

~~P.C.~~
~~62~~

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

Judgment
50, 1964

No.41 of 1962

ON APPEAL
FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

THAMBOO RATNAM

Appellant (Plaintiff)

- and -

1. THAMBOO CUMARASAMY
2. CUMARASAMY ARIAMANY
d/o KUMARASA

Respondents (Defendants)

RECORD OF PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

.. 78697

PARKER, GARRETT & CO.,
St. Michael's Rectory,
Cornhill, E.C.3.

Solicitors for the Appellant.

SLAUGHTER & MAY,
18, Austin Friars,
E.C.2.

Solicitors for the Respondents.

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No.41 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

THAMBOO RATNAM

Appellant (Plaintiff)

- and -

1. THAMBOO CUMARASAMY
2. CUMARASAMY ARIAMANY
d/o KUMARASA

Respondents (Defendants)

RECORD OF PROCEEDINGS
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1.

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No.41 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL AT KUALA LUMPUR

F. M. Civil Appeal No.10 of 1962
(K.L. Civil Suit No.511 of 1960)

B E T W E E N

THAMBOO RATNAM Appellant (Plaintiff)

10

- and -

1. THAMBOO CUMARASAMY
2. CUMARASAMY ARIAMANY
d/o KUMARASA

Respondents (Defendants)

RECORD OF PROCEEDINGS

No. 1.

NOTICE OF APPEAL

In the Court
of Appeal at
Kuala Lumpur.

20

TAKE NOTICE that Thamboo Ratnam the Plaintiff above-named being dissatisfied with the decision of the Honourable Mr. Justice Ong given at Ipoh on the 3rd February 1962, appeals to the Court of Appeal against the whole of the said decision.

No. 1.
Notice of
Appeal.
2nd March, 1962.

DATED this 2nd day of March, 1962.

Sgd. T. RATNAM,
Signature of Appellant.

To:

The Senior Assistant Registrar,
Supreme Court, Kuala Lumpur.

30

Messrs. S.M. Yong & Co., Solicitors for the
Respondents, 52, Klyne Street (First Floor)
Kuala Lumpur.

The address for service of the Appellant is
No.K-10, Sungei Pari Road, Ipoh.

No. 2.

Letter from Registrar, Supreme Court to Registrar, Court of Appeal, dated 13th March, 1962.

No. 2.

LETTER - REGISTRAR, SUPREME COURT TO REGISTRAR, COURT OF APPEAL.

(This document does not form part of the Record received from Court of Appeal Kuala Lumpur and is inserted by agreement between the parties)

No. (2) in F.M. Civil Appeal No. /62
/mjr

Selangor Registry,
Supreme Court,
Kuala Lumpur.

10

13th March, 1962.

The Registrar,
Court of Appeal, F.M.,
Kuala Lumpur.

F.M. CIVIL APPEAL NO. /62

Thamboo Ratnam

Vs.

Thamboo Cumarasamy and Another

I forward herewith 4 copies of Notice of Appeal filed herein.

20

2. The Appellant has paid \$500/- as security for the costs of the appeal on 3rd March, 1962 and the Appeal was entered in the list of Civil Appeals on the same day.

3. Please let me know the F.M. Civil Appeal number assigned to this appeal.

Sgd: AU AH WAH
Senior Assistant Registrar.

No. 3.

Letter from Registrar, Court of Appeal to Registrar, Supreme Court dated 15th March, 1962.

No. 3.

LETTER - REGISTRAR, COURT OF APPEAL to REGISTRAR, SUPREME COURT.

30

(This document does not form part of the Record Received from Court of Appeal Kuala Lumpur and is inserted by agreement between the parties)

No. (3) in F.M. Civil Appeal 10/62
SCS/VY.

The Federal Registry,
Supreme Court,
Federation of Malaya
Kuala Lumpur.
15th March, 1962.

No. 3.

Letter from
Registrar,
Court of Appeal
to Registrar,
Supreme Court
dated

The Senior Assistant Registrar,
Supreme Court, KUALA LUMPUR.

re Kuala Lumpur High Court Civil Suit No.511
of 1960

15th March,
1962

- continued.

10 Thamboo Ratnam Plaintiff
1. T. Cumarasamy 2. C. Ariamany Defendants

With reference to your memo No.(2) in F.M.
Civil Appeal No. /62 dated 13th March 1962
and the copies of the Notice of Appeal in the
above matter forwarded therewith, please note that
the Appeal in the above matter has now been regis-
tered as F.M.CIVIL APPEAL NO.10 of 1962.

20 2. The said Appeal is fixed for hearing at the
sitting of the Court of Appeal at Kuala Lumpur
which commences on Monday the 20th day of August,
1962, at 10.00 a.m.

3. Please note that in accordance with the time
prescribed under Rule 22(6) of Order 58 of the
Rules of the Supreme Court, 1957, the Record of
Appeal in this matter is required to be filed at
your Registry on or before 14th April 1962.

30 4. Before forwarding the copies of the Record of
Appeal to me, you are required to ensure that they
have been prepared in strict compliance with the
directions of the Honourable the Chief Justice as
contained in the Registrar's Practice Note No.1 of
1961.

Sgd.

(SHIV CHARAN SINGH)
Assistant Registrar,
Court of Appeal,
Federation of
Malaya.

c.c.

1. Thamboo Ratnam (Appellant)
No.K.10, Sungei Pari Road, IPOH.
- 40 2. Messrs. S.M. Yong & Co.,
(Solicitors for the Respondents)
No.52 Klyne Street, (First Floor) KUALA LUMPUR.
For your information, please

Please take notice, in particular, of the date
and place of hearing of this Appeal as stated in
paragraph 2 above.

No further notice of hearing of this appeal
will be issued to you, unless there is a change in
the date and/or place of hearing.

In the Court
of Appeal at
Kuala Lumpur.

No. 4.

NOTICE OF MOTION

No. 4.
Notice of
Motion.
18th April,
1962.

TAKE NOTICE that the Court of Appeal will be moved on Tuesday the 15th day of May, 1962, at 10 o'clock in the forenoon or so soon as Counsel can be heard by Mr. Anthony Hills of Counsel for the above-named Plaintiff on appeal from the Judgment herein of the Honourable Mr. Justice Ong given at Ipoh on the 3rd day of February, 1962, for an Order that the time for filing the Record of Appeal be extended to 14 days from the date of the Order to be made hereon.

10

DATED this 18th day of April, 1962.

Sgd. Shiv Charan Singh
Asst. Registrar,
Court of Appeal,
Kuala Lumpur.

Sgd. Donaldson &
Burkinshaw
Solicitors for the
Appellant.

To the above-named Respondents and to their Solicitors, Messrs. S.M. Yong & Co., 52, Klyne Street, Kuala Lumpur.

20

No. 5.
Affidavit of
Thamboo Ratnam.
18th April,
1962.

No. 5.

AFFIDAVIT OF THAMBOO RATNAM.

I, THAMBOO RATNAM of k-10 Sungei Pari Road, Ipoh, make oath and say as follows:-

1. I am the Plaintiff/Appellant in the present Appeal.

2. On the 13th April at 11.30 a.m. I first instructed my present Solicitors to act for me in this Appeal.

3. My present Solicitors explained to me that it would not be possible to file the Record within the time limited, i.e. on or before the 14th April 1962.

30

4. I had not instructed my Solicitors earlier nor had I taken any other action with regard to this Appeal as I had hoped that some compromise might be reached between the parties.

5. I therefore humbly request this Honourable Court to grant this my application that the time for filing the Record of Appeal herein be extended to 14 days after the date of the Order to be made herein.

SWORN at Kuala Lumpur this)
18th day of April, 1962 at) Sgd. T. Ratnam.
10.35 a.m.

10 Before me,
Sgd. W.P. Sarathy,
A Commissioner for Oaths.

In the Court
of Appeal at
Kuala Lumpur.

No. 5.

Affidavit of
Thamboo Ratnam.

18th April,
1962

- continued.

This Affidavit is filed on behalf of the above-named Appellant by Messrs. Donaldson & Burkinshaw, 505/507, Lee Yan Lian Building, Kuala Lumpur.

FILED this 18th day of April, 1962
Sgd. SHIV CHARAN SINGH,
Assistant Registrar, Court of Appeal,
Kuala Lumpur.

20

No. 6.

AFFIDAVIT OF THAMBOO CUMARASAMY

I, THAMBOO CUMARASAMY of full age and of Ceylon tamil nationality residing at No.378 Jalan Kamuaning, Imbi Road, Kuala Lumpur, affirm and say as follows:-

No. 6.

Affidavit of
Thamboo
Cumarasamy.

10th May, 1962.

1. I am the Respondent firstly above-named and am authorised by my wife, Cumarasamy Ariamany d/o Kumarasa, the Respondent secondly above-named to make this Affidavit on her behalf also.

30 2. As Judgment in Civil Suit No.511 of 1960 was given on 3rd February, 1962 the Appellant herein had ample time and opportunity to instruct his Solicitor and to file his Record of Appeal.

3. The Appellant did not at any time after the date of Judgment nor before, agree to compromise any matter in issue in the said suit nor has approached the Respondents with a view to a compromise.

In the Court
of Appeal at
Kuala Lumpur.

No. 6.
Affidavit of
Thamboo
Cumarasamy.
10th May, 1962
- continued.

4. The Respondents therefore pray for an Order
that the Motion be dismissed with costs.

AFFIRMED by the above-named)
Thamboo Cumarasamy at Kuala) Sgd. T. Cumarasamy.
Lumpur this 10th day of)
May, 1962 at 4.00 p.m.)

Before me,
Sgd. Nadarajah
Magistrate,
Kuala Lumpur.

(Seal)

10

This Affidavit is filed on behalf of the
Respondents by Messrs. Rajendra & Teik Ee, whose
address for service is No.11, Cross Street (1st
Floor), Kuala Lumpur.

No. 7.

Notes of
Argument
recorded by
and decision
of Thomson,
C.J.
15th May, 1962.

No. 7.

NOTES OF ARGUMENT - THOMSON, C.J.

Cor: Thomson, C.J.
Hill, J.A.
Good, J.A.

20

NOTES OF ARGUMENTS

Application for extension of time

For Appellant: Hills

For Respondents: Ponnudurai

Hills: Read Affidavit

Ponnudurai:

Oppose.

Costs.

Application dismissed with costs as
agreed at \$50/-.

30

Intld. J.B.T.
15.5.62.

True Copy
Sgd. Tneh Liang Peng.
Private Secretary to
Chief Justice.
19.7.62.

7.

No. 8.

NOTES OF ARGUMENT - HILL, J.A.

Coram: Thomson, C.J.
Hill, J.A.
Good, J.A.

15th May, 1962

Hills for Appellant

Ponnudurai for Respondents

10 Hills: Six weeks to file record -
20th August 1962 next Court of Appeal -
14 days. 0.64 r. 7.

Ponnudurai:

Opposes - was represented by Counsel -
No approach re compromise - no merits.
Refused - Costs \$50/-

Sgd. R.D.R. Hill
Judge of Appeal.

Certified true copy

Sgd. G.E.Tan

(Mrs. G.E.Tan)

Secretary to Judges of Appeal,
Federation of Malaya.
8th August 1962.

In the Court
of Appeal at
Kuala Lumpur.

No. 8.

Notes of
Argument
recorded by
and decision
of Hill, J.A.
15th May, 1962.

No. 9.

NOTES OF ARGUMENT - GOOD, J.A.

15th May, 1962

30 Hills: Application for leave to file record out
of time. Notice of Appeal was filed in
time. Does not involve any extension of
the hearing date. Next civil session is
on 20th August 1962. Record will be
filed by the 31st May 1962 if leave is
granted. Appellant unrepresented until
the day before the time expired.

No. 9.

Notes of
Argument
recorded by
and decision
of Good, J.A.
15th May, 1962.

In the Court
of Appeal at
Kuala Lumpur.

No. 9.

Notes of
Argument
recorded by
and decision
of Good, J.A.

15th May, 1962
- continued.

Ponnudurai:

Appellant was represented in the lower Court. I oppose the application - no merit in it. Discretion, but there must be circumstances to justify its exercise in favour of the Appellant.

Gatti v. Shoosmith (1939) 3 A.E.R. 916.

Carter v. Stubbs 6 Q.B.D. p.121.

Application dismissed with costs \$50/-.

Hills for Appellant

10

Ponnudurai for Respondents

Sgd. D.B.W. Good
Judge of Appeal.

Certified true copy

Sgd. G.E. Tan
(Mrs. G.E. Tan)

Secretary to Judges of Appeal,
Federation of Malaya.

8th August, 1962

No.10.

Order of Court.
15th May, 1962.

No.10.

ORDER OF COURT

20

Before: The Honourable Mr. Justice Thomson,
P.M.N., P.J.K., Chief Justice, Federation
of Malaya;

The Honourable Mr. Justice Hill, B.D.L.,
Judge of Appeal;

The Honourable Mr. Justice Good, Judge of
Appeal.

IN OPEN COURT

This 15th day of May, 1962

ORDER.

30

UPON MOTION made unto the Court this day by Mr. Anthony Hills of Counsel for the above-named Appellant in the presence of Mr. R. Ponnudurai of Counsel for the above-named Respondents applying for an Order that the time for filing the Record of Appeal be extended to 14 days from the date of the Order to be made on this Motion AND UPON READING the Notice of Motion dated the 18th day of

10 April 1962, and the Affidavit of Thamboo Ratnam affirmed and filed herein on the 18th day of April 1962 in support thereof, and the Affidavit of Thamboo Cumarasamy affirmed on the 10th day of May 1962 and filed herein on the 11th day of May 1962 in opposition thereto AND UPON HEARING Counsel as aforesaid for the parties IT IS ORDERED that this application be and is hereby dismissed AND IT IS FURTHER ORDERED that the above-named Appellant do pay to the above-named Respondents the costs of this application which are hereby fixed at \$50/- (Dollars fifty only).

GIVEN under my hand and the seal of the Court this 15th day of May 1962.

(L.S.)

Sgd. Shiv Charan Singh,
Assistant Registrar,
Court of Appeal,
Federation of Malaya.

In the Court
of Appeal at
Kuala Lumpur.

No.10.

Order of Court.
15th May, 1962
- continued.

No. 11.

20 NOTICE OF MOTION

TAKE NOTICE that the Court will be moved on Monday the 2nd day of July 1962, at 10.00 o'clock in the forenoon or as soon thereafter as Counsel can be heard by Mr. A.L. Hills of Counsel for the above-named Appellant for an Order that Conditional Leave to Appeal to the Yang di-Pertuan Agong be given to the Appellant against the whole of the Order of the Court of Appeal given on the 15th day of May, 1962.

30 DATED this 14th day of June, 1962.

Sgd. Shiv Charan Singh,
Asst. Registrar,
Court of Appeal,
Kuala Lumpur.

Sgd. Donaldson &
Burkinshaw
Solicitors for
the above-named
Appellant.

This Notice of Motion was taken out by Messrs. Donaldson & Burkinshaw, Lee Yan Lian Building, Kuala Lumpur, Solicitors for the above-named Appellant.

No.11.

Notice of
Motion.

14th June, 1962.

In the Court
of Appeal at
Kuala Lumpur.

To the above-named Respondents and to their
Solicitors, Messrs. Rajendra & Teik Ee,
No.11, Cross Street (First Floor), Kuala Lumpur.

No.11.
Notice of
Motion.
14th June, 1962
- continued.

FILED this 14th day of June, 1962.
Sgd. Shiv Charan Singh,
Asst. Registrar,
Court of Appeal,
Federation of Malaya.

No.12.
Affidavit of
Thamboo Ratnam.
14th June,
1962.

No. 12.
AFFIDAVIT OF THAMBOO RATNAM

10

I, THAMBOO RATNAM, Federal Citizen, residing
at K-10, Sungei Pari Road, Ipoh, make oath and
say as follows:-

1. I am the Appellant above-named and I crave
leave to refer to the Order of the Court of Appeal
made herein on the 15th day of May 1962, dismiss-
ing my application for leave to file Record of
Appeal out of time.
2. I desire to appeal against the said decision.
3. The matter in dispute relates to property to 20
the value of over \$4,500/-.
4. I am willing to abide by the usual conditions
governing the grant of leave to appeal by the
Court to the Yang di-Pertuan Agong.

SWORN at Kuala Lumpur this)
14th day of June, 1962 at) Sgd. T. Ratnam
12.10 p.m.

Before me,
Sgd. W.P. Sarathy
A Commissioner for Oaths.

30

This Affidavit is filed on behalf of the
above-named Appellant by Messrs. Donaldson & Bur-
kinshaw, 505/507 Lee Yan Lian Building, Kuala
Lumpur.

11.

No. 13.

AFFIDAVIT OF COLIN HAROLD WILLIAMS

In the Court
of Appeal at
Kuala Lumpur.

No.13.

Affidavit of
Colin Harold
Williams.

28th June,
1962.

I, COLIN HAROLD WILLIAMS of 31 Yap Kwan Seng Road, Kuala Lumpur, make oath and say as follows:-

1. I hold the B.Sc. degree in Estate Management of the University of London, am a Chartered Surveyor, a Chartered Auctioneer and Estate Agent and a fellow of the Rating and Valuation Association.

10 2. I am informed by the Appellant's Solicitors that the Appellant herein is claiming a half-share in the following lands:-

(a) Grant for Land No.11103 for Lot 378 Section 67, Town of Kuala Lumpur (0.213 acres Jalan Kamuaning)

(b) Grant for Land No.3429 for Lot 23 Section 40, Town of Kuala Lumpur (1.015 acres at Sungei Bonus)

20 (c) Certificate of Title No.12035 for Lot 377 Section 67, Town of Kuala Lumpur (0.213 acres).

3. A half-share in the above-mentioned lands is worth substantially more than \$4,500/- and in my opinion is worth at the present time not less than \$214,000/-).

SWORN at Kuala Lumpur this)
28th day of June, 1962 at) Sgd. C. H. Williams.
3.00 p.m.

30 Before me,
Sgd. W.P. Sarathy,
A Commissioner for Oaths.

This Affidavit was filed by Messrs. Donaldson & Burkinshaw, 505/507 Lee Yan Lian Building, Kuala Lumpur on behalf of the Appellant.

No. 14.

AFFIDAVIT OF THAMBOO CUMARASAMY

No.14.

Affidavit of
Thamboo
Cumarasamy.

28th June, 1962.

I, THAMBOO CUMARASAMY of full age and of Ceylon tamil nationality residing at 378 Jalan Kamuaning, Imbi Road, Kuala Lumpur, affirm and say as follows:-

In the Court
of Appeal at
Kuala Lumpur.

No.14.
Affidavit of
Thamboo
Cumarasamy.
28th June, 1962
- continued.

1. I am the Respondent firstly above-named and am authorised by my wife, Cumarasamy Ariamany, the Respondent secondly above-named to make this Affidavit on her behalf also.
2. The Application is in fact an application for leave to appeal from an interlocutory Order.
3. The Application is not a fit one for appeal.
4. Further the Application is vexatious and without any merit and is merely for the purpose of delay.

10

AFFIRMED by the above-named)
 deponent this 28th day of) Sgd. T. Cumarasamy
 June, 1962 at 2.15 p.m.)

Before me,
 Sgd. W.P. Sarathy
 A Commissioner for Oaths.

This Affidavit is filed on behalf of the Respondents by Messrs. Rajendra & Teik Ee, whose address for service is No.11 Cross Street (1st Floor) Kuala Lumpur.

20

No.15.

Notes of
 Argument
 recorded by
 Hill, Ag.C.J.
 2nd July, 1962.

No. 15.

NOTES OF ARGUMENT - HILL, AG. C.J.

2nd July 1962

CONDITIONAL LEAVE TO APPEAL

Hills for Appellant

Ponnudurai for Respondents

Hills: Value over \$4,500 - Affidavit.

If interlocutory - a fit one for appeal.
 In fact a final order.
 O.58 r.22(6) (1960 amendment)

30

New rule - no decision.

Atwood v. Chichester (1878) 3 Q.B.D.722 - 723. Irreparable mischief - in re
Kavena Hadjee Mohamed Yoosuf decd. and
Estate and Trust Agencies (1927) Ltd. v.
Fahmah Sham binte Hadji Sahib and Others.
SSLR 53 (58)

Appeals Ordinance 1958 3(1).
This is final.

Shubrook v. Tufnell (1882) 9 QBD 621.

Salaman v. Warner and Others (1891)
1 QBD 734.

Bozson v. Altrincham U.D.C. (1903)
1 K.B. 547. "as made" finally disposes.

Isaacs & Sons v. Salbstein and Another
(1916) 2 KB.139 (146)

10

V.K.R.Leonard v. Official Assignee - 1941
M.L.J.26. Asks for leave under usual
conditions.

In the Court
of Appeal at
Kuala Lumpur.

No.15.

Notes of
Argument
recorded by
Hill, Ag.C.J.

2nd July, 1962
- continued.

Ponnudurai: Application was an interlocutory one
- discretion exercised.

Special leave to proceed - rights not
finally disposed - other methods still
open - properties under caveat.

C. A. V.

20

Sgd. R.D.R.Hill,
Ag. C.J.

Certified true copy
Sgd. G.E.Tan
Secretary to Judges of Appeal,
Federation of Malaya,
8th August, 1962.

No. 16.

NOTES OF ARGUMENT - GOOD, J.A.

2nd July 1962

Hills for Appellant

30

Ponnudurai for Respondent

Hills: Application for conditional leave to appeal
against the dismissal by this Court of
Appellant's application (15th May 1962) to
file the appeal record out of time. If
this was a final order there is a right of
appeal (the value of the property being far

No.16.

Notes of
Argument
recorded by
Good, J.A.

2nd July, 1962.

In the Court
of Appeal at
Kuala Lumpur.

No.16.

Notes of
Argument
recorded by
Good, J.A.

2nd July, 1962
- continued.

in excess of \$4,500 vide Affidavit of C.H. Williams dated 28.6.62).

If it was an interlocutory order it must be shown to be a fit one for appeal. (Appeals from the Supreme Court Ordinance 1958, Section 3 (1)(b)).

O.58 r.22(6) Amended by L.N. 138/60. No decision yet on the amended sub-rule.

If applicant shows good reason for being out of time, Respondent must show that he would be prejudiced if the application were granted.

10

Atwood v. Chichester (1878) 3 Q.B.D.722.

Bramwell L.J. at 723.

No irreparable damage caused to Respondents by delay in filing record.

This is an appeal on a question of law and has merits to it. It is an appeal against a final judgment.

In re Kavena Hadjee Mohamed Yoosuf decd. and Estates and Trust Agencies (1927) Ltd. v. Fahmah Sham binte Hadji Sahib & Others. (1936) S.S.L.R.53 & 58 per A.K. a'Beckett Terrell, J.A.

20

Appeals from the Supreme Court Ordinance 1958 s.3.

Shubbrook v. Tufnell (1882) 9 Q.B.D. 621.

Salaman v. Warner & Others (1891) 1 Q.B. 734.

Bozson & Altrincham U.D.C. (1903) 1 K.B. 547.

30

In the present case, the order, as made, finally disposes of the rights of the parties.

Isaacs & Sons v. Salbstein & Another (1916) 2 K.B.139.

V.K.R. Leonard v. Official Assignee (1941) M.L.J. 30.

The Order in the present case is a final order.

40

Ponnudurai: I submit that the application was an interlocutory one and an order was made. An order dismissing a case for want of prosecution is interlocutory.

Arnot v. Amber Chemical Co. The Times May 20, 1953.

10

In April 1960 the Court of Appeal took into consideration the case of Salaman v. Warner & Others in the Shell Co., of Malaya Ltd. v. The Kuala Lumpur Municipal Council. This is a delaying tactic to cause pecuniary loss to my client. Can this Court look at the Affidavit of C.H. Williams?

I submit Appellant can only succeed if the order is a fit one for appeal.

Sgd. D.B.W. Good
Judge of Appeal.

20

Certified true copy
Sgd. G.E. Tan
Secretary to Judges of Appeal,
Federation of Malaya.
8th August, 1962.

No. 17.

NOTES OF ARGUMENT - SUFFIAN, J.

Monday, 2nd July 1962

Hills for Appellant

Ponnudurai for Respondents

Hills addresses:

30

Court has discretion to grant leave to appeal against interlocutory order - but in fact here it is an appeal against final order in which event I have a right to appeal.

Order 58, Rule 22 "or within such further time as the Court of Appeal may allow" with effect from 1960.

No prejudice has been suffered by Respondents.

In the Court of Appeal at Kuala Lumpur.

No.16.

Notes of Argument recorded by Good, J.A.

2nd July, 1962
- continued.

No.17.

Notes of Argument recorded by Suffian, J.

2nd July, 1962.

In the Court
of Appeal at
Kuala Lumpur.

No.17.

Notes of
Argument
recorded by
Suffian, J.
2nd July, 1962
- continued.

Attwood v. Chichester 1878 3 Q.B.D.722, 723.

Re Kavena 1936 S.S.L.R. 53, 58.

Section 3(1) Appeals from the Supreme Court
Ordinance 1958.

Shubrook v. Tufnell 9 Q.B.D.621, 622 - this
appeal is one against interlocutory order.

Salaman v. Warner 1891 1 Q.B.734 - against
the Appellant but it has not been followed since
1903 - see Bozson v. Altrincham U.D.C. 1903 1 K.B.
547, 548 - the order as made by this Court was a
final order. 10

Isaacs v. Salbstein (1916) 2 K.B. 139, 146.

Leonard v. O.A. 1941 M.L.J. 30.

Here order as made finally disposed of the
rights of the parties - therefore Appellant has
right for leave to appeal. I therefore ask for
leave under the usual conditions.

Ponnudurai addresses:

Order of 15th May 1962 was interlocutory
order. Appellant may by special leave appeal. 20
Salaman v. Warner 1891 1 Q.B. 734. April 1960
Malayan Law Journal. Property in dispute under
caveat. Appellant is only delaying.

C. A. V. Sgd, M. Suffian.

Certified true copy,
Sgd. (Illegible)
Secretary to Judge,
Kuala Lumpur,
7.8.62.

No.18.

Judgment of
Good, J.A.

18th July,
1962.

No. 18.

JUDGMENT OF GOOD, J.A.

Coram: Hill, Ag. C.J.
Good, J.A.
Suffian, J.

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This is an application for leave to appeal to
the Yang di-Pertuan Agong against an order of this
Court made on the 15th May 1962, when we dismissed

an application by the same applicant for leave to file the record of appeal out of time.

In the Court of Appeal at Kuala Lumpur.

The applicant was the unsuccessful Plaintiff in Civil Suit No.511 of 1960 which was tried in the High Court by Ong, J. The applicant filed a notice of appeal in time against the decision of Ong, J., but he was out of time in filing the record of appeal under Order 58, rule 22(6).

No.18.

Judgment of Good, J.A.

18th July, 1962
- continued.

10 The provisions governing leave to appeal are contained in Section 3(1) of the Appeals from the Supreme Court Ordinance 1958, and the relevant parts of that sub-section which have to be considered on the present application are:-

"... an appeal shall lie from the Court to the Yang di-Pertuan Agong with the leave of the Court -

(a) from any final judgment or order in any civil matter where

20 (i) the matter in dispute in the appeal amounts to or is of the value of four thousand five hundred dollars or upwards;; and

(b) from any interlocutory judgment or order which the Court considers a fit one for appeal;"

30 The respondents' answer to this application is that it is an application for leave to appeal from an interlocutory order which is not a fit one for appeal. The applicant makes his application on the basis that the order against which he desires to appeal is a final order to which section 3(1)(a)(i) applies.

The question that we have to decide is whether our own order of the 15th May 1962, which barred the applicant from appealing to us against the decision of the High Court, is final or interlocutory.

40 The question of when an order is final and when it is interlocutory is a vexed one which has been the subject of much anxious consideration by the Courts for a great many years. The earliest case to which we have had to refer was decided in 1877, but there were even earlier cases. The difficulty which judges have found in deciding the question is well illustrated in the case of In re Page, Hill v. Fladgate (1). In that case Cozens-Hardy, M.R., prefaced his judgment by saying:-

(1) (1910) 1 Ch.489.

In the Court
of Appeal at
Kuala Lumpur.

" I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others".

No.18.

Buckley, L.J., began his judgment by saying :-

Judgment of
Good, J.A.

" The rules are so expressed and the decisions are so conflicting that I confess I am unable to arrive at any conclusion satisfactory to my own mind as to whether this is an interlocutory or a final order".

18th July, 1962
- continued.

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and concluded with the words :-

" But I desire to say that in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final".

The echoes of this cri-de-coeur are still heard 52 years later and 8,000 miles away.

20

Mr. Hills for the applicant referred us to five cases on this point :-

- (1) Shubrook v. Tufnell (1882) 9 Q.B.D. 621.
- (2) Salaman v. Warner (1891) 1 Q.B. 734.
- (3) Bozson v. Altrincham U.D.C. (1903) 1 K.B. 547.
- (4) Isaacs v. Salbstein (1916) 2 K.B. 139.
- (5) Cogstad v. Newsum (1921) 2 A.C. 528.

Mr. Ponnudurai for the Respondents relied on Salaman and also referred us to an unreported case mentioned in item No.2719 in the Current Law Year Book for 1953: Arnot v. Amber Chemical Co. He also cited the judgment of Thomson, C.J., in The Shell Company of the Federation of Malaya v. The Chairman, Kuala Lumpur Municipal Council (2) which was given in this Court on the 17th April 1961. For the purposes of a decision on the present application, it is necessary to consider these cases.

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I will begin by referring to a case which was not cited by Counsel, Standard Discount Co. v. La Grange (3). I do so because this case foreshadows the principle which gradually emerges from the

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- (2) F.M. Civil Appeal No.67 of 1960.
 - (3) (1877) 3 C.P.D. 67.

line of cases cited. In it the Court of Appeal held that an order empowering a Plaintiff to sign judgment upon a specially indorsed writ is an interlocutory and not a final proceeding. The ratio decidendi of this decision was stated by Bramwell, L.J., as follows :-

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" There cannot be an order which is neither final nor interlocutory; and therefore if the order before us is not final, it must be interlocutory. Is it a final order? It is like every other order in one sense final, so long as it is not appealed against, but it is not the final order of the Court in the cause, because in order to entitle the Plaintiffs to levy execution there must be a subsequent direction by the Court. Therefore, I think it is an interlocutory order".

20

I now come to the case of Shubrook which, however, is not capable of being fully understood without reference to the earlier case of Collins v. The Vestry of Paddington (4). The first paragraph of the headnote to Collins is as follows:-

" The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is thereupon to make his award, is an 'interlocutory order' within the meaning of Rules of the Supreme Court, Order LVIII, Rule 15, and an appeal from the decision must be brought within twenty-one days".

30

But in Shubrook, Jessel, M.R., said that that was not what Collins decided but only that where the decision of the Court on the point submitted to it could not in any event necessitate the entering of final judgment for either party, the decision was interlocutory. In Shubrook an action for damages had been referred to arbitration and the arbitrator had stated a case for the opinion of the Court. The Court's opinion was that judgment should be entered for the Plaintiffs and it was thereupon ordered that the case be referred back to the arbitrator. The Court of Appeal held that this was a final order. This case was not followed in C.T. Cogstad & Co. v. H. Newsum Sons & Co., Ltd., (5) but Cogstad is of doubtful value in the present discussion because the decision turned on the wording of the arbitrator's award and no principle of

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(4) (1880) 5 Q.B.D. 368.
(5) (1921) 2 A.C. 528.

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general application can be gathered from it. The next case, to which Mr. Hills very properly drew our attention although it appears to be against him, is Salaman. In that case there was an appeal from an order of the Divisional Court dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial. It was held that the order of the Divisional Court was not a final order within Order 58, Rule 3, and that a final order is one made on such an applica- 10
tion or proceeding that, for whichever side the decision is given, it will if it stands, finally determine the matter in litigation. Fry, L.J., said at page 736 :-

" I think that the true definition is this, I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such applica- 20
tion or other proceeding fail or succeed, determine the action. Conversely I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined".

Shubrook and Salaman were both considered by the Court of Appeal in Bozson. In that case -

" An order was made in an action, brought to recover damages for breach of contract, that the questions of liability and breach of contract only were to be tried, and that the rest of the case, if any, was to go to an 30
official referee. At the trial the Judge held that there was no binding contract between the parties, and made an order dismissing the action, from which order the Plaintiff appealed".

It was held by the Court of Appeal that the appeal was from a final order. The Earl of Halsbury, L.C., after observing that the authorities were not in harmony said in respect of Shubrook and Salaman, without giving reasons, "I prefer to follow 40
the earlier decision". He was followed by Lord Alverstone, C.J., who in a very brief judgment laid down the test for determining whether an order is final or interlocutory. He said :-

" I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made,

finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order".

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- continued.

10 In In re Page it was held that an order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order. Such an order would appear to be final if one applies the test stated by Lord Alverstone and the grounds on which it was held to be interlocutory are, with respect, far from convincing. Cozens-Hardy, M.R., based the decision on three grounds:-

- 20 (a) that it had been the practice of the Courts to treat these orders as interlocutory;
- (b) that Chitty, J., in Price v. Phillips⁽⁶⁾ had refused leave to appeal against the dismissal of such an action because such actions should not be encouraged; and
- (c) that it was, on public grounds and on grounds of good sense a matter of extreme importance that an appeal from an order dismissing an action as being frivolous and vexatious should be disposed of by the Court of Appeal, if disposed of at all, in the shortest possible time.

30 Fletcher Moulton, L.J., who had been the leading Counsel for the successful party in Salaman's case, speaking from his own recollection of that case said that in his opinion the decision in Salaman amounted to a decision that this was an interlocutory order. Buckley, L.J., appeared to lean towards the contrary view, for he said:-

40 " I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to theirs without saying that I am completely satisfied with the reasons given for the view that this is an interlocutory order".

Speaking for myself and with the greatest respect I am unable to see that any cogent reasons have been advanced in In re Page to justify a departure from Lord Alverstone's test.

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In Isaacs & Sons v. Salbstein⁽⁷⁾ Swinfen Eady, L.J., considered both Shubrook and Salaman and said :-

" Neither decision seems quite consistent with that in Bozson v. Altrincham Council which puts the matter on the true foundation that what must be looked at is the order under appeal".

That was an appeal from the Divisional Court to the Court of Appeal. The County Court had given a final judgment and the Divisional Court had made an order for a new trial. The Court of Appeal held that this was clearly an interlocutory order.

Finally there was the case of Peek v. Peek⁽⁸⁾ in which the Court of Appeal held that an order of the Divisional Court setting aside a decree nisi of divorce and directing a new trial was an interlocutory order within Order 58, Rule 15. In that case Tucker, L.J., at page 299 referred to the case of Isaacs and quoted the judgments of Halsbury, L.C., and Alverstone, C.J., in Bozson from the judgment of Swinfen Eady, L.J., in Isaacs. He then went on to say :-

" In my view, that decision (i.e., the decision in Isaacs) governs this case, unless Counsel for the husband is right in saying that a distinction should be drawn between it and the present proceedings".

It is clear therefore that the test laid down by Lord Alverstone in Bozson has been approved and followed by the Court of Appeal in subsequent cases though not in In re Page.

I now have to refer to the two cases cited by Mr. Ponnudurai for the Respondents. It is a matter of regret that it is not possible to derive any assistance from Arnot because it is unreported and the report in The Times of May the 20th, 1953, is not available. All that we know about it is that in the circumstances of that particular case an order dismissing an action for want of prosecution was for the purposes of appeal held to be an interlocutory order. On that bare knowledge I am unable to base any conclusion. The other case referred to by Mr. Ponnudurai was The Shell Company of the Federation of Malaya v. The Chairman, Kuala

(7) (1916) 2 K.B. 139.

(8) (1948) 2 A.E.R. 297.

Lumpur Municipal Council. I do not think that this case affords us any help, as it is the present case in reverse. The High Court Judge had dismissed an appeal against an assessment by the rating authority on the ground of a procedural defect in the filing of the notice of appeal. The order of the High Court put an end to the litigation and was clearly a final order according to Lord Alverstone's test. We disagreed with the view taken by the High Court Judge, and the effect of our decision was to enable the appeal to the High Court, which had been barred in limine by the High Court Judge, to proceed. We removed the finality of the High Court Order and in effect reopened the proceedings. When application was made to us for leave to appeal to the Yang di-Pertuan Agong, we decided that our order which it was desired to appeal against was an interlocutory order and as we did not consider it to be a fit one for appeal, we refused leave.

In the Court
of Appeal at
Kuala Lumpur.

No.18.

Judgment of
Good, J.A.

18th July, 1962
- continued.

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In the present case our order refusing an extension of time for the applicant to file the record of appeal put an end to the proceedings and applying Lord Alverstone's test finally disposed of the rights of the parties by barring the unsuccessful Plaintiff from appealing against the order of the High Court. Our order of the 15th May 1962, is therefore for the purposes of appeal a final order against which the applicant may appeal as of right provided the value of the subject matter is not less than \$4,500/- (and as to that there is no dispute) and provided that he complies with the usual conditions as to security and the provisions as to time.

30

I would allow the application with costs and give conditional leave to appeal on the Appellant giving security for costs in the sum of \$5,000/- and filing the record within three months.

Sgd. D.B.W. Good,
Judge of Appeal.

40

Kuala Lumpur,
18th July 1962.

A.L. Hills, Esq., for Appellant
R. Ponnudurai, Esq., for Respondents.

True copy
Sgd. Tneh Liang Peng.
Private Secretary to Chief Justice.
19.7.62.

In the Court
of Appeal at
Kuala Lumpur.

No.19.

Judgment of
Hill, Ag. C.J.
18th July, 1962.

No. 19.

JUDGMENT OF HILL, AG. C.J.

Cor: Hill, Ag. C.J.
Good, J.A.
Suffian, J.

I agree with the Judgment which my learned brother Good has just read. Out of a number of conflicting opinions and decisions that of Lord Alverstone in Bozson's case stands out as the one judgment that provides a real and practical test for determining whether an order is final or interlocutory and I too would apply it here.

10

Kuala Lumpur,
18th July, 1962.

Sgd. R.D.R. Hill
Acting Chief Justice
Federation of Malaya.

A.L. Hills, Esq., for Appellant
R. Ponnudurai, Esq., for Respondents.

True Copy,
Sgd. Tenh Liang Peng
Private Secretary
to Chief Justice
20.8.62.

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No.20.

Judgment of
Suffian, J.
18th July, 1962.

No. 20.

JUDGMENT OF SUFFIAN, J.

Cor: Hill, Ag. C.J.
Good, J.A.
Suffian, J.

I agree with the judgments just delivered by My Lords and have nothing to add.

Kuala Lumpur,
18th July, 1962.

M. Suffian
Judge
Federation of Malaya.

30

A.L. Hills, Esq., for Appellant
R. Ponnudurai, Esq., for Respondents.

Certified true copy
Sgd.
Secretary to Judge,
Kuala Lumpur
20.8.62.

No. 21.

ORDER GRANTING FINAL LEAVE TO APPEAL

In the Court
of Appeal at
Kuala Lumpur.

Before: The Honourable Dato Sir James Thomson,
P.M.N., P.J.K., Chief Justice, Federation
of Malaya;

The Honourable Mr. Justice Hill, B.D.L.,
Judge of Appeal;

The Honourable Mr. Justice Syed Sheh
Barakbah, P.J.K., B.D.L., Judge of Appeal.

No.21.

Order granting
Final Leave to
Appeal to His
Majesty the
Yang di-Pertuan
Agong.

10 IN OPEN COURT This 15th day of October, 1962.

15th October,
1962.

O R D E R

20 UPON MOTION made unto the Court this day by
Mr. Anthony Hills of Counsel for the above-named
Appellant in the presence of Mr. R. Ponnudurai of
Counsel for the above-named Respondents AND UPON
READING the Notice of Motion dated the 9th day of
October 1962 and the Affidavit of Mr. Thamboo Rat-
nam affirmed and filed on the 10th day of October,
1962 in support of the said Motion AND UPON HEAR-
ING Counsel as aforesaid for the parties and by
consent IT IS ORDERED that Final Leave be and is
hereby granted to the above-named Appellant Thamboo
Ratnam to appeal to His Majesty the Yang di-Pertuan
Agong from the Order of the Court of Appeal dated
the 15th day of May 1962 AND IT IS FURTHER ORDERED
that the costs of this Motion be costs in the
cause.

GIVEN under my hand and the Seal of the Court
this 15th day of October, 1962.

(L.S.) Sgd. Raja Azlan Shah
Registrar,
Court of Appeal,
Federation of Malaya.

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

No.41 of 1962

ON APPEAL
FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

THAMBOO RATNAM

Appellant (Plaintiff)

- and -

1. THAMBOO CUMARASAMY
2. CUMARASAMY ARIAMANY

d/o KUMARASA

Respondents (Defendants)

RECORD OF PROCEEDINGS

PARKER, GARRETT & CO.,
St. Michael's Rectory,
Cornhill, E.C.3.

Solicitors for the Appellant.

SLAUGHTER & MAY,
18, Austin Friars,
E.C.2.

Solicitors for the Respondents.