liability as directors for the failure of the employer company to make employment provident fund ("EPF") payments to its employees. The order of the High Court, the court of first instance, did not expressly specify the type of liability imposed upon two debtors, one of whom is the appellant. The provisions of the Employees Provident Fund Act 1991, more particularly s. 46, expressly provides for the joint and several liability of directors of an employer company, where there is a failure to make the requisite employer's contribution.

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[2] The issue before the courts below was the nature of the liability against each of the two debtors, given that the order of the trial court adjudging liability against them did not expressly specify whether each debtor was liable for the full quantum or not. Both the courts below were of the view that the failure to include the phrase "jointly and severally" in a court order would mean that each defendant would be only liable for a portion of the judgment sum, proportionate to his share/interest/obligation.

[3] We reversed the decisions of the courts below and now give our reasons for doing so.

Salient Facts

[4] The Employees' Provident Fund Board ("the Board") filed a Sessions Court suit against a company, Fix Interior Collections Sdn Bhd ("the company") and its directors, two siblings named Edwin Cassian a/l Nagappan @ Marie ("Edwin") and Bernard John a/l Nagappan @ Marie Alphonso Michael, premised on the company's failure to make employer contributions on behalf of its employees.

[5] The parties recorded a consent judgment dated 24 April 2013, where each of the three defendants agreed to pay the Board the arrears amounting to RM133,697 for the period from October 2010 until January 2012 in 24 installments, together with dividends and interest as well as legal fees of RM800. The subject of contention in the subsequent enforcement proceedings was that the consent judgment did not include the phrase that the defendants would be "jointly and severally" liable for the judgment sum.

[6] The defendants failed to comply with the terms of the consent judgment as they only made part payment, leaving an outstanding balance of RM90,857 with dividends and interest.

[7] The Board then issued a bankruptcy notice against Edwin alone. It was served by way of substituted service. Likewise, the creditor's petition which the Board presented against Edwin was also served by way of substituted service.

The High Court

[8] Subsequently, Edwin applied to set aside the bankruptcy notice and the creditor's petition. The Senior Assistant Registrar of the High Court allowed the application to set aside both the bankruptcy and the creditor's petition. Dissatisfied, the Board appealed to the judge-in-chambers. The Board's appeal was dismissed by the judge of the High Court.

[9] The High Court Judge affirmed the decision of the Senior Assistant Registrar which relied on the Court of Appeal case of *Sumathy Subramaniam v. Subramaniam Gunasegaran & Another Appeal* [2018] 2 CLJ 305; [2017] 6

MLJ 753 ("*Sumathy*") which held that in a case where bankruptcy proceedings were initiated simultaneously against two judgment debtors, they could not both be held liable for the whole judgment sum.

[10] The High Court therefore ordered them to pay the sum in equal proportions, stating that it was bound by *Sumathy*. It further held that if the words "jointly and severally" liable were not inserted into the consent judgment, the court cannot look behind the judgment.

The Court Of Appeal

[11] The Board's appeal to the Court of Appeal was similarly unsuccessful and was dismissed on 29 April 2019. The Board contended before the Court of Appeal that its action against Edwin was filed pursuant to s. 46 of the Employees Provident Fund Act 1991 ("the EPF Act") which provides as follows:

> **46 Joint and several liability of directors, etc**
>
> (1) **Where any contributions remaining unpaid by a company,** a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, **the directors of such company** including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, **shall together with the company,** firm or association of persons liable to pay the said contributions, **be jointly and severally liable for the contributions due and payable to the Fund.** (emphasis added)

[12] The Board's reliance on s. 46 of the EPF Act to urge the court to read in the words "jointly and severally" into the consent judgment was not accepted by the Court of Appeal, despite the express statutory provisions of the Act imposing joint and several liability. The Court of Appeal agreed with the High Court that the case of *Sumathy* was applicable to the present facts and went on to hold that it could not import into the enforcement or bankruptcy order, the phrase "joint and several".

[13] The reason given by the Court of Appeal was the fact of the consent judgment between the Board and the directors, which it held to be a contract binding the parties. The Court of Appeal then went on to hold, erroneously, that the bankruptcy notice and the creditor's petition were defective because these papers claimed for the whole judgment sum instead of only the portion owed by Edwin. In short, the Court of Appeal was of the considered view that the liability of each of the two directors was only half of the debt owed to the Board.

The Federal Court

[14] The Board applied for leave to appeal to the Federal Court. Leave was granted on this sole question of law:

> Whether this Court should give effect to the liability on a "joint and several" basis as provided under section 46 of the Employees Provident Fund Act 1991 in a situation where the words "joint and several" were not specifically stated in the court judgment.

[15] At the end of the hearing before us, we determined, unanimously that the question of law is to be answered in the affirmative. We append below our reasons for so concluding.

Our Analysis And Decision

The Law: Joint, Several, and Joint and Several Liability – General Principles

[16] Joint liability arises when two or more persons jointly promise to do the same thing. There is only one obligation or promise, and consequently, performance by one person discharges the others. In the case of a joint promise, the obligation is single and entire. It is extinguished by a judgment and decree in a suit against any one of the joint promisors: see *In Re Vallibhai Adamji* 1933 Indlaw Mum 179, AIR 1933 Bom 407.

[17] Several liability, on the other hand, arises when two or more persons make separate promises to another, whether by the same instrument or by different instruments. There is more than one obligation or promise, as compared to joint liability where there is one obligation or promise.

[18] A joint and several promise is different from a joint promise. Joint and several liability arises when two or more persons in the same instrument jointly promise to do the same thing and also severally make separate promises to do the same thing. Joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promisors: see *In Re Vallibhai Adamji* (*supra*).

[19] It is like joint liability in that the co-promisors are not cumulatively liable, so that performance by one discharges all; but it is free from most of the technical rules governing joint liability: see Burrows, Andrew, "*Joint Obligations*"; *Chitty on Contracts*: vol. 1, General Principles, 33rd edn., (London: Thomson Reuters, 2018), paras 1391-1403 at p. 1391.

[20] In all these instances, the promisor who has discharged the liability may then seek a proportionate share from each of the other debtors. The creditor however is at liberty to go against any one or all of the debtors.

The Position At Common Law

[21] At common law, it used to be that a judgment recovered against one or more of a number of joint debtors precludes an action against the others: see *King v. Hoare* (1844) 13 M & W 494, *Kendall v. Hamilton* (1879) 4 App Cas 504, HL. This is due to the doctrine of merger or upon the rule that joint debtors have the right to be sued together: see *Halsbury's Laws of England*, 4th edn., vol 9, 1974, Contract, '9. Joint and Several Promises' at para. 624. Because the rule resulted in hardship to the creditor, it was abolished by statute in the United Kingdom, with the consequence that a creditor is no longer precluded from suing one joint debtor merely because he has previously obtained a judgment against another: see Peel, Edwin, *Trietel: The Law of Contract,* 14th edn., (Great Britain: Sweet & Maxwell, 2015), para. 13-007.

[22] However, when liability is joint and several, a judgment against one debtor does not, even at common law, bar a several action against another: *Lechmere v. Fletcher* (1833) 1 Cr & M 623, *King v. Hoare* (1844) 13 M & W 494 at 505, *Blyth v. Fladgate* [1891] 1 Ch 337 at p. 353, *Balgobin v. South West Regional Health Authority* [2012] UKPC 11; [2013] 1 AC 582 at [21], *Halsbury's Laws of England*, 5th edn., Vol 22, 2012, Contract, '9. Joint Promises' at para. 648. A claim against joint and several debtors is barred only if one of them satisfies it, whether under a judgment or otherwise: see Peel, Edwin, *Trietel: The Law of Contract*, 14th edn., (Great Britain: Sweet & Maxwell, 2015), at para. 13-008. This rule was rationalised by Lord Ellenborough in *Drake v. Mitchell* [1803-13] All ER Rep 541 at p. 542 as follows:

> … a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party, and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have.

[23] It is pertinent to note that even under the old common law position, there was no indication that in a joint liability situation, the liability of two or more debtors is shared. That is a misconception of the meaning of joint liability.

The Position In Malaysia

[24] In this jurisdiction in any event, the common law is inapplicable, as we are governed by the Contracts Act 1950. Section 44 of the Contracts Act 1950 (Act 136) ("the Contracts Act") is the relevant provision relating to joint liability. It states:

> (1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel **any one** or more of the joint promisors to **perform the whole** of the promise.
>
> (emphasis added)

[25] Section 44 of the Contracts Act is in *pari materia* with s. 43 of the Indian Contract Act, 1872. In *Re Vallibhai Adamji* (*supra*), BJ Wadia observed that the provision:

> … makes the liability on all contracts joint and several, and allows the promisee to sue one or more of the several joint promisors as he chooses, and excludes the right of any one of them to be sued along with his co-promisor or co-promisors.

(See also: *Union of India v. East Bengal River Steamer Service Limited* 1963 Indlaw Cal 177; AIR 1964 Cal 196)

[26] In summary therefore, unless a contrary intention is expressed in the contract, all joint contracts effectively impose a full liability for the debt on each of the promisors, by virtue of s. 43 of the Indian Contract Act, 1872: see *Pollock & Mulla: Indian Contract and Specific Relief Acts* – vol. 1, 13th edn., (India: LexisNexis, 2009), at p. 1043-1044. Thus, where the debts are jointly incurred, each promisee is liable for the whole amount: see *Dhanki Mahajan v. Rana Chandubha Vakhatsing* AIR 1969 SC 69.

[27] Accordingly, so long as a judgment debt remains unrealised, the judgment creditor is entitled to proceed against one or any number of judgment debtors to secure the performance of an obligation in its entirety.

[28] The issue that possibly gives rise to confusion is s. 44(2) of the Contracts Act which allows the promisor who has paid the full promised amount to claim contribution from the joint promisor for an equal contribution. This means that the liability for the full promised sum is shared equally between all the promisors. However that is between the promisors, *inter se*. It does not affect the rights of the creditor which are governed by s. 44(1) of the Contracts Act.

[29] This brings us to the underlying rationale for joint liability as opposed to joint and several liability. Each of these doctrines relates to the number of promises made, and not the number of promisors who made a particular promise. In the case of joint liability, there is one promise and two or more promisors. Each is liable to the extent of the promised amount. In the case of a joint and several liability, there is more than one promise. The promisors make two or more promises and thus several liability arises.

Conclusion

[30] In summary, even in the United Kingdom where there is a judgment premised on a joint liability, the creditor is at liberty to go against one, or the other or both. In respect of the present appeal, the position is even clearer in this jurisdiction because we are governed by s. 44 of the Contracts Act which statutorily provides that the creditor may proceed against one or both of the joint promisors.

The Court Of Appeal Decision In Sumathy

[31] As stated earlier, the courts below regarded themselves bound by the earlier Court of Appeal decision in *Sumathy*. In *Sumathy*, the creditor sued the principal borrower and the guarantor for monies outstanding under a friendly loan. Summary judgment was entered against both defendants, on the same terms, but the judgment did not state whether the liability of the parties was joint or several. Subsequently, two separate bankruptcy notices were filed at the same time against the principal borrower and the guarantor, both specifying the judgment debt of RM291,800.

[32] The Court of Appeal held at para. 19 of the judgment that a plaintiff who becomes a judgment creditor where the liability is joint, is only entitled to seek recovery in equal proportions against each of the defendants. This premise is, with respect, flawed because it pre-supposes that liability is proportionate to the number of promisors, from the perspective of the creditor. In *Sumathy*, the position of the creditor was conflated with the position of the debtors or promisors *inter se*, as we have explained above.

[33] We would also respectfully point out that the doctrine of merger has no application in the issue of whether or not the enforcement court can look behind the judgment. Merger comes into play when the cause of action is sought to be revisited against the same parties.

The Court Of Appeal Decision In Kejuruteraan Bintai Kindenko

[34] In *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leon*g [2021] 5 CLJ 1; [2021] 2 MLJ 234, costs of RM50,000 was awarded to Kejuruteraan Bintai Kindenko ("KBK") against Fong and four other petitioners. KBK then commenced bankruptcy proceedings against Fong as the costs of RM50,000 was never paid. Fong challenged the bankruptcy notice on the ground that he was not indebted to the sum of RM50,000. This contention found favour with the High Court.

[35] KBK then appealed to the Court of Appeal. The Court of Appeal, speaking through Justice Darryl Goon Siew Chye, in a meticulous and comprehensive judgment examining a long line of cases, concluded that it differed in reasoning with *Sumathy*. However, the Court of Appeal was constrained to dismiss the appeal as it regarded itself bound by the decision in *Sumathy* based on the rule of *stare decisis* as enunciated in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718. We would, with respect concur with the reasoning in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Fong Soon Leong* [2021] 5 CLJ 1; [2021] 2 MLJ 234.

The EPF Act

[36] The instant appeal concerns a consent judgment entered into between the parties. Of primary importance is s. 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in manner which is not consonant with the EPF Act. In short, the EPF Act prevails over the terms of the judgment.

[37] In any event, we reiterate that the reading by the Court of Appeal of the judgment in the instant case was flawed by reason of its misapprehension of the term "joint liability" as explained above.

[38] Finally, s. 44 of the EPF Act is also relevant by virtue of our discussion above. It is manifestly clear that the liability of the judgment debtors in the present appeal is both joint and several by operation of law.

[39] In our considered opinion, the courts below erred in law in invoking the presumption that joint liability means liability for only half the debt and not the full amount. As mentioned earlier, joint and several liability gives rise to one joint obligation and to as many several obligations as there are joint and several promises. The promisee, ie, the Board, is therefore entitled to proceed against one promisor, or the other, or both, in order to procure full performance as is evident from s. 44 of the EPF Act.

[40] Furthermore, there is a notable absence of terms creating "joint" liability in the judgment itself. Even if such a term had been inserted that would not entitle the courts to conclude that liability is somehow halved between the two obligors or promisors. Given the prevailing interpretation of s. 44 of the EPF Act, merely inserting the word "jointly" in the consent judgment would not suffice to halve liability as there must be express words to that effect to state that the liability of the joint promisors is to be borne in equal proportions. Moreover, such halved liability should take root from the original promise whereby the liability of a promisor for a debt owed to a creditor is expressly stated to be only half of the debt. If we are to accept the premise that "joint and several liability" cannot be read into the judgment due to an absence of such words, it similarly follows that a silent judgment cannot automatically be inferred to impose "joint" liability where there is no such mention. This is especially so when the liability that arises is explicitly stipulated by statute. In the circumstances, liability under the consent judgment must necessarily be both joint and several in light of our discussion above.

[41] One final point remains to be made. The Court of Appeal in *Sumathy* was concerned that the judgment creditor would be "very much overpaid" if both defendants were to be liable for the amounts in the bankruptcy notices. To address this, guidance can be gleaned from *Tang Min Sit v. Capacious Investments Ltd* [1996] AC 514, where Lord Nicholls of Birkenhead delivering the Privy Council judgment at p. 522 said that:

> ... a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. This principle of full satisfaction prevents double recovery.

Conclusion

[42] We unanimously allowed the appeal with no order as to costs. We answered the question of law in the affirmative for the reasons above. The matter is remitted to the High Court.