HALAMAN PERDANA SDN BHD & ORS

v.

TASIK BAYANGAN SDN BHD

Federal Court, Putrajaya
Arifin Zakaria CJ, Zulkefli Ahmad Makinudin CJM, Richard Malanjum CJSS, Abdull Hamid Embong, Zainun Ali FCJJ
[Civil Application No: 08-783-10-2012(B)]
20 March 2014

Civil Procedure: *Jurisdiction — Federal Court — Inherent powers of Federal Court — Power to review own decision — Limits of such power — Whether such power limited to only reviewing Federal Court's own decision — Whether such power applicable to review decision of other courts — Whether such power applicable to review Federal Court's discretion not to grant leave*

Civil Procedure: *Jurisdiction — Federal Court — Inherent powers of Federal Court — Review sought of Federal Court's refusal to grant leave — Allegation of bias made against Court of Appeal judge — Such allegation not made to Federal Court judges hearing leave application — Whether Federal Court could entertain review of own decision not to grant leave on basis of such bias — Whether issue of bias properly made to Federal Court — Whether Federal Court ought to entertain allegation of bias by judge of another court*

The High Court had decided a claim against the applicants. The applicants' subsequent appeal to the Court of Appeal was also dismissed. The applicants filed a leave application to the Federal Court and then filed a review application to the Court of Appeal praying for the judgment of the Court of Appeal to be reviewed. The applicants subsequently applied to the Federal Court to adjourn the leave application pending hearing of the review application in the Court of Appeal. The Federal Court refused to adjourn the leave application and subsequently dismissed it. The Court of Appeal also dismissed the review application. The applicants applied to the Federal Court under s 96 of the Courts of Judicature Act 1964 and/or r 137 of the Rules of the Federal Court 1995 ("r 137") to *inter alia*: (i) review the decision of the Court of Appeal dismissing the applicants' appeal; and (ii) review the Federal Court's refusal to grant an adjournment of the leave application pending the hearing of the review application, and the consequent dismissal of the leave application.

Held, dismissing the application with costs:

(1) The Federal Court has the jurisdiction to review its own decision in order to prevent injustice or to prevent an abuse of the process of the court under r 137. However, it has no jurisdiction to review decisions of other courts including the Court of Appeal under r 137. (paras 15-16)

(2) In the instant case, the review application was an incompetent application *ab initio*. The Court of Appeal was not the apex court in the instant case. There was therefore no basis in law for the applicants to complain that the Federal Court erred in not allowing an adjournment of the leave application pending the disposal of the review application in the Court of Appeal. (paras 17-18)

(3) The grant or refusal of an adjournment was entirely an exercise of discretion by the judges who heard the leave application. It was not a matter within the ambit of r 137. Granting the adjournment due to the pending review application would have been an exercise in futility. (paras 21-22)

(4) The applicants had made an allegation of bias against a particular Court of Appeal judge at the hearing of their review application in the Court of Appeal. However, they failed to raise this allegation of bias before the judges who heard the leave application. This allegation of bias should have been raised at the earliest opportunity available instead of being raised at the review stage. The applicants could not now say that the leave application ought to be impugned on the grounds of bias. There was no allegation of bias against the decision to dismiss the leave application or against any of the judges who heard the leave application. (paras 26-30)

(5) The jurisdiction of the Federal Court under r 137 is limited to reviewing its own decisions. The basis to do so is very stringent. Since in the instant application there was no allegation of bias or any reason to impugn the decision of the Federal Court in dismissing the leave application, there was thus no basis to invoke the power under r 137. The instant application failed to meet the threshold requirement for r 137. (paras 31 & 33)

Case(s) referred to:

Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd [2003] 1 MLRA 293 (refd)

Dato' Abu Hasan Sarif v. Dato' Dr Abd Isa Ismail [2012] 1 MLRA 565 (refd)

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application [2013] 5 MLRA 1 (refd)

David Wong Hon Leong v. Noorazman Adnan [1995] 1 MLRA 708 (refd)

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 1 MLRA 719 (refd)

Sharikat Galian Razak Sdn Bhd lwn. Magical Capital Sdn Bhd [2014] 2 MLRA 165 (refd)

Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1995] 2 MLRA 304 (refd)

Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2009] 3 MLRA 112 (refd)

Legislation referred to:

Courts of Judicature Act 1964, ss 87, 96

Rules of the Federal Court 1995, r 137

Counsel:

For the applicants: Malik Imtias Sarwar (Gobind Singh Deo, Tan Jee Tjun & Pavendeep Singh with him); M/s Thomas Philip

For the respondent: K Kirubakaran (Max Yong & S Malar with him); M/s Kiru & Yong

JUDGMENT

Richard Malanjum CJSS:

Introduction

[1] By way of notice of motion dated 25 October 2012 ('the motion') the applicants, pursuant to 's 96 of the Courts of Judicature Act 1964 and/or Rule 137 ('r 137') of the Rules of the Federal Court 1995 and/or the inherent jurisdiction of this Honourable Court', are seeking for the review of the decisions of the Court of Appeal and/or of this court. They pray for the following orders:

A. 'That the decision of the Court of Appeal dated 8 December 2011 (in Civil Appeal No: B-02-338-2011 ('the Appeal') which dismissed the applicants' appeal against the whole of the decision of the Shah Alam High Court given on 29 December 2010 (in Civil Suit No: MT6(5)-22-35-2002) be set aside and the appeal be reheard;

B. Further or alternatively, that the decisions of the Federal Court on 20 September 2012 vide the notice of motion filed by the applicants in Civil Application No: 08(f)-6-01-2012(B) ('the leave application'):

   (i) in dismissing the applicants' counsel's application for adjournment of the hearing of the leave application ('first decision'); and

   (ii) in dismissing the leave application ('second decision');

be set aside and the leave application be reheard;

C. That the Court of Appeal Order dated 7 December 2011 and the Shah Alam High Court judgment dated 29 December 2010 be stayed pending the disposal of this application; and

D. Any further and/or other order this Honourable Court deems fit and/or otherwise appropriate.'

[2] While the motion did not categorise the prayers as above, for convenience we have done so in this judgment.

[3] The application was supported by an affidavit of Tan Sri Dato' Abdul Aziz bin Abdul Rahman (No K/P: 331003-03-5329).

[4] We heard the arguments and adjourned to consider the points submitted. We have reached our unanimous decision and this is therefore the judgment of the court.

Background Facts

[5] In order to properly understand the grievances raised by the applicants it is helpful to summarise the background facts.

[6] The applicants were the defendants in the Shah Alam High Court Suit No: MT6(5)-22-35-2002. The High Court adjudged the matter in favour of the respondent on 29 December 2010.

[7] Dissatisfied with the High Court decision, the applicants filed an appeal to the Court of Appeal ('COA'). During the hearing of the appeal on 8 December 2011 the panel of judges of the COA comprised of Justice Datuk Wira Low Hop Bing (Presiding), Justice Datuk Abdul Wahab Patail and Justice Dato' Sri Abu Samah Nordin dismissed the Appeal ('the COA judgment'). Justice Datuk Wira Low Hop Bing ("the COA Judge") wrote the COA judgment.

[8] The applicants then filed the leave application on 4 January 2012 to this court. The leave application was premised entirely on the issues as pleaded before the High Court and the COA.

[9] While the leave application was pending, the applicants filed a review application in the COA on 3 May 2012 ('COA review application') praying for an order that the COA judgment should be reviewed on the ground that there was a real danger of bias on the part of the COA Judge when he failed to disclose to the parties that there was 'an unsettling degree of familiarity' between the COA Judge and the Director of the respondent by the name of Dato' Peter Kuah ('Kuah'). The applicants alleged that there were series of text messages via Short Messaging Service ('SMS') exchanged between the COA Judge and Kuah and also between the COA Judge and another person by the name of Ms Ooi Suan Kim ('Ooi'). These exchanges occurred between 2 December 2011 and 5 December 2011 that is, before the appeal was heard and dismissed on 8 December 2011.

[10] Prior to the hearing of the COA review application, the leave application was fixed for hearing on 20 December 2012. On 7 December 2012, the then solicitors for the applicants wrote to the Registry of this court to ask for an adjournment on the basis that the COA review application was still pending. The solicitors for the respondent opposed the request as contained in their letter dated 7 September 2012. In turn, the Registry of this court vide its letter dated 12 September 2012 declined to grant the request.

[11] On 14 September 2012 the solicitors for the applicants wrote again to the Registry of this court seeking for an adjournment of the hearing of the leave application on the basis that the COA review application had been fixed on 16 October 2012. In its letter dated 18 September 2012 the respondent was opposed to any adjournment. By its letter dated 19 September 2012 the Registry of this court again declined to grant the request.

[12] At the commencement of the hearing of the leave application learned counsel for the applicants again made another attempt to seek for an adjournment in order to allow the COA review application be determined first. The request was again refused and the hearing proper was ordered to proceed. After hearing the parties this court dismissed the leave application.

[13] On 16 October 2012, the COA review application came up for hearing. Learned counsel for the respondent raised a point on jurisdiction contending that the COA had no jurisdiction to review its own decision. Faced with such objection, learned counsel for the applicants applied to withdraw the COA review application with no order as to costs. The COA thus struck out the COA review application.

The Motion

[14] In our view there are only two basic questions to consider in the motion, namely, whether this court has the jurisdiction to entertain it and if so, whether on the facts and circumstances of this case including the arguments submitted by learned counsel for the parties, this is a proper case to exercise such jurisdiction.

Jurisdiction Under Rule 137

(i) Prayer A

[15] In respect of the first question we are of the view that it is now settled law that this court has the jurisdiction to review **its own decision** in order 'to prevent injustice or to prevent an abuse of the process of the court'. This court in its recent judgment ruled that 'the inherent power of the court to review its decision as declared in r 137 is a necessary power which is inbuilt or intrinsic in the court, as the court of justice. This power may be equated to the powers of the courts to dismiss an action for want of prosecution or to the power of court to strike out any pleading or indorsement of any writ in the action under the Rules of Court 2012. This inherent power is derived from the inherent jurisdiction of the court which is to do justice and to prevent any abuse of process. This power springs not from legislation but from the nature and constitution of the court as a dispenser of justice. And this inherent power can only be taken away by express provision in any written law.' (See: *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application* [2013] 5 MLRA 1) [Emphasis Added].

[16] But while this court in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application (supra)* reaffirmed the principle that it has jurisdiction to review its own decisions, it was also made clear by this court in another decision that it has no jurisdiction under r 137 to review decisions of other courts including that of the Court of Appeal. Indeed it was held that 'leave for the application of r 137 to review the decision of the Court of Appeal would result in the abuse of process of the court' (see: *Sharikat Galian Razak Sdn Bhd lwn. Magical Capital Sdn Bhd* [2014] 2 MLRA 165). Thus, the decision in *Dato' Abu Hasan Sarif v. Dato' Dr Abd Isa Ismail* [2012] 1 MLRA 565 was ruled to have been decided *per incuriam*.

[17] Notwithstanding the foregoing, it remains the law that 'where the Court of Appeal is the apex court of any particular case in view of s 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power'. (See: *Harcharan Singh Piara Singh v. PP* [2012] 1 MLRA 103).

[18] As such, the COA review application was an incompetent application *ab initio*. The COA was not the apex court in this case. There was therefore no basis in law for the applicants to complain that this court erred in not allowing an adjournment of the leave application pending the disposal of the COA review application.

[19] Hence, prayer A of the motion is a non-starter and an abuse of the process of the court. It is therefore refused.

(ii) Prayer B

[20] We now turn to prayer B of the motion. Basically it is for the rehearing of the leave application. But in doing so the applicants sought to impugn the two decisions of the learned judges of this court who heard the leave application. The first decision was the refusal to grant an adjournment and the second decision was the dismissal of the leave application itself.

[21] As regards the prayer to set aside the first decision we are of the view that it was obviously not within the ambit of r 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges who heard the leave application.

[22] At any rate in view of the principle reiterated in *Sharikat Galian Razak Sdn Bhd lwn. Magical Capital Sdn Bhd (supra)* granting the adjournment due to the pending COA review application would have been an exercise in futility.

[23] In respect of the second decision, in order to succeed in setting it aside the applicants must overcome the threshold requirement of r 137.

[24] The law governing the application of r 137 is now very well settled. In *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application (supra)* the learned Chief Justice in delivering the judgment of this court reaffirmed the view that the inherent power as declared by r 137 'can only be

exercised in special or exceptional circumstances'. It was further said that 'the court is mindful of the fact that this inherent jurisdiction must be exercised with circumspection in order to prevent any abuse of the same.' And 'in no circumstances whatsoever, this jurisdiction should be used as an avenue of further appeal'.

[25] The learned Chief Justice went on to say this at paras 20 and 21 of the judgment:

> '[20] Zaki Tun Azmi PCA (as he then was) in *Asean Securities (supra)* laid down some of the circumstances in which this discretion may be exercised. However, he intimated that the list is not intended to be exhaustive and it is open to the court to determine such application on a case by case basis.
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> [21] From the authorities, it would appear that an application may be allowed on the grounds of:
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> (a) bias (*Taylor & Anor v. Lawrence & Anor (supra)*);
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> (b) coram failure (*Gurbachan Singh s/o Bagawan Singh & Anor v. Vellasamy s/o Ponnusamy) (supra)*;
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> (c) fraud or suppression of material evidence (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 1 MLRA 319; *Re Uddin (supra)*); or
>
> (d) procedural unfairness (*Cassell & Co Ltd v. Broome (No 2)* [1972] 2 All ER 849n).'

[26] Reverting to the motion the complaint is primarily based on bias, a ground in which some of the earlier applications under r 137 succeeded. But any allegation of bias must be related to the decisions in the leave application and not the COA judgment. Simply put, to succeed in the motion the applicants must show that the decisions, in particular the second decision in the leave application, was tainted with bias in the sense that when it was made there was actual or a real danger of bias.

[27] The applicants in the motion only averred that their fundamental right to a fair and proper hearing was affected due to a real danger of bias on the part of the COA Judge who was the presiding judge of the bench that heard and dismissed the appeal.

[28] Meanwhile, it could hardly be disputed that when the leave application was heard the applicants had already made the allegation of bias against the COA Judge in their COA review application.

[29] And there was nothing to prevent them from submitting the allegation of bias before the learned judges who heard the leave application. Unfortunately they failed to do so. The allegation of bias should have been raised at the earliest opportunity available instead of coming back for review. (See: *David Wong Hon*

Leong v. Noorazman Adnan [1995] 1 MLRA 708; *Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 1 MLRA 293; *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2009] 3 MLRA 112; *Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor* [1995] 2 MLRA 304).

[30] The applicants could not now say that the decision to dismiss the leave application should be impugned on the ground of bias. In fact there was no allegation of bias against the decision to dismiss the leave application or against any of the judges who heard the leave application.

[31] As discussed above the jurisdiction of this court under r 137 is limited to reviewing its own decision. The basis to do so is also very stringent. It may only allow a review of its own decision in order 'to prevent injustice or to prevent an abuse of the process of the court'.

[32] Some of the instances when this court has allowed the review of its own earlier decisions are listed above. Bias is one of them. (See: *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 1 MLRA 719).

[33] Since in the motion there is no allegation of bias or any reason advanced to impugn the decision of this court dismissing the leave application there is therefore no basis to invoke the power under r 137. In short, the motion failed to meet the threshold requirement of r 137. Thus, prayer B is also refused.

Conclusion

[34] Accordingly the motion is dismissed with costs.