DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: B-02(IM)-1911-10/2016

ANTARA

1. **GAN BEE SAN**
   (No. K/P: 641109-10-5368)
2. **LEE LENG LENG**
   (No. K/P: 580209-10-5270)
3. **CHUA YOKE LAN**
   (No. K/P: 820127-10-5066) **… PERAYU-PERAYU**

DAN

1. **MALAYAN BANKING BERHAD (3813-K)** **… RESPONDEN PERTAMA**
2. **SKS FOAM (M) SDN BHD**
   (NO. SYARIKAT: 191363-U)
   (Dalam Likuidasi) **… RESPONDEN KEDUA**

[Dalam Perkara Nombor Penggulungan Syarikat: 28-535-12/2012
Dalam Mahkamah Tinggi Malaya Di Shah Alam

Dalam Perkara Seksyen 217 dan 218(1)(e) Akta Syarikat 1965

Dan

Dalam Perkara SKS Foam (M) Sdn Bhd
(No. Syarikat: 191363-U)

Antara

Malayan Banking Berhad (3813-K) **… Pempetisyen**

Dan

SKS Foam (M) Sdn Bhd
(No. Syarikat: 191363-U) **… Responden]**

CORAM

LIM YEE LAN, JCA
IDRUS BIN HARUN, JCA
YEOH WEE SIAM, J

JUDGMENT OF THE COURT

[1] By a Notice of Motion dated 29.6.2016, the appellants had applied pursuant to Order 15 rule 6(2)(b)(ii) of the Rules of Court 2012 and section 243(1) of the Companies Act 1965 or the inherent jurisdiction of the court for leave to intervene in the winding up proceedings between the first and second respondents, and for an order that the order of winding up dated 18.3.2013 (the said winding up order) be set aside or in the alternative that all further proceedings in respect of the winding up of the second respondent be stayed.

[2] The grounds of the application appear sufficiently in the Notice of Motion and to the extent that they are central to this appeal, we would mention that the appellants, in their grounds of application started off by stating that a petition to wind up the second respondent was presented on 19.12.2012 upon which petition, the second respondent was ordered to be wound up on 18.3.2013. However, the said winding up order was made by the Deputy Registrar of the High Court at Shah Alam which was in contravention of rule 5(1)(a) of the Companies (Winding Up) Rules 1972. Under the said rule, a petition to wind up a company has to be heard before a judge in open court and not by a registrar. In view of the fact that the said winding up order was made by the Deputy Registrar of the High Court, that order is null and void and ought to be set aside as the Deputy Registrar has no power to order the winding up of the second

respondent. That being the case, the position adopted by the appellants is that this is a fit and proper case for the court to set aside the said winding up order.

[3] The learned judge, that is Mohd Yazid Mustafa J, on 23.9.2016 dismissed the appellants' application concluding that the Notice of Motion was unsustainable. In the grounds of judgment, His Lordship found that the said winding up order was made before the Deputy Registrar of the High Court at Shah Alam and not before Vernon Ong J (as His Lordship then was) as alleged by the first respondent. However, despite this finding, the learned judge held that the appellants must file an appeal to the Court of Appeal against the said winding up order. Another reason relied on by the learned judge in dismissing the application was that the appellants had no locus standi to intervene for the reasons that they had not obtained leave of court to institute the proceeding against the second respondent who was in liquidation. The appellants, moreover did not file a notice to appear at the hearing of the petition nor a proof of debt with the liquidator and they were not creditors let alone shareholders of the second respondent. Finally, there was, according to the learned judge, a delay in filing the application which was 3 years after the said winding up order was made and yet the appellants failed to provide any explanation for such delay. The learned judge held in the end that the application to intervene should have been made before the said winding up order was granted.

[4] This appeal therefore concerns, and has been brought by the appellants in light of, the order made by the learned judge on 23.9.2016 in dismissing the appellants' application. At the heart of the appeal lies the essential question which is confined exclusively to the status of the

said winding up order of 18.3.2013 which is whether it was made before the Deputy Registrar or before Vernon Ong J, and if it was granted by the Deputy Registrar, whether the said winding up order was valid.

[5] The principal challenge mounted by the respondents against the appellants' appeal is described in this Court in their written submissions to the effect that the appellants' application and thus this appeal are academic. It would be necessary to mention that this main ground was in fact relied on by the respondents during the hearing of the Notice of Motion in the court below when they raised a preliminary objection thereon. The application, learned counsel for the respondents submitted, was academic and no longer a live issue simply because there was a typographical error in the said winding up order when it was stated therein that the same was granted by the Deputy Registrar and that it had since been amended via an order given by the High Court on 18.7.2016 to show that the said winding up order was in fact made by Vernon Ong J.

[6] At this point, it is necessary to draw attention to one aspect of the proceedings before the High Court, that is, while the appellants' application dated 29.6.2016 was pending in the court below, solicitors for the first respondent on 4.7.2016 applied by way of a Summons In Chambers to the court to amend the said winding up order to read as though it had been made by Vernon Ong J. It is interesting to note that the first respondent's application to amend the said winding up order was allowed by Mohd Yazid Mustafa J on 18.7.2016. However, the facts gleaned from the appeal record clearly show that the said winding up order was never granted by Vernon Ong J. In fact, the winding up application was heard before the Deputy Registrar and the said winding up order was made by him in chambers. It is also a significant point to

emphasize that the learned judge, in his Grounds of Judgment dated 23.2.2017 found for a fact that the said winding up order dated 18.3.2016 was made by the Deputy Registrar and not by Vernon Ong J.

[7] Accordingly, this material point raises a question concerned with the amendment of the said winding up order on 18.7.2016 which according to the respondents was made because there was a clerical error when the said winding up order was drawn up. There can be no doubt whatsoever that there was no clerical error in the drawing up of the said winding up order. The first respondent, coming to the realisation that they had made a mistake in obtaining the said winding up order before the Deputy Registrar of the High Court, proceeded by the back door to apply to the court to amend the same and had in due course surreptitiously obtained the amendment order to make it appear as though it had been made by Vernon Ong J when in truth His Lordship never made the said winding up order. The fact that the application to amend the said winding up order was never served on the appellants but served on solicitors for the second respondent only lends credence to our finding that the amendment order was obtained by surreptitious application.

[8] We can only describe the act of the first respondent's solicitors in taking this course of action as wholly inappropriate when it was within their knowledge that the said winding up order was made by the Deputy Registrar and that there was no clerical error therein. It is significant to observe that, despite the pendency of the appellants' Notice of Application to *inter alia*, set aside the said winding up order on the ground that the same was invalid as it was made by the Deputy Registrar, the first respondent proceeded with the application to amend the said winding

up order without serving the Notice of Motion on the appellants although they saw it fit to serve the said Notice of Motion on the second respondent who consented to the amendment. The first respondent without any doubt had initially prosecuted the said winding up proceedings without any amendment until it was pointed out by the appellants in their Notice of Motion that the said winding up order was an illegality and void ab initio. It was in fact only at this stage that the first respondent sought to amend the said winding up order knowing fully well that it was a nullity. The appellants, by the manner in which the application was made, we should say, had been deprived of the right to be heard on the first respondent's application to amend the winding up order.

[9] Now we quote from the Companies (Winding Up) Rules 1972 the relevant rule 5 which is expressed as follows:

> **5. Matters to be heard in Court and Chambers**
>
> (1) The following matters and applications in Court **shall be heard before the Judge** in open Court:
>
> *(a)* petitions;
>
> *(b)* appeals to Court;
>
> *(c)* applications under section 307;
>
> *(d)* applications for the committal of any person to prison for contempt;
>
> *(e)* applications for an order for a public examination;
>
> *(f)* applications to rectify the register;
>
> *(g)* such matters and applications as the Judge may from time to time by any general or special orders direct to be heard before him in open Court.

(2) Subject to the provisions of the Act every other matter or application to the Court under the Act to which these Rules apply may be heard and determined in Chambers. [our emphasis]

Based on rule 5(1), it is clear to us that the effect of this rule is that a winding up order must be made by a judge in open court. The Deputy Registrar, in our judgment, was bereft of any power to grant the said winding up order which he did in chambers and thus in contravention of this rule. Consequently, the said winding up order is invalid and void ab initio. The question of amending the said winding up order under the circumstances did not arise, however, since the court below had allowed the application to amend an invalid order coupled with the fact that the appellants had been deprived of the right to be heard on the respondents' application, which in our view is in breach of rules of natural justice, the amending order is consequently rendered null and void as well.

[10] It is legitimate in this connection to have regard to the case of **Krish Maniam & Co v. Golden Plus Holdings Berhad [2014] MLRHU 466** and we reproduce the entire judgment of the case delivered by Vernon Ong J below –

"[1] On 2 April 2014, the Court allowed the respondent's oral application to set aside the Winding-Up order dated 18 December 2013. The grounds of the decision are as follows:

1. The winding-up petition was heard before a Deputy Registrar on 18 December 2013.

2. The Winding-Up order was made by the Deputy Registrar not withstanding the fact that according to the order the coram was Justice Vernon Ong in open court.

3. The manner in which a petition shall be heard is prescribed under the Companies (Winding-Up) Rules 1972. Rule 5 of the 1972 Rules stipulates that petitions shall be heard before the Judge in open Court.

4. In this instance, the winding-up petition was heard in chambers. Secondly, it was heard before a Deputy Registrar instead of the Judge. Thirdly, on the morning of the day in question, I was not sitting as I was attending a meeting at the Kuala Lumpur High Court.

5. In all the circumstances, the Winding-Up order was made in breach of r 5 of the 1972 Rules. Not only was it made in breach of the open court requirement under r 5, it was given without jurisdiction. A Deputy Registrar has no jurisdiction to make a winding-up order.

6. An order which is illegal is a nullity and cannot be allowed to stand. This is especially so in the case of a Winding-Up order which bears serious and far reaching consequences for a company.

7. For the foregoing reasons, the Court allowed the respondent's oral application to set aside the Winding-Up order (***Badiaddin; Serac Asia FC***)."

[11] In **Krish Maniam**, supra, it was brought to the attention of Vernon Ong J that the Deputy Registrar made the winding up order and His Lordship on his own motion made an order that the winding up order was invalidly made. We are saying in this appeal that the said winding up order was invalidly made as it was so made by the Deputy Registrar without jurisdiction. On the facts of the present case, we accept the submission urged on behalf of the appellants that clearly the said winding up order was in breach of rule 5(1) of the Companies (Winding Up) Rules

1972. Therefore, the impugned order is not a mere irregularity, it is instead null and void and this Court has inherent jurisdiction to set aside the said winding up order as of right. It could not be said, as the respondents through their counsel had attempted to convince us, that Vernon Ong J had acted through the Deputy Registrar. There is not an iota of evidence to support this contention. In fact, His Lordship's decision in **Krish Maniam**, supra, clearly shows that the learned judge would not have allowed such thing to happen for an obvious reason that there is absolutely no provision in the law or practice direction for the learned judge to permit the Deputy Registrar to exercise his powers. Further, there is completely no evidence to show that in the instant case this is the practice of the court. Even if there is, such practice in our judgment plainly contravenes a clear direction of the law in rule 5(1) of the Companies (Winding Up) Rules 1972. As the said winding up order is an illegality having been made for want of jurisdiction, the issue whether the appellants ought to have filed an appeal against the said winding up order as contended by learned counsel on behalf of the respondents did not arise. The correct approach would be to set aside the said winding up order. At the risk of repetition, we are going to say it again without any hesitation that the said winding up order was made by the Deputy Registrar of the High Court and this finding had been accepted by the learned judge in his judgement wherein he had in no uncertain terms held that the same was made by the Deputy Registrar. This is what the learned judge said –

> "22. After examining the Court records, I find that the winding up order dated 18.3.2013 was made before the Deputy Registrar of Shah Alam High Court and not before the learned then High Court judge, Datuk Vernon Ong."

[12] The authority on which the appellants principally rely on the issue of an invalid order is the case of **Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd [1998] 1 MLJ 393** in which the Federal Court authoritatively held as follows:

> "It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the **final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction** so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of ***Isaacs v. Robertson*** **[1985] AC 97** where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "… which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.
>
> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly, in this country the statement of Abdoolcader J (as he then was) in ***Eu Finance Bhd v. Lim Yoke Foo*** **[1982] 1 MLRA 507**; [1982] 2 MLJ 37 at page 39 provides the correct guideline on the subject:

> ‘The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In ***Harkness v. Bells’ Asbestos and Engineering Ltd*** **[1967] 2 QB 729,** Lord Diplock LJ (now a Law Lord) said (at p 736) that ‘it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside’.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened ‘any written law’, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.” [our emphasis]

[13] The principle which can be distilled from the above case is that, as a general rule, an aggrieved party who is dissatisfied with a final order of

a High Court must file an appeal to the Court of Appeal. But, a clear exception to this rule would be the case where the order made by the High Court is null and void when it is obtained in breach of rules of natural justice or on the grounds of illegality or lack of jurisdiction, in which case the High Court in exercising its inherent jurisdiction will have the power to set aside its own order. Therefore, when this Court was called upon to determine the question whether the learned judge had erred in dismissing the appellants' application, we are satisfied that the attempt by the respondents to persuade us to hold that the appellants' application and appeal are academic is completely untenable and must be rejected.

[14] Reference in this connection may also be made to the decision of the Federal Court in **EU Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37** and we quote the relevant excerpts from its judgment –

> "The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon ----- in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In ***Harkness v Bell's Asbestos and Engineering Ltd*** **[1967] 2 QB 729, 736**, Lord Diplock L.J. (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
>
> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal

'but he is not bound to (do so), because he is at liberty to treat the act as void' [***Birmingham (Churchwardens and Overseers) v Shaw*** **(1849) 10 QB 868, 880; 116 ER 329** (at page 880 *per* Denman C.J.)]. In ***Barnard v National Dock Labour Board*** **[1953] 2 QB 18**, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 *per* Singleton L.J.). ***Ridge v Baldwin*** **[1964] AC 40** is to the same effect.

Lord Denning said in ***Director of Public Prosecutions v Head*** **[1959] AC 83** (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in ***Regina v Paddington Valuation Officer & Anor., Ex parte Peachey Property Corporation Ltd (No. 2)*** **[1966] 1 QB 380**, (at page 402). The judgment of this court in ***Pow Hing & Anor v Registrar of Titles, Malacca*** **[1980] 1 MLRA 57; [1981] 1 MLJ 155**, refers (at page 157) to the decision of the House of Lords in ***London & Clydeside Estates Ltd v Aberdeen District Council & Anor [1980] 1 WLR 182***, and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

…We reiterate the second order in the matter before us is invalid and wholly dehors the provisions of the Code and no appeal is therefore essential or necessary to impugn its validity and it can be subject to collateral attack in the instant proceedings."

[15] The judgment of the Federal Court in **Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374** is also clearly in sync with its decisions in the above cases where it accepted that the rule that the Court had no power under any application in the action to alter or vary a judgment after it had been entered or an order after it had been drawn up, except in so far as is necessary, to correct errors in expressing the intention of the Court, was subject to certain exceptions, one of which was that an order which is a nullity owing to failure to comply with an essential provision such as service of process, could be set aside by the court which made the order in the exercise of its inherent jurisdiction. We would also refer to the decision of this Court in **Sibu Slipway Sdn Bhd v Yii Chee Ming & Ors and other appeals [2017] 1 MLJ 368** in which it was acknowledged that the court always retained a residuary power in its inherent capacity to intervene and remedy wrongs, particularly when there was an abuse of process.

[16] We would hold that, our conclusion that the said winding up order is void ab initio for the reasons we have alluded at length above, is enough to dispose of this appeal. Nevertheless, upon determination of the respondents' principal issue, for completeness, it would be apposite that we endeavour to consider the relevant ancillary grounds relied on by the respondents in their written submission.

[17] In this regard, we have given anxious consideration to the argument urged for the respondents that the High Court was *functus officio* and thus lacked jurisdiction to entertain the application upon granting the order to wind up the second respondent. However, as we have earlier found, since the said winding up order, having been granted by the Deputy Registrar who had no jurisdiction to grant it, was an order that

was void ab initio, we cannot therefore accede to this argument which is obviously a non-issue. Suffice it to say that in the event the order had been validly made by a judge, then the issue of *functus officio* becomes relevant. Otherwise, this issue of *functus officio* is undoubtedly a dead issue.

[18] Another point of contention of the respondents is that the appellants have no requisite *locus* to apply to the court for intervention, on the grounds that the appellants did not obtain leave of court pursuant to section 226(3) of the Companies Act 1965, that they are not parties to the winding up proceedings, that the first appellant as a creditor did not file any proof of debt with the liquidator and that the second and third appellants are not shareholders of the second respondent who did not file any proof of debt with the liquidator. However the facts that we could discern from the affidavit of the first appellant affirmed on 28.6.2016 show that she was the creditor of the second respondent. The first appellant relied on the evidence of a letter dated 28.6.2010 issued by her to the second respondent showing that the second respondent was indebted to the first appellant with the outstanding sum of RM973,700.00 payable to her. So far as it concerns the second and third appellants, the allegation that they are not shareholders of the second respondent has been rebutted in their affidavit affirmed on 28.6.2016 in which it was stated that they were the shareholders of the second respondent. They have in this regard relied on two separate Forms 32A which are Forms of Transfer of Securities dated 26.5.2010 and 2.7.2010 showing that they were shareholders of the second respondent. Based on Form 32A dated 26.5.2010, it is evident that the shares in the second respondent were transferred by Tan Yoke Soon to Lee Leng Leng, the second appellant in this appeal, whereas Form 32A dated 2.7.2010 shows that the shares in

the second respondent were transferred by Chua Teow Pak to Chua Yoke Lan, the third appellant in this appeal.

[19] In our judgment, there is ample proof as manifested above that the first appellant was the creditor of the second respondent. The fact that she did not file a proof of debt with the liquidator does not necessarily mean that the first appellant is not the second respondent's creditor. The fact remains that there is a sum outstanding which is payable by the second respondent to the first appellant. There is also sufficient proof in the form of duly executed share transfer forms that would show that the second and third appellants are the shareholders of the second respondent. This issue is again a non issue. The relevant issue before the court is yet again whether the order has been validly made and we are satisfied, on the facts of the present case, that the order has not been validly made. The issue raised in no way detracts from the established fact that the said winding up order is illegal as the Deputy Registrar did not have the jurisdiction to grant such order.

[20] A submission was made for the respondents that there were laches and inordinate delay on the part of the appellants in making the application to intervene and set aside the said winding up order. The learned judge thought that there was indeed a delay in filing the application. The question before this Court is whether the order is a valid order. In our judgment, once it has been brought to the attention of the court that an order is illegal and void ab initio, it behoves this Court immediately to step in on its own volition to set aside the said winding up order. The execution of an illegal order must be stopped at all costs. Needless to say in this regard, that it is open to the parties to file a fresh winding up proceedings.

[21] The argument of the respondents which we will now consider as the last remaining question relates to the issue of leave upon which it was urged for the respondents that the appellants required leave of the winding up court to file the application. We agree with the appellants' contention that the appellants do not require leave of the Winding Up Court to file this application. It is clear that the appellants have not filed any fresh proceedings at all. The application herein is in a pending matter. It is essentially a proceeding commenced by the appellants with the object of setting aside the order invalidly made, to wind up the second respondent which in no way can be treated as a fresh suit or action filed by the appellants against the second respondent that would fasten liability on the second respondent or its assets. We do not think that this application falls within the scope of, or contravenes, section 226(3) of the Companies Act 1965 which prohibits any action or proceeding from being proceeded with or commenced against the company except by leave of the court. No such leave is, in our judgment, necessary in the case before us.

[22] In conclusion, for the reasons we have given above, the instant application under consideration before this Court is a thoroughly meritorious appeal and we think that this is an appropriate case for this Court to formally interfere with the decision of the learned judge. His Lordship had clearly misdirected himself on the facts and the law in dismissing the appellants' application. Having found that the winding up order was made by the Deputy Registrar and that the said order was made in contravention of rule 5(1) of the Companies (Winding Up) Rules 1972 which rendered the order a nullity ab initio, the learned judge ought to have exercised the court's inherent jurisdiction to set aside the said winding up order. The said winding up order, being an illegal order,

cannot be allowed to stand in the court's record. We accordingly set aside the order of the High Court dated 23.9.2016 and allow the Notice of Motion dated 29.6.2016 as per prayers 1 and 2 thereof. The appeal is allowed with costs of RM15,000 to be shared by the appellants.

Signed

(IDRUS BIN HARUN)
Judge
Court of Appeal, Malaysia
Putrajaya

Dated: 10 August 2017

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