

Salijah bte Ab Latef
v
Mohd Irwan bin Abdullah Teo

[1996] SGCA 32

Court Of Appeal — Civil Appeal No 93 of 1995
Yong Pung How CJ, Lai Kew Chai J and Goh Joon Seng J
27 March; 8 May 1996

Civil Procedure — Jurisdiction — Litigant seeking order for enforcement of Syariah Court order through High Court — Order sought premised on declaration of rights — Whether conflict of jurisdiction between High Court and Syariah Court — Whether order sought fell solely within jurisdiction of Syariah Court — Characterisation — Distinction between jurisdiction and power — Section 35 Administration of Muslim Law Act (Cap 3, 1985 Rev Ed)

Equity — Remedies — Injunction — Syariah Court order requiring husband to transfer ownership of matrimonial home to wife on payment — Wife duly making payment — Whether husband's legal title to his share of property cut — Whether wife having personal equity against husband for transfer of property — Whether mandatory injunction lay against husband

Muslim Law — Syariah Court — Jurisdiction — Ancillary matters consequent on Muslim divorce — Whether Syariah Court having sole jurisdiction — Section 35 Administration of Muslim Law Act (Cap 3, 1985 Rev Ed)

Facts

The parties, who were Muslim, were granted a divorce by the Syariah Court, which also ordered that the husband's share in their jointly-owned flat be given to her and that all moneys taken from his CPF account to purchase the flat be repaid by her without interest. As the appellant wife lost all contact with the respondent husband after his desertion, she was unable to effect the transfer of the property. She sought relief in the High Court pursuant to the order made by the Syariah Court. As s 14(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed, 1993 Reprint) ("SCJA"), the provision which allowed for the High Court to enforce its "judgment or order", could not be extended to enforce a judgment or order of the Syariah Court, the appellant's procedural tack was to apply to the High Court for a declaration that she was entitled to sole ownership of the flat, and then for consequential relief that would in effect enforce the Syariah Court order.

The High Court dismissed her application on the ground that jurisdiction was excluded by s 16(2) of the SCJA, as the matter was covered by s 35(2)(d) of the Administration of Muslim Law Act (Cap 3, 1985 Rev Ed) ("AMLA"). Furthermore, no declaration could be granted as the appellant had no justiciable right, the matter being *res judicata* and exclusive jurisdiction had been given to another tribunal. The appellant appealed on various grounds, the main one being whether the order sought for enforcement of the Syariah Court order fell solely within the jurisdiction of the Syariah Court. This required a determination

of the characterisation of the orders sought; the distinction between jurisdiction and power; and the effectiveness of the Syariah Court.

Held, dismissing the appeal:

(1) The orders sought rested on a declaration of rights of the appellant, which could not be characterised as an order for enforcement, but was a substantive determination of the rights of the appellant: at [34], [35] and [36].

(2) The ability to enforce an order could not be described as an incident of jurisdiction. It was a form or type of power. As such it had to be examined whether the cause of action fell within the ambit of the Syariah Court. The crucial test was whether in substance the subject matter of the dispute had been demarcated for determination by the Syariah Court. As the subject matter of the dispute required a statement of the wife's interest in the property, such interest arising from the divorce, pursuant to s 35 of the AMLA, the High Court had no jurisdiction to enter into determination at all. This was despite the fact that what was being asked for was ostensibly the enforcement of the earlier order. There being no jurisdiction, there was no scope for the exercise of a power: at [40] and [41].

(3) The declaration sought went to the substance of the order made by the Syariah Court, not merely its legal effectiveness: at [46].

[Observation: Although the court below characterised the question as whether there was a justiciable right that could be the subject of a declaration, the real issue was whether the rights were contested. Justiciableness was restricted to whether the courts ought as a matter of policy to determine particular issues, generally with a high political content. In this appeal, no legal rights remained to be contested, except by way of appeal. What amounted to a contest of rights was that there must be a subsisting dispute between the parties which had not been resolved by any judgment of court. Once there had been such a judgment the controversy ended subject only to the right of an appeal: at [62] and [63].

A strong policy reason for not granting the declaration was that to do so would be tantamount to the High Court becoming an enforcement body, curing defects of power of other tribunals. Such tribunals like the Syariah Court were clearly intended to be independent of the High Court, and the High Court ought not interfere with them save under administrative law: at [91].

The Syariah Court order contemplated the husband transferring ownership to her on payment of the CPF funds. The husband's legal title to his share of the property had been cut down such that it existed only so long as the wife did not make payment. When the wife was prepared to make that payment, the husband's legal title ought to pass over to her, and the husband could not in all conscience continue to hold it. The wife had a right then to seek the intervention of a court of equity, she having a personal equity against the husband for the transfer of the property. That equity could be served by a mandatory injunction, and it was then open for the High Court to order that the husband convey the property to the wife upon payment of the CPF: at [98], [101] and [104].]

Case(s) referred to

Ainsworth v Criminal Justice Commission (1992) 66 ALJR 271 (refd)

- Barnard v National Dock Labour Board* [1953] 2 QB 18 (refd)
- Baynard v Woolley* (1855) 20 Beav 583; 52 ER 729 (refd)
- Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd (No 2)* [1967] 1 AC 853; [1966] 2 All ER 536 (refd)
- Central Provident Fund Board v Lau Eng Mui* [1995] 2 SLR(R) 826; [1995] 3 SLR 109 (folld)
- Davies v Gas Light and Coke Company* [1909] 1 Ch 248 (refd)
- Den Norske Bank AS v Northern Feather Pte Ltd* [1992] 2 SLR(R) 853; [1993] 1 SLR 402 (distd)
- Green v Weatherill* [1929] 2 Ch 213 (refd)
- Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485; [1994] 2 SLR 316 (distd)
- Jefferys v Jefferys* (1841) Cr & Ph 138; 41 ER 443 (refd)
- Kendall v Hamilton* (1879) 4 App Cas 504 (refd)
- Lockyer v Ferryman* (1877) 2 App Cas 519 (refd)
- Merker v Merker* [1963] P 283 (distd)
- Morrison Rose & Partners v Hillman* [1961] 2 QB 266 (refd)
- Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348; [1990] SLR 999 (folld)
- Mutasa v Attorney General* [1979] 3 All ER 257 (refd)
- Patten v Burke Publishing Co Ltd* [1991] 1 WLR 541 (refd)
- Rahimah bte Hussan v Zaine bin Yusoff* [1995] 1 SLR(R) 239; [1995] 2 SLR 391 (refd)
- Rampai Anak Changgat v Langau Anak Chandai* (folld)
- Redland Bricks Ltd v Morris* [1970] AC 652 (refd)
- Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 (refd)
- Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* [1938] 2 All ER 101 (refd)

Legislation referred to

- Administration of Muslim Law Act (Cap 3, 1985 Rev Ed) s 35 (consd)
- Constitution of the Republic of Singapore (1985 Rev Ed, 1992 Reprint) Art 94(1)
- Rules of Court 1996, The O 15 r 16, O 20 r 5, O 27 r 7, O 57 r 13(4)
- Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed, 1993 Reprint) ss 14, 16(2), 18, First Schedule para 14

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The respondent in person.*

[Editorial note: The decision from which this appeal arose is reported at [1995] 3 SLR(R) 233.]

8 May 1996

Judgment reserved.

Yong Pung How CJ (delivering the judgment of the court):

1 This is an appeal from the decision of Judith Prakash J dismissing the application of the appellant, the divorced wife, for a declaration concerning the interest of the wife in a property. The wife was in effect seeking the assistance of the High Court in enforcing an order of the Syariah Court, the court having jurisdiction over the parties, making division of that property. The respondent, the husband, was not represented below, but the judge was assisted by an *amicus curiae*, Ms Choi Yok Hung.

2 At the hearing of the appeal, the husband appeared in person. Upon being questioned by the court, it was apparent that he took issue with the merits of the Syariah Court's order. The Court of Appeal was informed by the husband that he sought to appeal against the decision of the Syariah Court. Leave to appeal out of time was granted by the Appeal Board, but the husband took no further steps in the proceedings thereafter. In the interests of justice, it was decided that the husband ought to be allowed some time to proceed with the appeal on the merits. The court thus ordered that the time be taken for consideration of the appeal, and that no judgment would be handed down for a period of six weeks, which gave the husband time to pursue his appeal in the Syariah Court. That appeal was heard by the Syariah Court Appeal Board on 27 April 1996. The decision of the Board was handed down on 30 April. All that concerns this Court of Appeal was that the Appeal Board ordered that the property be sold with the money remaining after refunds to the parties' respective CPF accounts, and various other payments, to be divided with 40% to the husband and 60% to the wife. Such an order of course meant that there was no basis for the declaration sought. Nonetheless, as the matters raised were of some importance judgment is now given as to whether the declaration sought could have been granted.

3 The draft of this judgment was prepared before the outcome of the Appeal Board hearing was known. It was, therefore, premised upon the assumption that no variation would be ordered. In the circumstances, particularly as the subjunctive mood reads awkwardly if used too frequently, save for the concluding remarks, the following portions of the judgment of this court will read as if no variation had been made and the wife could still rely on the original Syariah Court order.

Brief facts

4 The parties are Muslims who married in December 1981, and have three children. They purchased their matrimonial home, a flat, at Block 638 Yishun St 61 #01-150 in their joint names. In 1993, a divorce was sought in the Syariah Court by the wife, on the grounds of desertion and failure by the husband to maintain both herself and the children. In June 1993, the

divorce was granted, and the wife was awarded custody of the children, with access to the husband. The court also ordered that:

the flat ... shall be given to the wife. All the CPF contributions of the husband used to purchase the flat shall be returned to his CPF account without interest. The husband shall transfer his interest in the flat to the wife. All expenses relating to the transfer ... shall be borne by the wife.

5 The husband was not present at the hearing. As the wife was unable to locate him in order to effect the transfer, she obtained the assistance of the Legal Aid Bureau. Some time later, the husband agreed to transfer the property, but could not afterward be contacted. As she was unable to obtain the husband's cooperation in the matter, the wife sought by way of originating summons the following orders from the High Court:

- (a) a declaration that the wife was entitled to sole ownership of the property;
- (b) an order that the husband, within 14 days of the making of the order of court, do attend at the Yishun branch office of the Housing and Development Board to execute such documents as would be necessary to effect the transfer of the property solely to the wife and to effectively vest ownership of the property in the wife;
- (c) an order that in the event of the husband's failure to comply with the aforesaid order; the Registrar of the Supreme Court be empowered and do execute all such documents as are necessary on behalf of and in the name of the husband to effect the transfer to the wife.

6 At the first hearing on 21 January 1995, the husband having informed the court that he wanted to instruct counsel, an adjournment was granted. At the adjourned hearing, the husband informed the court that although he could not obtain either a lawyer or legal aid, he still desired to contest the application. The judge, in view of the complex issues she thought would arise, considered it appropriate to appoint an *amicus*.

The wife's case below

7 The wife argued that the Syariah Court order had vested a right to sole ownership in her. The order to effect that vesting was an appropriate application to be heard by the court under O 15 r 16 Rules of the Supreme Court ("RSC"), and there were no alternative avenues available as time had run out for an appeal to the Appeal Board. She argued that indeed if she could only resort to the Administration of Muslim Law Act (Cap 3), hereafter AMLA, she would be left remediless as the only means available there were either a fine or the imprisonment of the husband. If the husband still declined to transfer the property, she would not obtain the remedy she desired and was entitled to for no order could be made to transfer the

property since AMLA gave no power to the Syariah Court, unlike the Supreme Court, to have documents executed where the defendant refuses.

8 In support of her contentions, the wife placed reliance on the fact that similar orders were granted in the past. The one case in which such an application was declined, *Rahimah bte Hussan v Zaine bin Yusoff* [1995] 1 SLR(R) 239, was said to be in error. The wife pointed to the English decision of *Barnard v National Dock Labour Board* [1953] 2 QB 18 for the proposition that the High Court had a discretionary power to intervene in the decisions of statutory tribunals by way of declaration.

9 The High Court had the jurisdiction to grant such an order, notwithstanding s 16(2) of the Supreme Court of Judicature Act (Cap 322), hereafter SCJA, which prevents the High Court trying a civil proceeding within the jurisdiction of the Syariah Court, as the disposition of property had already been heard and decided by the latter. What was sought was not a decision of such disposition but merely the enforcement of that order.

The *amicus curiae*'s arguments

10 The *amicus* took issue firstly with the wording of the declaratory order sought. She then considered the various statutory provisions, including predecessor Acts of AMLA.

11 A substantial portion of her arguments was directed towards the power of the court to grant declaratory relief. She noted that there had to be a justiciable right, and that matters *res judicata* would not be susceptible to declarations. No declaration could also be granted where, as here, exclusive jurisdiction had also been given to another tribunal. Additionally, the rights of the wife were merged in the judgment. Nothing remained. In any event, no jurisdiction existed, as it was excluded by s 16(2) of the SCJA.

The decision

12 In determining the issue, the judge declined to follow *Rahimah bte Hussan v Zaine bin Yusoff* ([8] *supra*). It was accepted by Her Honour that s 14 SCJA only applied to High Court orders. It was thus necessary to examine whether the High Court could grant such an order as desired by the wife. What the wife wanted was a declaration under O 15 r 16 and para 14 of the First Schedule to the SCJA, the requirements of which are that it would provide real relief, that the matter was justiciable, and that exclusive jurisdiction had not been granted to another tribunal.

13 The primary consideration was whether the wife had a justiciable right. In Her Honour's view, no justiciable right remained after the order was made by the Syariah Court for no uncertainties existed as to her rights in the property. Furthermore, no real relief would have been effected by such a declaration by itself, which indicates that the discretion of the High Court ought not be exercised in her favour.

14 The submission of the *amicus* that the High Court could not make a declaration of rights under an order given by another judicial tribunal was accepted. The judge rejected the contention of the wife that *Barnard* ([8] *supra*) would assist the court in the present case. The basis of that decision was that the tribunal there had no power to make the orders which it did, while in the present case, the Syariah Court had the power to make the necessary order, and the wife depended on the very validity of that Syariah Court order.

15 Additionally, the matter was *res judicata*, and the wife's rights had been merged in the order issued by the Syariah Court. As for the argument that the wife would be left remediless, the judge considered that the wife had not even asked for enforcement by the Syariah Court so that it could not be known if the wife had been left remediless. The judge also accepted that the declaratory order sought was defective, as the wife was not entitled to sole ownership as she had not yet made payment.

16 In any event, Her Honour found that there was no jurisdiction, as the matter fell within the jurisdiction of the Syariah Court, and s 16(2) SCJA applied to exclude the High Court since the dispute was over the disposition of property, and therefore covered by s 35(2)(d) of AMLA.

The appeal

The wife's arguments on appeal

17 During the hearing, although the wife's case had already been submitted earlier, counsel for the wife relied solely upon written skeletal arguments which differed slightly in emphases and treatment from the written case submitted. Both sets of arguments will be considered in this appeal as alternative submissions. These arguments addressed the issues of jurisdiction, the granting of declarations, *res judicata*, exhaustion of remedies, and the amendment of the declaration sought.

18 Firstly, it is contended that there is no conflict of jurisdiction, since what is asked for is merely a declaration on the legal effectiveness of the order. The issue then is whether the Syariah Court had the power and jurisdiction to make the order which it did. That such a question is within the jurisdiction of the court is said to be shown by the cases of *Merker v Merker* [1963] P 283 and *Ho Ah Chye v Hsinchieh Hsu Irene* [1994] 1 SLR(R) 485. On the other hand, if the declaration is refused, the order of the Syariah Court would be rendered worthless. It may have been that the Legislature assumed that the Supreme Court would be able to enforce rights conferred by the Syariah Court. This is supported by the fact that the Syariah Court order created rights which are enforceable and amenable to perfection at common law.

19 Alternatively, it is said that the relief sought is not within the Syariah Court's jurisdiction for the Syariah Court has no power to hear or grant an application for enforcement of that relief granted by it (*Muhd Munir v Noor Hidah* [1990] 2 SLR(R) 348 cited). Neither is the present application an attempt to reopen the substantive dispute for it is concerned with enforcement only. The application thus falls within the jurisdiction of the High Court, and not the Syariah Court.

20 Turning to the issue of whether the declaration ought to have been granted, the wife argues that the judge had erred in restricting the jurisdiction to declarations dealing with contested rights. It is said that this is only a matter of practice, and the court can and should give a declaration though without trial or by consent (*Patten v Burke Publishing Co Ltd* [1991] 1 WLR 541 cited). Such power extends to rights determined by a tribunal unable to give effect to its declarations.

21 Also taken issue with is Her Honour's holding that the subject matter of the declaration is not justiciable for whether or not the wife is able to enforce the order depends upon the recognition by the general law of the land that the Syariah Court is a competent tribunal.

22 Another consideration to be borne in mind is that the failure to give effect to the order would damage the standing of the court. Indeed, nothing hinders the granting of a declaration for such remedy exists to correct injustice.

23 Contrary to what was thought by Her Honour below, it is said further that the issue was not *res judicata* – the issue was not exhausted, it was not a final judgment which could be enforced, there was no opportunity to recover what is sought now and different evidence was required to establish her claim in the High Court.

24 Finally, it is said that Her Honour was wrong in requiring that there be exhaustion of other remedies before a declaration can be granted.

The husband's contentions

25 The husband was still unrepresented at the hearing of the appeal, and he made no arguments on the issues presented by the wife.

The issues

26 In the determination of this appeal, the following main issues arise:

- (a) Jurisdiction;
- (b) The award of a declaratory judgment;
- (c) Considerations of public policy;
- (d) The proper resolution.

Amendment

27 A preliminary point has to be dealt with first. The wife argues that the declaration sought if inappropriate could have been amended by the High Court, to a declaration that the wife is entitled to sole ownership upon the refund of the husband's contributions to the CPF without interest.

28 No provision is specified but it is assumed that it is a reference to O 20 r 7 Rules of Court (for ease of reference, all citations of rules will be to the Rules of Court 1996, rather than the Rules of the Supreme Court 1970) which states that O 20 r 5, dealing with amendment of writs and pleadings, also applies to amendment of originating summonses. That rule states:

Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

29 It is highly unlikely that any amendment would prejudice the other party. There is no reason then why such amendment should not be allowed, and it is accordingly allowed.

Jurisdiction

30 Section 16(2) of the SCJA and s 35 of AMLA are reproduced. Section 16(2):

Notwithstanding subsection (1), the High Court shall have no jurisdiction to hear and try any civil proceeding which comes within the jurisdiction of the Syariah Court constituted under the Administration of Muslim Law Act.

31 And s 35:

(1) The Court shall have jurisdiction throughout Singapore and shall be presided over by a president to be appointed by the President of Singapore.

(2) The Court shall hear and determine all actions and proceedings in which all parties were married under the provisions of the Muslim law and which involves disputes relating to —

- (a) marriage;
- (b) divorces known in the Muslim law as fasakh, cerai taklik, khuluk and talak;
- (c) betrothal, nullity of marriage or judicial separation;
- (d) the disposition or division of property on divorce;
- (e) the payment of *emas kahwin*, maintenance and consolatory gifts or *mutaah*.

32 In the present appeal, the wife obtained an order of division of property under s 35(2)(d). What must be resolved is whether an order for

enforcement of that order falls within the jurisdiction of the Syariah Court as well.

33 In this regard, there are basically three points that have to be examined. The first, implicit though it may be, concerns the characterisation of the orders sought as orders for enforcement. The second, again implicitly assumed by the wife, is the conflation of the concepts of jurisdiction and power. The third is whether the declaration, as contended by the wife in her alternative submissions, goes to resolving the effectiveness of the Syariah Court.

Characterisation

34 Characterisation is an important consideration in this appeal. Most of the wife's arguments are based on her characterisation of the orders sought as ones going to enforcement rather than a determination of the substantial rights of hers. The orders sought are reproduced in an abbreviated form:

Order 1: a declaration of rights.

Order 2: an order for execution by the husband.

Order 3: an order that in lieu of order 2, execution be by the Registrar.

35 While no doubt the overall effect of these three orders sought is to effect enforcement, such a characterisation ignores that the basis of orders 2 and 3, which are really what the wife is interested in, is order 1. Without order 1, there can be no orders 2 and 3.

36 Now order 1 cannot by any stretch of imagination or terminology be characterised as an order for enforcement. It determines the rights of the wife. It is substantive.

Jurisdiction and power

37 One of the arguments put forward by the wife was that there is no conflict of jurisdiction for the subject matter of the present appeal is the enforcement of the earlier order, and not the determination of the substantive issues. This raised the point of characterisation discussed above. This argument cannot be accepted as well for the reason that it confuses jurisdiction and power.

38 The distinction between the two was aptly put by Chan Sek Keong J in *Muhd Munir* ([19] *supra*), where he said (at [19]):

The jurisdiction of a court is its authority, however derived, to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute. The jurisdiction and powers of the High Court are statutorily derived. Whether it has any common law jurisdiction or powers is a question which is not relevant here. A court may have jurisdiction to

hear and determine a dispute in relation to a subject matter but no power to grant a remedy or make a certain order because it has not been granted such power, whereas if a court has the power to grant a remedy or make a certain order, it can only exercise that power in a subject matter in which it has jurisdiction. ...

39 He said further (at [20]):

[T]he expression ‘jurisdiction’ as used in s 16(1) [now s 16(2)] of the SCJA with reference to the Syariah Court, when read together with s 35 of AMLA, means the authority of the Syariah Court to exercise any judicial power given by AMLA in respect of the types of subject matter prescribed by s 35(2) ...

In other words, jurisdiction is a precondition of the lawful exercise of a particular power.

40 The ability to enforce an order cannot be described as an incident of jurisdiction. It is a form or type of power. It is therefore meaningless to speak, as the wife does, of the jurisdiction to enforce the Syariah Court order. Jurisdiction, other than in its territorial sense, is only concerned with the categories of law or causes of action available to the parties. On the other hand, whether or not relief can be given is a question of power only, as can be seen from the terminology of the First Schedule to the SCJA. As such, in the present circumstances one has to examine whether the cause of action falls within the ambit of the Syariah Court.

41 From the discussion of the characterisation of the orders and the distinction between jurisdiction and power, it follows that the crucial test is whether in substance the subject matter of the present dispute has been demarcated for determination by the Syariah Court. Where the Syariah Court has such jurisdiction, the High Court cannot deliberate on the issue. Section 16 SCJA speaks of “any civil proceeding which comes within the jurisdiction of the Syariah Court”, while s 35 AMLA states that the Syariah Court “shall hear and determine all actions and proceedings ... [involving] disputes relating” to the various matters specified. At this stage of analysis, what has to be discerned is the subject matter of the application in question. It requires a statement of the wife’s interest in the property, and such interest arises from the divorce. Therefore, in the appeal at present, the declaration is undoubtedly one involving the disposition or division of property on divorce. The result is thus that the High Court has no jurisdiction to enter into determination at all, despite the fact that what is being asked for is ostensibly the enforcement of the earlier order. There being no jurisdiction, there is no scope whatsoever for the exercise of a power.

42 Thus, the fact highlighted by the wife that the Syariah Court is now *functus officio* is irrelevant. Nor is it material that the Syariah Court does not have the power to enforce the order. The wife’s arguments are directed

to whether there is a clash of powers of the Syariah Court and the Supreme Court. That is wholly beside the point.

Legal effect of the declaration sought

43 An alternative submission made by the wife is that what is sought here is a declaration on the legal effectiveness of the order made by the Syariah Court. What the High Court was asked to determine, was, it is said, whether the Syariah Court had the jurisdiction and the power to make such an order. The matter does not involve then the subject matter of that order, and it follows that there is no conflict of jurisdiction.

44 However superficially attractive this contention may be, skirting as it does any conflict between the jurisdictions of the two courts, and emphasising that the matter here concerns something akin to an examination of the *vires* of the Syariah Court, which is clearly within the jurisdiction and power of the High Court to do, it must be realised that it proceeds upon a fundamental fallacy.

45 The declaration sought, as amended, would read:

The [wife] is entitled to sole ownership of the property known as Apt Blk 638, Yishun St 61, #07-150, Singapore 2256 upon paying to her husband the CPF funds used for the purchase of the property, without interest.

46 That declaration goes to the substance of the order made by the Syariah Court. If the wife maintains that the order sought was merely to recognise the jurisdiction and power of the Syariah Court, it would have been appropriately phrased as follows:

The order made by the Syariah Court is effective and is recognised by the general law of the land.

47 Or some such formulation. If the wife desires such an order the High Court has the jurisdiction to grant it. What benefit the wife would have obtained from that though is unclear. Such an order cannot even form the basis of an execution by the Registrar of the appropriate documents under s 14, SCJA.

Conclusion

48 There is then no jurisdiction in the High Court to give the orders sought. And it must be emphasised that such lack of jurisdiction cannot be cured by consent or lack of contest. That is sufficient to dispose of the appeal by the wife, subject to the consideration of the proper resolution discussed below, which does not lead to a conflict with the jurisdiction of the Syariah Court.

49 However, the wife submitted extensively on the award of declaratory orders, and some observations would be pertinent.

The award of a declaration

50 The required preconditions of a declaratory judgement may be stated to be (adapting Zamir and Woolf, *The Declaratory Judgment* (2nd Ed, 1993)):

- (a) the existence of jurisdiction and power;
- (b) that discretion ought to be exercised in favour of the application;
- (c) the plaintiff has *locus standi*; and
- (d) that the defendant is a necessary defendant.

51 The basis of the power to grant declaratory judgments is s 18, SCJA, para 14 of the First Schedule of the Act, and O 15 r 16 of the Rules of Court.

52 Section 18 of the SCJA reads:

- (1) The High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore.
- (2) Without prejudice to the generality of subsection (1) the High Court shall have the powers set out in the First Schedule. ...

53 Para 14 of the First Schedule reads:

Power to grant all reliefs and remedies at law and in equity

54 And O 15 r 16 reads:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Jurisdiction and power

55 The issue of jurisdiction has already been discussed above. It is incorrect to speak of a declaratory jurisdiction. As noted above, what a court may possess is the power to make a declaration. This distinction between the two has to be borne in mind, since most analyses, including those of the editors of Zamir and Woolf, of declaratory orders do not make that distinction. This is to be expected when the jurisdiction of the court is wide, or limited only by territory – in the vast majority of cases then, jurisdiction is synonymous with power. But where, as in the instant appeal, there is a question of limitation of jurisdiction, then the difference between the two is significant and cannot be ignored.

56 No real issue of the power of the court to grant declaratory judgments arises in this appeal. If the question of jurisdiction is overcome, then what remains to be examined is whether the court's discretion ought to be exercised in favour of a declaration.

Discretion

57 Some guidance as to the relevant factors which may be considered by the court in determining whether the discretion of the court ought to be exercised in favour of the granting of a declaration was given by Lord Dunedin in *Russian Commercial & Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 (at 448):

The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

58 However, it must be noted that in *Ainsworth v Criminal Justice Commission* (1992) 66 ALJR 271, the High Court of Australia indicated that at least as regards the existence of a real controversy, that this would be a question going to the exercise of the power to grant declarations itself, and not just a matter of discretion; it was said by Mason CJ, Brennan J, Toohey J and Gaudron J (at 278):

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[it] is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise' (*Foster v Jododex Aust Pty Ltd* (1972) 127 CLR 421, *per* Gibbs J, at p 437). However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. (See *Re Judiciary and Navigation Acts* (1921) 29 ALR 257.) The person seeking relief must have 'a real interest' (*Forster* (1972) 127 CLR, *per* Gibbs J, at p 437; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Ltd* [1921] 2 AC 438, *per* Lord Dunedin, at p 448) and relief will not be granted if the question 'is purely hypothetical', if relief is 'claimed in relation to circumstances that [have] not occurred and might never happen' (*University of New South Wales v Moorhouse* (1975) 133 CLR 1, *per* Gibbs J, at p 10) or if 'the Court's declaration will produce no foreseeable consequences for the parties' (*Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180, *per* Mason J, at p 188; see also *per* Aickin J, at p 189.)

59 However, it would seem that there is little practical difference between the two positions, since in practically all cases where the issues are theoretical the courts have declined to exercise their discretion. In the present appeal, the requirement of controversy will be treated as part of the consideration for the exercise of the discretion.

The existence of a real controversy

60 The primary consideration in this appeal is whether there is a real contest of the legal rights. The editors of Zamir and Woolf have identified one rationale for the reluctance of the courts to deal with theoretical issues

– that it distracts the courts from deciding real, subsisting problems. A stronger reason is that if there is in fact no real issue subsisting, then the matter would not be *res judicata*, nor the issue merged in judgment. In that event, it would be open for the issue to be reopened again and again. The need for the existence of a contested dispute is to ensure that there is finality in the court's judgments as well.

Whether legal rights are contested

61 This was not really argued below, or considered by the judge. A problem of characterisation arises yet again for the answer depends on what rights are considered to have been determined by the Syariah Court.

62 Below, the judge was concerned with whether there was a justiciable right that could be the subject of a declaration. Although Her Honour characterised the question in this way, the real issue is rather whether the rights are contested. Justiciableness strictly speaking is restricted to whether the courts ought as a matter of policy to determine particular issues, generally with a high political content. An example of a non-justiciable issue was the consideration in *Mutasa v Attorney General* [1979] 3 All ER 257 of whether the Crown has a duty to protect its subjects.

63 It is doubtful that in this appeal, legal rights remain to be contested, except by way of appeal. What amounts to a contest of rights is that there must be a subsisting dispute between the parties which has not been resolved by any judgment of court. For once there has been such a judgment, or pronouncement, the controversy ends subject only to the right of an appeal.

64 In this appeal, the wife has obtained the Syariah Court order, which has specified her interest in the property. The husband may not be happy with that decision; he may wish to appeal that decision; but it cannot be said that he is in a position to dispute the rights of the wife. That being the case, it is not apparent what issues are left between the parties except enforcement.

65 The wife made an argument in dealing with this requirement that it is only a rule of practice that a declaration will not be granted when giving judgment by consent or in default, and cites *Patten v Burke* ([20] *supra*) in support. The relevance of this is not clear. The question of contested rights is not one of whether a party actually comes to court opposing the order sought, but whether there is actually a dispute about the alleged rights. A party may well so dispute the rights of another person, and yet not come to court to argue against it, or may well eventually agree to a consent judgment – that, however, is a separate consideration for the exercise of the discretion, it falls to the question of whether there is a proper contradictor.

Foreign judgments on status

66 In her case, the wife argued that cases on matrimonial status indicate that courts may grant declarations though the matter has been dealt with by another tribunal and there are then no contested rights remaining. The wife cites a case, *Merker v Merker* ([18] *supra*), which was concerned with a declaration made by the family court concerning the status of parties, whose marriage had already been pronounced annulled by a German Court. The competence of that tribunal was attacked, for failing to abide by the provisions of the municipal law. It was further alleged that the German decree left the common law marriage intact, and was not conclusive as to whether there was an English common law marriage. In other words, the whole basis of that prior decision and the competence of the tribunal was in question.

67 *Merker* would only be relevant if the Syariah Court's competence was questioned. Indeed, in her skeletal arguments, the wife cited *Merker* in the section dealing with the effectiveness of the Syariah Court order. As discussed above, in the section on characterisation and jurisdiction, this has no relation to what the wife actually seeks.

68 The distinction between *Merker* and the declaration actually sought in the instant appeal can be illustrated as follows:

Merker

- (1) The German tribunal's decision went to a conclusive determination of the rights of the parties.
- (2) The decision was X.
- (3) The relief was Y.

The declaration granted was as to (1) and did not affect the decision X or the relief Y.

Present appeal

- (1) The Syariah Court's decision went to a conclusive determination of the rights of the parties.
- (2) The decision was X.
- (3) The relief was Y.

The declaration sought goes to both (2) and (3).

69 A similar issue arose locally in *Ho Ah Chye* ([18] *supra*), which was concerned with a declaration as to the marital status of the parties. A declaration in such a context is directed to affirming the validity of a prior judicial decision. It is an exercise of the jurisdiction of the court to determine validity of orders.

70 In other words, unlike *Merker*, as emphasised before, there is no challenge in the present appeal as to the conclusiveness of the decision of the Syariah Court. No assistance can then be derived from either *Merker* or the matrimonial status cases. Indeed most issues of declarations of matrimonial status are concerned only with (1) and not (2) or (3).

Res judicata

71 The next issue concerns whether the matter was *res judicata*. Spencer-Bower and Turner, *Res judicata* (2nd Ed, 1969), state that for a matter to be *res judicata*, it has to be shown that it was subject to a judicial decision pronounced by a judicial tribunal. The wife argues that the matter remains free of such a decision as what had been sought in the Syariah Court was the division of property on divorce. It is said that the wife could not and did not ask for enforcement of the transfer of the matrimonial property; but what is sought before the Court of Appeal is a declaration of her rights and interests in the property. The problem of characterisation has already been dealt with above.

72 The substantive issue has already been determined by the Syariah Court. Whether or not the wife was so entitled depends on the prior judgment of the Syariah Court. It is pertinent to note that if the husband were to challenge the wife's right to the declaration sought, he would in effect have to argue that she was not so entitled. That would be precluded because the issues have been dealt with by the Syariah Court. That indicates that the declaration sought here is in substance and reality, a declaration as to those very rights determined by the Syariah Court in making its order.

73 Though this was not raised, it could be argued that the doctrine of *res judicata* ought not bind the wife, as she does not seek to reopen the Syariah Court decision – it is the husband who is estopped from denying the correctness of that decision. This argument does have its attractions, for it is not readily apparent why the wife ought not to obtain a second statement of her rights. To this extent there is no attack on the finality of the prior decision. However, there must be finality not only to decisions but also litigation (*Lockyer v Ferryman* (1877) 2 App Cas 519; *Morrison Rose & Partners v Hillman* [1961] 2 QB 266; *Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd (No 2)* [1966] 2 All ER 536), for if a party for whose benefit a decision was made was entitled to come before the courts again and again for restatements of her rights, then there would be no finality to litigation. It is a question of policy.

74 Lord Maugham noted:

The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between

the same parties or persons claiming under them (*New Brunswick Rail Co v British and French Trust Corp Ltd* [1939] AC 1, at p 19).

The doctrine thus binds the wife.

75 Against this it could be argued that the principle can be outweighed by other considerations of policy. This will be dealt with in the section on policy considerations.

76 Besides the matter being *res judicata*, as noted by the judge the right in the property had been merged in the order of the Syariah Court. The basis of the doctrine of former recovery or merger is based on several premises: the finality of litigation (*Green v Weatherill* [1929] 2 Ch 213), the protection of parties from oppressive proceedings (*Workington Harbour & Dock Board v Trade Indemnity Co Ltd (No 2)* [1938] 2 All ER 101, and the extinction of the issue (*Kendall v Hamilton* (1879) 4 App Cas 504).

77 Above, it was pointed out that the Syariah Court order determined the rights of the wife. That being so, the issue of the interest in the matrimonial property has been merged in a prior remedy, though that remedy was contained as part of a larger order — the order to transfer the property in return for repayment of the CPF funds. In other words, the declaration seeks to reopen an issue which has been merged in the remedy sought. The declaration cannot latch on to any issue then.

78 The wife cited in her argument that there was no prior recovery in the case of *Den Norske Bank AS v Northern Feather Pte Ltd* [1992] 2 SLR(R) 853. There Warren L H Khoo J adopted a passage from the 4th edition of *Halsbury's Laws of England*, in which it was stated that for a plea of *res judicata* to succeed, it is necessary for the claimant to have had an opportunity to recover, and might have, but for his own fault, recovered that which is the subject matter of the second action. That statement of the law is correct, but once again the precise terms of the remedy sought here has to be noted, for it is clear that the wife has already obtained what she seeks by the declaration. The order in question is one that the wife has such and such an interest in the property. Thus, in the present appeal, the wife had the opportunity to and did in fact recover what was sought – the determination of her interest in the property. That she was unable to enforce it in the way that she wanted is irrelevant.

79 Warren LH Khoo J said further that a possible test for determining whether there has been merger is to ask whether the same evidence would prove the case. While such a test is a possible determiner, it is not the only one. Such an approach is not appropriate where the basis of the second claim is in fact the first claim itself. In this situation, there has been merger, and because the previous decision is used to support the second claim, there is then no need for further evidence, so the test identified by Warren Khoo J does not even come into play at all.

80 Support for the position taken comes from the case of *Rampai Anak Changgat v Langau Anak Chandai* Cases on Native Customary Law in Sarawak 144. In that case the plaintiff had had his rights to a certain lot of land determined by a *penghulu* in a native court. The plaintiff subsequently, because of a dispute with the defendant, sought a declaration from the High Court as to his right in the land. It was held by Lee Hun Hoe J that, *inter alia*, the plaintiff was bound by the decision of the *penghulu* because it was *res judicata*.

The existence of an alternative remedy

81 The wife contends that the judge had misdirected herself by requiring that the wife exhaust the alternative remedy before a declaration could be granted in her favour. The basis of the wife's contention is the passage which reads:

Whilst the remedy provided by AMLA for non-compliance with its orders might not be the remedy which the wife wanted or might not give direct effect to the order, this did not mean that the remedy was ineffective. The wife in this case had not even asked the Syariah Court to enforce its order. She could not know for certain whether if the husband had been faced with enforcement proceedings he would still have refused to comply with the order. I could not in these circumstances justify any intervention by the High Court on the basis that without it the wife would be left without a remedy and thus suffer an injustice.

82 There is, indeed, no necessity that there be no alternative remedy before a declaration is granted; since a declaratory order is discretionary, it is always open to the court, in the appropriate cases, even where there is an alternative remedy which has not been utilised, to grant the order. But Her Honour has been quoted out of context. Her Honour was in fact responding to an argument put forward by counsel below that the wife would be left without a remedy if she was constrained to proceed under the provisions of AMLA. It is clear then that the passage quoted was directed to the policy consideration that the wife would be left remediless. Her Honour was not at that point considering whether her discretion to grant a declaratory order could still be exercised.

Conclusion

83 Her Honour was thus correct in not granting a declaration.

Policy arguments

84 In contending both that the High Court had jurisdiction and that a declaration ought to have been granted, the wife made a number of policy submissions. The wife argues that the fact that no relief is available in the Syariah Court indicates that a remedy ought to be granted by the High

Court; that real relief could be obtained from the High Court; that the Syariah Court offers no real alternative; that there would be no undermining of the jurisdiction of the Syariah Court by a declaration of the High Court but conversely that there would be undermining of the Syariah Court if no relief is granted; and that all persons must have remedies for their rights.

85 Taking those dealing with jurisdiction first, these were made to substantiate the contention that policy requires that there be jurisdiction for the High Court to grant the desired declaration. One of these is that it is said that the Legislature has assumed that the rights conferred by the Syariah Court would be enforced by the High Court. This is not really a question of public policy, but rather one of interpretation. In the circumstances, there can be no such inference, for the silence of the legislation on this point is equivocal.

86 It is also said that the failure to exercise jurisdiction would render the decision of the Syariah Court worthless. However strong such policy arguments may be, any decision of the High Court, and even of the Court of Appeal, has to be according to law. That law is laid down in statute. It behoves the courts that decisions passed down are decisions made in the lawful exercise of power, which is grounded in the jurisdiction conferred by the Constitution and the Legislature. Section 16 has already been reproduced above. Article 94(1) of the Constitution reads:

The Supreme Court shall consist of the Court of Appeal and the High Court with such jurisdiction and powers as are conferred on those Courts by this Constitution or any written law.

87 Thus, exceeding the jurisdiction would be an act *ultra vires*, and is excused no less because there can be no appeal against such excess. The courts police themselves according to the rule of law.

88 The courts may of course develop and extend notions and concepts in the law. To such extent then the courts may alter the shape of the law. But it must be recognised and accepted that that approach cannot extend to the very basis of the authority conferred upon the courts.

89 However great an injustice, however grave the sorrow, if the court finds that it does not have the jurisdiction to enter into a certain issue, it cannot create such jurisdiction. To do otherwise would be confer itself authority above the Constitution.

90 As for those arguments put forward to support the granting of the declaration, particularly that the lack of relief would affect the standing of the court, and that an injustice would occur, these do not outweigh the need to ensure that there is a real controversy extant, particularly given that any injustice remains hypothetical given that enforcement proceeding under the provisions of AMLA, however effective or otherwise they might be,

have not even been resorted to. Similar considerations apply to arguments that the notions of *res judicata* and merger ought to be overridden.

91 Indeed a strong policy reason for not granting such a declaration is that to do so would be tantamount to the High Court becoming an enforcement body, curing defects of power of other tribunals. This cannot be. Such tribunals as the Syariah Court are clearly intended to be independent of the High Court, and the High Court ought not interfere with them save under administrative law.

92 It lies with the Legislature to make the necessary amendments to the Administration of Muslim Law Act to enable the Syariah Court to either enforce its own orders, or to make them equivalent, for the purposes of the SCJA, to orders of the High Court. Alternatively, it could be given equivalent powers of enforcement as the Subordinate Courts.

The proper resolution

93 The wife seeks to obtain execution of the judgment of the Syariah Court order. She cannot do so as long as her claim is based on the division of the matrimonial property, for the jurisdiction to do so is clearly excluded, and the matter is not amenable to a declaratory order for the reasons given above. Both problems may, however be avoided if she were to base her claim not on the division as such, or the ascertaining of those rights, but rather in the conversion of those rights into the full legal title.

94 Counsel was in fact aware of this, and had averred at some points in the arguments to the possibility of remedies other than a declaration, but discounted them because these were considered too time consuming for the wife to pursue. While a claimant may choose remedies, he or she must demonstrate an entitlement to those remedies. Where there is no such entitlement to one, but there is to another, then the claimant clearly has to be satisfied with the other.

95 On the facts of this case, the court is of the view that it is totally misconceived for the wife to attempt to obtain a declaration in order to give effect to the Syariah Court order. However, the wife does have a right recognised in general law, and which can be given effect to in the appropriate manner.

96 In *Central Provident Fund Board v Lau Eng Mui* [1995] 2 SLR(R) 826, the Court of Appeal held that an order of court in division of matrimonial property under s 106 confers a proprietary interest to the extent ordered. It follows that that interest must be regarded as an equitable interest, whether as a *sui generis* remedial constructive trust or otherwise.

97 The same should apply in the instant appeal. The order by the Syariah Court conferred an equitable interest on the wife. There can be no argument that any other interest could have been created – the orders of the

Syariah Court must be considered as creating interests according to general law, for it is largely only Muslim personal law that is applied in Singapore.

98 However, noting the order made, in addition to conferring an equitable interest on the wife, it also contemplated the husband transferring ownership to her on payment of the CPF funds, without interest. The husband's legal title to his share of the property has been cut down such that it is subject to the payment over by the wife; it exists only so long as the wife does not make payment. When the wife is prepared to make that payment, the husband's legal title ought to go over to her, and the husband cannot in all conscience continue to hold it. It would be repugnant for him to do so. Though the wife may seek an action for contempt, if it is available, she also has a right then to seek the intervention of a court of equity. In that sense, the wife then has a personal equity against the husband for the transfer of the property. The question is how that equity can be enforced.

99 If there were a contract between the parties, then specific performance may be available provided of course that the husband is not entitled to any equitable defence. The basis of equity's intervention in that situation is of course to protect the expectation engendered by the contract, and the detriment suffered or that which would be suffered by the party seeking performance. This is seen in the fact that equity will not enforce a contract for which there is no binding consideration (*Jefferys v Jefferys* (1841) Cr & Ph 138).

100 In the appeal at hand, the basis of intervention is the equity possessed by the wife against the husband. Notwithstanding then the lack of a contract, some remedy of performance ought to be available to give effect to the equity of the wife. By analogy with the position in contract, one remedy does suggest itself – a mandatory injunction, for in many ways, specific performance would seem to be a species of mandatory injunction, and it has been observed that there is little difference in principle between the two (*Davies v Gas Light and Coke Company* [1909] 1 Ch 248).

101 In the view of this court, a mandatory injunction is available to serve that equity. Where, as in the present appeal, the court is acting in its exclusive, as opposed to its auxiliary, equitable power, that is, it is protecting purely equitable rights, then a prohibitory injunction would be available as of right (*Baynard v Woolley* (1855) 20 Beav 583). The question then is whether there ought to be any difference between the principles governing prohibitory injunctions and mandatory injunctions in the exercise of such power. Nothing suggests itself why there ought to be any such difference. This may represent an expansion of equity, and there appears to be scant authority for it, but in the view of the court, it is a justified one.

102 The position is of course different where the mandatory injunction is sought to remedy a non-equitable breach, such as in tort (*Redland Bricks*

Ltd v Morris [1970] AC 652). There, following the authorities, it would seem that some caution would be required; it is not for this court at present to determine whether those authorities should be followed in all their rigour. Similarly where any equitable remedy is sought in the auxiliary power of the court of equity – in such situations, the issue of an injunction lies at the discretion of the court.

103 It must be noted that not all equities would necessarily be amenable to protection or effect by mandatory injunctions. In the view of this court, particularly where property rights will be affected, a mandatory injunction of this nature will only issue where the equity arises out of a direct impeachment of the legal title held by the party to be enjoined. Where some equity does exist without so affecting such legal title, or where the matter is governed by contract, the other party must be left to the traditional remedies. And it must be clear that such an equity must arise out of an act or omission that is so repugnant, as in the case here, it strikes at the basis of the continued holding of the legal title. This court will not attempt to lay down the precise ambit governing such equities as do impeach legal title; this must be left for development or restriction as the occasion demands.

104 It is then open for the court to order that the husband do convey the property to the wife upon payment of the CPF. As the husband has failed to do so thus far, it would be appropriate to require enforcement upon the wife paying into the husband's CPF account. Furthermore, since the wife has been trying to effect the perfection of her interest for some time, it is ordered as well, as is within the power of this court, that if the husband fails within 14 days of the wife indicating her readiness to pay over the money, to execute the necessary documents, such documents may be executed by the Registrar under s 14, SCJA.

105 The appropriate order then is in the following terms:

The husband is ordered to transfer, by executing all necessary documents, the property to the wife upon the wife paying into his CPF account the funds used for the purchase of the property, without interest that would have accrued.

Such transfer is to be effected within 14 days of the wife indicating by any appropriate means that she is so ready to pay the funds, and if the husband fails to do so, thereafter the transfer will be executed by the Registrar.

106 This proposed solution avoids any direct conflict with the jurisdiction of the Syariah Court, and it does not purport to address the decided issue of what constituted the interests of the parties. And though this was not the order sought by the wife, it is open to the court under O 57 r 13(4) to give such orders to ensure the determination on the merits of the real question

in controversy between the parties. The real issue here is one of enforcement, thus an appropriate order for enforcement may be made.

Conclusion

107 That would have been the decision of this court in the absence of the variation of the Syariah Court order. This judgment in our view clarifies the issues pertaining to jurisdiction and the enforcement of orders. For instance, if the husband should refuse to execute the transfer pursuant to the orders of the Appeal Board, it would follow that the husband would be ordered to do so. If he failed to do so, the Registrar may in his name and on his behalf execute the transfer. As noted, any shortcomings in AMLA ought really be addressed by the Legislature.

108 In the circumstances, the appeal is dismissed with no order for costs.

Headnoted by Arvin Lee.
