Privy Council Appeal No. 41 *of* 1962

Thamboo Ratnam – – – – – – – – *Appellant*

v.

Thamboo Cumarasamy and another – – – – – *Respondents*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER 1964

Present at the Hearing:
LORD HODSON.
LORD GUEST.
LORD DONOVAN.
[*Delivered by* LORD GUEST]

This is an appeal from an order of the Court of Appeal of the Supreme Court of the Federation of Malaya, dated 15th May 1962 dismissing an application made by the appellant by notice of motion, dated 18th April 1962, for an order that the time for filing the record of appeal be extended to 14 days from the date of the order sought.

On 3rd February 1962 Ong J. gave judgment for the respondents in an action brought by the appellant against them in the Supreme Court of the Federation of Malaya in the High Court at Kuala Lumpur and dismissed the appellant's claim with costs. In this action the appellant claimed a half interest in properties having a value of not less than $428,000 or about £50,000.

The appellant was entitled as of right and without leave to appeal against the judgment and order to the Court of Appeal.

Under the Rules of the Supreme Court of the Federation of Malaya by Order 58, Rule 15 the notice of appeal had to be filed within one month and in accordance with Order 58, Rule 21 the appellant on 2nd March 1962 personally filed four copies of the notice of appeal and the sum of $500 as security for the costs of the appeal.

In accordance with Order 58, Rule 22 the record of appeal which comprised the memorandum of appeal and certain other documents was required to be filed within six weeks after the entry of the appeal "or within such further time as the Court of Appeal may allow". This period of six weeks expired on 14th April. Under Rule 22 (1) the appellant is required in the memorandum of appeal to set forth "concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided". The appellant was also required to attach to the memorandum of appeal a copy of the judge's notes of the hearing and a copy of the judgment appealed from (Rule 22 (4)).

By letter, dated 15th March 1962 the Registrar of the Court of Appeal informed the Registrar of the Supreme Court at Kuala Lumpur that the appeal was fixed for hearing at the sitting of the Court of Appeal which was to commence at Kuala Lumpur on 20th August 1962, and drew attention to the fact that the record of appeal should be filed at Kuala Lumpur on or before 14th April 1962. A copy of this letter was sent to the appellant personally and received by him. A copy was also sent to the respondents' solicitors.

On 18th April 1962 the appellant's solicitors made an application for an extension of time for filing the record of appeal to 14 days from the date of the order to be made. The Court of Appeal had jurisdiction to extend the time for filing the record of appeal even though the application for extension was made after the expiry of the time allowed (Order 64, Rule 7).

On 15th May 1962 the Court of Appeal heard and dismissed the application. Subsequently the Court of Appeal held that the order dismissing the application was a final order in that it finally disposed of the rights of parties and accordingly the appellant did not require the leave of the Court of Appeal to appeal to the Board.

When the application came before the Court of Appeal the Court had before them affidavits by the appellant and the respondent first named respectively. In his affidavit the appellant explained that he first instructed his present solicitors to act on 13th April when they explained to him that it would not be possible to file the record within the time limited i.e. on or before 14th April 1962. He further stated that he had not instructed his solicitors earlier nor had he taken any other action with regard to the appeal as he had hoped that some compromise might be reached between the parties. In the first-named respondent's affidavit it was stated that the appellant at no time agreed to any compromise nor did he approach the respondents with a view to compromise.

A full argument took place before the Court of Appeal during which it was stated on behalf of the appellant that to grant the application would not involve any postponement of the date of hearing which could take place on 20th August. The Court of Appeal in dismissing the application gave no reasons for their decision.

The principles upon which a Court will act in reviewing the discretion exercised by a lower Court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v. Johnston* [1942] A.C.130 Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam* [1937] A.C.473). Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court (*Mayor of Montreal v. Brown and Another* (1876) 2. App. Cas. 168.

The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

The principle for which the appellant's counsel contended was that the application should be granted unless to do otherwise would result in irreparable mischief. This was said to be extracted from the judgment of Bramwell L.J. in *Atwood v. Chichester* (1878) 3 Q.B.D. 722 at page 723 when his Lordship said " When sitting at chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think a correct view." Their Lordships note that these observations were

made in reference to a case where the application was to set aside a judgment by default which is on a different basis from an application to extend the time for appealing. In the one case the litigant has had no trial at all: in the other he has had a trial and lost. Their Lordships do not regard these observations as of general application.

Their Lordships are satisfied that to allow this appeal would be substantially to interfere with the practice of the Board in regard to applications of this nature. The Board is not familiar with the practice in local Courts and their Lordships are most unwilling to interfere with the exercise of their discretion upon questions of procedure.

For these reasons their Lordships will report their opinion to the Head of Malaysia that the appeal should be dismissed and that the appellant should pay the costs.

(91015) Wt. 8069/113 80 12/64 Hw

In the Privy Council

THAMBOO RATNAM

v.

THAMBOO CUMARASAMY
AND ANOTHER

DELIVERED BY
LORD GUEST

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