

MD HAKIM LEE

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v.

MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN
KUALA LUMPUR

b

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J

[ORIGINATING SUMMONS NO: R1-24-61-96]

5 NOVEMBER 1997

CONSTITUTIONAL LAW: *Jurisdiction - Of High Court and Syariah Court - Whether clearly defined - Renunciation of the Islamic faith by a Muslim convert - Validity - Whether High Court clothed with jurisdiction to declare on validity of renunciation - Whether within the inherent jurisdiction of the Syariah Court - Federal Constitution Arts. 74, 121(1), (1A), List II of Ninth Schedule - Administration of Islamic Law (Federal Territories) Act 1993 ss. 46, 47*

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CONSTITUTIONAL LAW: *Syariah Court - Jurisdiction of - Whether limited to matters that are expressly enacted in the Enactment - Whether much wider than those expressly conferred therein - List II of Ninth Schedule of the Federal Constitution - Whether not to be narrowly interpreted - Jurisdiction as conferred by para 1 of List II thereof - Whether inherent in the Syariah Court - Federal Constitution Arts. 74, 121(1), (1A), List II of Ninth Schedule - Administration of Islamic Law (Federal Territories) Act 1993 ss. 46, 47*

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ISLAMIC LAW: *Renunciation of the Islamic faith - Validity - Declaration thereon - Jurisdiction - Whether within the exclusive jurisdiction of the Syariah Court - Federal Constitution Arts. 74, 121(1), (1A), List II of Ninth Schedule - Administration of Islamic Law (Federal territories) Act 1993 ss. 46, 47*

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INTERPRETATION: *Article 121(1A) Federal Constitution - 'The civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts' - Scope and effect*

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The plaintiff in this case was born a buddhist. On 30 March 1978 the plaintiff embraced the religion of Islam and assumed the name of Md Hakim Lee. By a certain statutory declaration and a Deed Poll dated 12 October 1995, however, the plaintiff renounced the Islamic faith and thereafter applied to the High Court for a declaration that his renunciation of the faith was in accordance with law and valid, and further, that such renunciation did not require the consent of the defendant.

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- a* The defendant sought to challenge the jurisdiction of the High Court to entertain the plaintiff's application, and argued by way of preliminary objection, that jurisdiction in respect of the matter lay exclusively with the Syariah Court. Before the learned judge, questions inevitably arose as to (i) whether on account of the ouster of the jurisdiction clause in art. 121(1A) of the Federal
- b* Constitution ('the Constitution') the matter of the declaration sought by the plaintiff herein fell outside the jurisdiction of the High Court to determine (ii) whether the matter in any case came within the jurisdiction of the Syariah Court by virtue of art. 74 of the Constitution read with para 1 List II of the Ninth Schedule thereof.
- c* **Held:**
- [1] The language of art. 121(1A) is clear and unambiguous. The civil courts, in this case the High Court, has no jurisdiction in respect of any matter that is within the jurisdiction of the Syariah Courts.
- d* [2] Under art. 74 and para. 1 of the State List in the Constitution, the jurisdiction of the Syariah Court is much wider than those expressly conferred upon it by the respective State legislature. The Syariah Court, thus, shall have jurisdiction over persons professing the religion of Islam in respect of any of the matters included in para. 1 thereof. It is not
- e* limited to those expressly enacted.
- [3] The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the Syariah Court within the
- f* contemplation of para. 1 of the State List and which jurisdiction is ousted from the courts mentioned in art. 121(1) of the Constitution.
- [3a] If the State legislature has not as yet legislate specifically on the matter it is within its competency to do so in the future under Article 74 of the Constitution. Therefore, when these matters are in issue, the
- g* jurisdiction is clothed in the Syariah Court and not in the courts mentioned in art. 121(1), notwithstanding the absence of express provisions in the State Enactments at the time the issue arises. This is the intention of art. 121(1A) when it states in no uncertain term that the civil courts in art. 121(1), which includes the High Courts, shall not
- h* have jurisdiction over the matter.
- [4] The plaintiff was by his own admission a person professing the religion of Islam as of 30 March 1978. In pursuant to para. 1 List II, the court having the jurisdiction over him in respect of the matters sought in his application must be the Syariah Court because it falls within the category
- i* of personal law of persons professing the religion of Islam.

- [5] It is not true to say that in order to ascertain the question of jurisdiction of the Syariah Court, reference be made only to the respective laws enacted by the State legislature to see whether jurisdiction over the particular matter is given to the Syariah Courts or the civil courts provided in art. 121(1) of the Constitution. List II of the Ninth Schedule of the Federal Constitution should not be interpreted so narrowly in the light of the overall jurisdiction given by the Constitution in List II that the Syariah Court shall have jurisdiction over persons professing the religion of Islam in respect of matters stated therein. a
- [6] It follows that, the jurisdiction of the Syariah Courts as given by the Administration of Islamic Law (Federal Territories) Act 1993, in the light of the provisions provided in para 1 of List II of the Constitution, cannot in any way limit the wider jurisdiction of the courts to deal over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof, by the mere fact that the jurisdiction to decide on the matter of the application of the plaintiff here is not so expressly stated in the Act. The wider jurisdiction given by para 1 List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the Syariah Court, subject of course to the right to exercise that jurisdiction is being expressly given by the Act which power is within the competency of the legislature to do under art. 74. b
- [7] This matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the Deed Poll and the statutory declaration is outside the jurisdiction of this court to determine on account of the ouster of the jurisdiction by art. 121(1A) of the Federal Constitution. By virtue of para. 1 in List II of the Schedule to the Federal Constitution, the jurisdiction lies in the Syariah Court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art. 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court. c

[Application dismissed. Preliminary objection upheld.] d

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a Cases referred to:

Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib [1992] 2 MLJ 793
(*refd*)

Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Anor [1996]
3 CLJ 231 (*not foll*)

b *Mohamed Habibullah and Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah,
Bukit Mertajam & Anor* [1991] 3 CLJ 2768 (*foll*)

Soon Seng v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994]
2 CLJ 107 (*foll*)

*Hajjah Mahani bt Sulaiman & 3 Ors v. Majlis Agama Islam & Adat Melayu
Terengganu* [1993] 3 AMR 2898 (*foll*)

c Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, ss. 46, 47

Federal Constitution, arts. 11, 74, 121, 121(1), (1A)

Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Karpal Singh; M/s Karpal Singh & Co

d *For the defendant - Tuan Haji Sulaiman Abdullah; M/s Zain & Co*

JUDGMENT

Abdul Kadir Sulaiman J:

e This is an application by the plaintiff for the following relief:

(a) a declaration that his renunciation of the Islamic religion by a Deed Poll dated 12 October 1995 is in accordance with law and valid;

f (b) a declaration that he is not required to obtain the consent of the Defendant to renounce the religion of Islam;

(c) costs; and

(d) any further or other relief the court deem fit and just.

g According to his supporting affidavit wherein the Deed Poll and a statutory declaration of 12 October 1995 were exhibited, the Plaintiff was born a Buddhist. He embraced the religion of Islam on 30 March 1978 and used the name of Md. Hakim Lee. But by the Deed Poll and the statutory declaration he has renounced the religion of Islam and showed an intention to use the name of Lee Leong Kim in place of Md. Hakim Lee. He deposed that his action is guaranteed by art. 11 of the Federal Constitution and as such no authority or body could limit or hinder his freedom. The defendant did not file any affidavit in opposition to this application of the plaintiff. However, the defendant filed a summons in chambers to have the said application of the plaintiff struck out under O. 18 r. 19 of the Rules of the High Court 1980

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on the ground that the High Court has no jurisdiction to hear this application of the plaintiff by virtue of art. 121(1A) of the Federal Constitution. After submissions made before me on this application by summons in chambers of the defendant but before a decision was made, by consent, the defendant withdrew its summons and thereby leaving the substantive application of the plaintiff to be proceeded on with a hearing with the defendant raising the issue of the jurisdiction of this court to entertain this application of the plaintiff in the light of art. 121(1A) of the Federal Constitution, as a preliminary issue. On the hearing of the application of the plaintiff aforesaid, both learned counsel for the parties made no submissions but agreed to adopt wholly their submissions made during the proceedings under O. 18 r. 19 of the RHC in as far as they are relevant to the application of the plaintiff. With that my decision on the threshold jurisdiction of this court to hear the substantive application of the plaintiff follows.

Clause (1A) was added to art. 121 of the Federal Constitution by Act A704 and came into force on 10 June 1988. Clauses (1) and (1A) of art. 121 state as follows:

121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:

- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur;
- (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of **any matter within the jurisdiction of the Syariah courts**". (emphasis added).

To my mind, the language of art. 121(1A) used by the legislature is clear and without any ambiguity. The civil courts, in this case, the High Court, has no jurisdiction in respect of any matter that is within the jurisdiction of the Syariah courts. What then is the matter that is within the jurisdiction of the Syariah courts? Is the matter of the declaration sought by the plaintiff by his application a matter within the jurisdiction of the Syariah Courts and therefore,

- a* this court is prevented by art. 121(1A) of the Federal Constitution from adjudicating? Having determined the matter, the necessary question that follows is what is the jurisdiction of the Syariah Courts? Is it confined only to those express jurisdiction given by the relevant state Enactment or the wider jurisdiction of the courts which includes those jurisdiction which is not so expressly enacted but inherent in the courts itself?
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According to the Ninth Schedule to the Federal Constitution, Islamic law and personal and family law of persons professing the religion of Islam is included in paragraph 1 of List II which is called the State List. The said para. 1 states:

- c* Except with respect to the Federal Territories of Kuala Lumpur and Labuan, **Islamic law and personal and family law of persons professing the religion of Islam**, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat Fitrah and Baitulmal or similar Islamic religious revenue, mosques or any Islamic public places or worship, **creation and punishment of offences by persons professing the religion of Islam against precepts of that religion**, except in regard to matters included in the Federal List; **the constitution, organisation and procedure of Syariah courts, which shall have jurisdictions only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph**, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control and propagating doctrines and beliefs among persons professing the religion of Islam; **the determination of matters of Islamic law and doctrine and Malay custom.** (emphasis added).
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- To my mind, having considered art. 74 and para. 1 of the State List in the Constitution, the jurisdiction of the Syariah Court is much wider than those expressly conferred upon it by the respective State legislature. The Syariah Court shall have jurisdictions over persons professing the religion of Islam in respect of any of the matters included in para. 1 thereof. It is not to be limited only to those expressly enacted. The matters include Islamic law and personal and family law of persons professing the religion of Islam. They include cognizance over offences by persons professing the religion of Islam against precepts of that religion. The fact that the legislature is given the power to legislate on these matters but it does not as yet do so, will not detract from the fact that those matters are within the jurisdiction of the Syariah Court within the contemplation of para. 1 of the State List and which jurisdiction is ousted from the courts mentioned in art. 121(1) of the Constitution. If the State
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legislature has not as yet legislate specifically on the matter it is within its competency to do so in the future by virtue of the powers given under art. 74 of the Constitution. Therefore, when these matters are in issue the jurisdiction is clothed in the Syariah Court and not in the courts mentioned in art. 121(1) notwithstanding the absence of express provisions in the State enactments at the time the issue arises. That is the intention of art. 121(1A) when it states in no uncertain term that the civil courts in art. 121(1), which includes the High Courts, shall not have jurisdiction over the matter. The fact that the Syariah Courts have not been expressly conferred with the jurisdiction to adjudicate on the issue raised, by the State legislature, it does not mean that the jurisdiction must be exercised by the courts in art. 121(1). The issue is not one whether a litigant can get his remedies but one of jurisdiction of the courts to adjudicate – the threshold jurisdiction to be seised of the matter. Referring to the case of *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1992] 2 MLJ 793 SC, Harun Hashim SCJ at p. 802 said:

With respect, I think that the learned judge in arriving at his decision fell into error of isolating and treating the allegations of assault and battery as an actionable wrong simpliciter (which is clearly within the jurisdiction of the High Court) without regard to the fact that this is a matter for Islamic Family Law within the jurisdiction of the Syariah Court. It seems to me that the learned judge was under the impression that if the High Court did not give a remedy, the wife would not have any remedy.

Reverting to the facts in this application of the plaintiff, he prays for the two declarations mentioned above. It is his own admission as contained in his affidavit in support that he embraced the religion of Islam on 30 March 1978. Therefore, as of that date he was a person professing the religion of Islam and was no longer a Buddhist. In pursuance of para. 1 of List II, the court having the jurisdiction over him in respect of the matters sought in his application must be the Syariah Court because it falls within the category of personal law of persons professing the religion of Islam. Provided the jurisdiction to adjudicate on this matter is given by the State legislature, it is only the Syariah Court which could validly make a declaration whether his renunciation of the Islamic religion through the Deed Poll of 12 October 1995 is in accordance with law and valid, and also to declare whether or not he is required to obtain the consent of the defendant to renounce Islam. As from 10 June 1988, this jurisdiction which court hitherto enjoyed had expressly been taken away by art. 121(1A) of the Federal Constitution.

In *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231, my learned brother held the view to the contrary. He held that the Syariah Court is not a creature of the Syariah Law (Hukum Syarak). It owes its existence to the written laws of Parliament and State legislatures.

- a* As such it is his view that in order to ascertain the question of jurisdiction of the Syariah Court, it is incumbent that reference be made to these laws and see whether jurisdiction over the particular matter is given to the Syariah Court or the civil court. While it is true that the constitution, organisation and procedure of Syariah Court is to be so provided by the respective State
- b* legislature as so stated in para. 1 of State List read with art. 74 of the Constitution but the issue at hand is not one of the constitution, organisation and procedure of Syariah Court. The issue is a substantive one which a Syariah Court having “jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included” in para. 1 of State List,
- c* has the power to adjudicate, and as pointed out earlier, the prayers sought in the application is one touching on the personal law of “persons professing the religion of Islam”. Therefore, with respect, it cannot be true to say that in order to ascertain the question of jurisdiction of the Syariah Court, reference be made only to the respective laws enacted by the State legislature to see
- d* whether jurisdiction over the particular matter is given to the Syariah courts or the civil courts provided in art. 121(1) of the Constitution. To seek for the jurisdiction of the Syariah Court, List II of the Ninth Schedule to the Federal Constitution should not be interpreted so narrowly in the light of the overall jurisdiction given by the Constitution in List II that the Syariah Court shall have jurisdiction over persons professing the religion of Islam in respect of
- e* matters stated therein. In *Mohamed Habibullah’s* case, *supra*, Harun Hashim SCJ at p. 800 said:

- f* It is obvious that the intention of Parliament by art 121 (1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court: *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court had jurisdiction and **not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah Court**. The validity of a state law can only be questioned in a separate proceeding under art 4(3) of the Federal Constitution And by art 4(4)
- g* read with art 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3). (emphasis added).

- h* Section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 (hereinafter referred to as ‘the Act’), in so far as is relevant to this present application of the plaintiff states as follows:

46. (1) A Syariah Court shall have jurisdiction throughout the Federal Territories and shall be presided over by a Syariah Judge.
- (2) A Syariah High Court shall:

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- (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all parties are Muslim and which relate to: a
 - (x) other matters in respect of which jurisdiction is conferred by any written law. and

section 47 thereof states as follows: b

47. (1) A Syariah Subordinate Court shall have jurisdiction throughout the Federal Territories and shall be presided over by a Judge of the Syariah Subordinate Court.

(2) The Syariah Subordinate Court shall: c

- (b) in its civil jurisdiction, hear and determine all such actions and proceedings as the Syariah High Court is authorized to hear and determine in which the amount or value of the subject-matter in dispute does not exceed fifty thousand ringgit or is not capable of estimation in terms of money. d

(3) The Yang di-Pertuan Agong may from time to time by notification in the Gazette extend the civil jurisdiction of the Syariah Subordinate Court.

Those jurisdiction of the Syariah Courts given by the Act, in the light of the provisions provided by para. 1 of List II mentioned earlier cannot in any way limit the wider jurisdiction of the courts to deal over persons professing the religion of Islam in respect of any of the matters included in para. 1 thereof, as construed narrowly by my learned brother in *Lim Chan Seng, supra*, by the mere fact that the jurisdiction to decide on the matter of the application of the plaintiff here is not so expressly stated in the Act. If I may call, the wider jurisdiction given by para. 1 of List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the Syariah Court subject of course to the right to exercise that jurisdiction is being expressly given by the Act which power is within the competency of the legislature to do under art. 74. e

Harun Hashim SCJ in *Mohamed Habibullah's case, supra*, took the objective view of the Constitution thus, at p. 803: f

Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution. Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Syariah Courts but also by the civil courts. g

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a What art 121(1A) has done is to grant exclusive jurisdiction to the Syariah Courts in the administration of such Islamic Laws. In other words, art 121 (1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah Courts.

b Gunn Chit Tuan SCJ in *Mohamed Habibullah's case, supra*, in respond to the submission by the learned counsel said at p. 822:

c With respect to the submission of Mr. Balwant Singh Sidhu regarding whether the plaintiff could be considered as apostate, reference ought to be made to the dictum of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor*, when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah Court.

d Citing *Dalip Kaur's case*, Mohamed Azmi SCJ in *Mohamed Habibullah's case, supra*, has this to say at p. 814:

In *Dalip Kaur v. Pegawai Polis Daerah Bukit Mertajam* at p 9, Mohamed Yusoff SCJ, has also expressed the following views:

e It is apparent from the observation made by the learned Judicial Commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious considerations and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers

f at a Sikh temple he was definitely an apostate.

g The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.

h On this view it is imperative that the determination of the question in issue requires substantial consideration on the Islamic law by relevant jurists qualified to do so. **The only forum qualified to do so is the syariah court**". (emphasis added).

i Therefore, on the principle adumbrated in *Mohamed Habibullah and Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768, I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the determination of his status upon

his purported renunciation of the Islamic faith by the Deed Poll and the statutory declaration is outside the jurisdiction of this court to determine on account of the ouster of the jurisdiction by art. 121(1A) of the Federal Constitution. By virtue of para. 1 in List II of the Schedule to the Federal Constitution, the jurisdiction lies in the Syariah Court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art. 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court.

As for the decisions so far given by the courts of co-ordinate jurisdiction on the interpretation of art. 121(1A) of the Federal Constitution as cited in the arguments, with respect, I would agree with the decision given in *Soon Seng v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 2 CLJ 107 that the civil court had no jurisdiction to make a declaration of the nature sought by the plaintiff in this application. So is the decision given in *Hajjah Mahani bt Sulaiman & 3 Ors v. Majlis Agama Islam & Adat Melayu Terengganu* [1993] 3 AMR 2898.

In the circumstances, on a preliminary issue of law, I dismiss this application of the plaintiff with costs as this court has no jurisdiction to adjudicate in the matter prayed in the application in the light of art. 121(1A) of the Federal Constitution.

Reported by WA Sharif

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