See Teow Koon v Kian Joo Can Factory Bhd & Ors [2022] MLJU 3546

Malayan Law Journal Unreported

FEDERAL COURT (PUTRAJAYA)

VERNON ONG LAM KIAT, ABDUL RAHMAN SEBLI, ZABARIAH MOHD YUSOF, MARY LIM THIAM SUAN AND RHODZARIAH BUJANG FCJJ

CIVIL REVIEW NO 08(RS)-12-09/2019(W)

2 September 2022

Malik Imtiaz Sarwar (with Khoo Suk Chyi and Voon Su Huei) (Thomas Philips) for the appellant.
Thayalan Muniandy (with Chong Jun Min) (Thayalan & Assoc) for the respondents.

Mary Lim Thiam Suan FCJ:

JUDGMENT OF THE COURT [Majority]

[1] Pared to its bare facts, this is what this application for 'review' was.

[2] On 3.5.2018, the applicant was granted leave to appeal under section 96(a) of the Courts of Judicature Act 1964 [Act 91]. The applicant proceeded to file a Notice of Appeal on 16.5.2018 and thereafter, filed the records of appeal, memorandum of appeal and other bundles of documents as are generally required for the hearing of the substantive appeal.

[3] On 25.6.2018, the respondents moved the Federal Court under rule 137 of the Rules of the Federal Court 1995 and/or inherent jurisdiction to strike out the order granting the applicant leave to appeal as well as his notice of appeal. The respondents cited the full satisfaction of the judgment sum with interest and the receipt of that judgment sum as the basis for arguing that the application for leave to appeal had been rendered redundant and nugatory with the Federal Court correspondingly having no jurisdiction to entertain the motion for leave to appeal. In short, that the applicant had compromised his right to appeal. The parties exchanged affidavits in relation to the motion.

[4] On 12.3.2019, the motion was allowed, by majority. The striking out motion was scheduled for hearing on the same day as the substantive appeal. The applicant was present in court for the hearing - see paragraph 12 of his affidavit in support [encl. 2].

[5] Before us, the applicant sought to review those orders; and to reinstate Federal Court Civil Appeal No. 02(f)-46-06/2018(W) for hearing vide motion in encl. 1. His principal arguments in support of the application are as follows:

i. the question of whether he had compromised his right to appeal was a question of fact which could not be determined on the material before the court since it was not an irresistible inference that he had compromised that right in the light of his denial of compromise;

ii. that the respondents had waived their right to take issue with his acceptance of the payment of the judgment sum;

iii. of the judgment sum of RM9,599,271.38 (with interest) awarded by the High Court, he had only been paid RM2,848,956.03 (with interest) in which case, he could not be taken to have waived his rights to the remaining sum of RM6,750,325.35;

iv. the Federal Court had departed from settled principle of whether there is sufficient prima facie plausibility of a relevant fact to merit further investigation as to their truth in the face of conflicting affidavit evidence cannot be determined in a striking out application; that such departure was impermissible in law;

v. the grounds advanced for the striking out motion did not warrant the order granting leave to appeal to be set aside ex debitio justitiae;

vi. that he had been denied his right to have his appeal heard on its merits;

vii. that the appeal had been adjudged in an arbitrary manner wholly inconsistent with his right to a fair hearing and due process, occasioning thus a miscarriage of justice and a grievous injustice to him which was further underscored by the failure of the majority to provide written reasons for their decision;

viii. that the Federal Court was not empowered to make decisions without regard to his constitutional right to a fair hearing and to due process guaranteed under Article 8 of the Federal Constitution

ix. that there is no alternative remedy available to him save to file the present motion to review the decision of 12.3.2019.

[6] In opposing the application, the respondents argued that the application was misconceived and that-

i. the applicant had not met the very high threshold for review;

ii. none of the grounds raised constitute an appropriate case for review;

iii. the question of whether the applicant had compromised his right to appeal as a result of receiving the judgment sum of RM2,528,556.72 together with interest towards satisfaction of the order of the Court of Appeal was not a question of fact but an issue of law;

iv. the application for review was untenable and was in itself an abuse of process of Court.

[7] Upon due and careful deliberations of the arguments raised by both parties, by majority, we agreed with the respondents and dismissed the application for review. These are our reasons in full for dismissing the application.

Material facts

[8] Both the judgments of the High Court and the Court of Appeal in respect of the underlying dispute between the parties are reported and the factual backdrop is well-explained in those decisions – see See *Teow Koon v Kian Joo Can Factory Berhad & Ors* [2016] 1 LNS 375; [2016] MLJU 367 and *Kian Joo Can Factory Berhad & Ors v See Teow Koon & Another Appeal* [2017] 8 CLJ 667; [2017] MLJU 972.

[9] In summary, the applicant started his employment with the 1st respondent in 1967. He rose through the ranks and in 1974 was appointed as the 1st respondent's director and executive director with extensive job responsibilities within the respondents' group of companies.

As explained by the Court of Appeal in its grounds of judgment, although the applicant was employed by the 1st respondent under a contract of employment as an executive director, the payment of his salary had been apportioned to the 2nd and 3rd respondents to defray tax exposure and to gain tax benefits. Under the terms and conditions of employment implemented from 31.3.1999 but effective from 1.1.1999, the applicant was ranked Job Grade D2 of Kian Joo Group of Companies Terms and Conditions of Employment - Executive Director [HR Package].

[10] Discord arose between the parties when the 1st respondent sought to impose a retirement age of 55 years for all executive directors including the applicant and his brother who was holding the post of managing director. Both brothers sued the respondents at the High Court at Shah Alam but their claim was dismissed. On appeal, the Court of Appeal on 4.10.2006, held that the applicant was entitled to be employed until he attained the age of 70 years.

[11] On 25.1.2012, Can-One International Berhad became the single largest shareholder of the 1st respondent. At the 1st respondent's 2014 AGM, the applicant who had retired by rotation, offered himself for re- election as a director of the 1st respondent. Unfortunately, the applicant was not re-elected.

[12] On 2.5.2015, the 1st respondent informed the applicant that following his retirement and his non-re-election at the 2014 AGM, his position as executive director came to an end on 16.4.2014. Consequently, the applicant filed fresh proceedings at the High Court at Kuala Lumpur claiming that his removal as executive director was illegal, null and void. He contended that his contract of employment as an executive director was separate and distinct from his position as director in the 1st respondent's board of directors; and that his removal was in direct violation of the decision of the Court of Appeal which had ordered that he was entitled to continue working as an executive director until he attained the age of 70 years. The primary remedies sought were a declaration that he was entitled to work as an executive director until he attained the age of 70 years and that his removal as executive director was unlawful, null and void; that he be restored to his position as executive director without any loss of salaries, perks and benefits.

[13] After a full trial, the claim was allowed by the High Court. The applicant was awarded full salaries and contractual bonuses until the age of 70 years, a sum of RM6,750,325.35 together with interest.

[14] This decision was set aside on appeal. Principally, the Court of Appeal disagreed with the High Court finding inter alia that res judicata and issue estoppel did not operate against the respondents. According to the Court of Appeal, the earlier decision of the Court of Appeal in 2006 did not declare that the applicant was exempt from the provisions of the Companies Act 1965 or the Articles of Association; or that the applicant was guaranteed "permanence in service until age 70 under all circumstances". The issues on appeal also could not have been raised in

the earlier suit as the issues arose later. The earlier suit "dealt with the narrow question of the contract of employment"; the "present case is concerned with issues that arose later and deal with the question of whether the contract of employment as executive director of the respondent had come to an end as the platform on which the respondent was so appointed, that is, as a director of the 1st appellant, no longer existed when the respondent failed to get re-elected as a director of the 1st appellant".

[15] The earlier decision of the Court of Appeal also did not "fetter the exercise of statutory powers by the shareholders in the election or re- election of the directors of the company". The Court of Appeal held that:

> "The composition of the board of directors of a public-listed company, such as the 1st defendant, was determined by its shareholders in attendance at a general meeting of a company exercising their voting rights attached to their shares. When the shareholders decided that they did not wish to re-elect the plaintiff as a director of the 1st defendant, they were in effect saying that they did not wish for the plaintiff to remain on the board of directors. By extension, they did not wish for the plaintiff to remain in management by being appointed or remain as an executive director. The plaintiff's employment as an executive director was thus clearly dependent/conditional upon his holding or maintaining office as a director of the 1st defendant. As the cessation of the applicant's position as an executive director was lawful, that part of the plaintiff's claim to the effect that he was entitled to serve as an executive director of the 1st defendant up until the age of 70 must fail.

[16] The Court of Appeal further held that the provisions of the Companies Act 1965 make no distinction between an executive director and non-executive director. A person occupying the position of a director by whatever name called is a director by definition under the Companies Act 1965. The distinction between an executive director, non-executive director and independent director lies in the roles, functions and capacity of employment."

[17] With these pronouncements, the Court of Appeal recalculated the damages due to the applicant from RM6,750,325.35 down to RM2,528,536.72 together with interest and costs.

[18] Dissatisfied, the applicant sought leave from the Federal Court and was successful in obtaining leave to appeal on the following question of law:

> Where a director of a company is employed as an executive director for a fixed period of time under a service contract, would the company be liable for a breach of the said contract (in absence of any breach by the director) for terminating the same by reason of the director not being re-elected.

[19] Meanwhile, following the decision of the Court of Appeal, the applicant's solicitors who were holding the sum of RM2,528,536.72 as stakeholders pending the outcome of the appeal, retained the sum of RM2,528,536.72 as awarded by the Court of Appeal and returned the balance to the respondents. All this took place through an exchange of letters between the respective solicitors. It is this retention of the sum awarded by the Court of Appeal that the respondents said was a full satisfaction of the judgment sum, that this payment or satisfaction of the judgment debt destroyed the whole basis or substratum of the case or appeal, compromised the applicant's right to appeal, and rendered the leave and the appeal itself, redundant and nugatory. The respondents thus moved the Federal Court to set aside the leave to appeal and also strike out the appeal. The majority in the Federal Court agreed. This Court is now moved to review that decision.

Power to review

[20] The principles on the engagement of this Court's extremely limited powers of review have been so well-laid down in a long line of unbroken decisions. See for instance, *Asean Security Paper Mills Sdn Bhd v Mitsui Sumimoto Insurance (Malaysia) Bhd* [2008] MLJU 1090; [2008] 6 CLJ 1; *TR Sandah ak Tabau & Others (Suing on behalf of themselves & 22 other proprietors,*

occupiers, holders and claimants of native customary rights (NCR) land situated at Rumah Sandah and Rumah Lajang, Ulu Machan, 96700 Kanowit, Sarawak) v Director of Forest, Sarawak & Anor & Other Applications [2019] 10 CLJ 436; *Bellajade Sdn Bhd v CME Group Bhd & Another Application* [2019] 8 CLJ 1; *Jeli Anak Naga & Ors v Tung Huat Pelita Niah Plantation Sdn Bhd & Ors* [2020] 1 CLJ 449; *Yong Tshu Khin v Dahan Cipta Sdn Bhd & Anor & Other Appeals* [2021] 1 MLJ 478; *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1; *Nivesh Nair a/l Mohan v Dato Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320.

[21] These cases have laid down the following principles and we have no reason to restate, revisit or review those same principles. For a further appreciation of the rare and exceptional circumstances, see paragraph [30] in Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor, reminded at paragraph [31] that the list is by no means exhaustive.

[22] In this application, it really is a case of whether any of the grounds relied on meet any of the stringent conditions for review. In our view, none of the grounds equate to a rare or exceptional circumstance meriting our exercise of this limited discretion.

[23] The applicant's first ground concerns the question of whether he had compromised his right to appeal by the acceptance of the payment of the sum awarded by the Court of Appeal. His learned counsel argued that that question is necessarily one of fact that the previous bench of the Federal Court was in no position to determine, one way or another, just from the affidavit evidence with the parties diametrically apart. When the Federal Court nevertheless accepted the respondents' version of the facts on this issue of compromise, it radically departed from trite principles that such debate of fact must not be adjudicated summarily but at a full trial or hearing. The decisions of *Gurbachan Singh Bagawan Singh v Vellasamy Pennusamy* [2012] 2 CLJ 663 and *Tay Book Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 were cited in support.

[24] From the applicant's submissions, we note that there is an acknowledgement that the Court is entitled to accept affidavit evidence and this is where it has determined that the version of the respondents had sufficient prima facie plausibility. It is however, the applicant's contention that in the face of undoubtedly credible denial from the applicant, the previous panel of the Federal Court was not in any position to resolve the issue on affidavit evidence.

[25] With respect, we disagree. Bearing in mind that in the exercise of our discretion under rule 137 of the Rules of the Federal Court 1995, this Court does not sit as if on appeal over the earlier decision, the correctness of the earlier decision, whether on the facts or on the law, is not under scrutiny as both are matters of evaluation and opinion. On the issue of law, this Court is not here to determine whether or not the earlier panel had interpreted or applied the law correctly. An illustration was given in Asean Security Paper Mills Sdn Bhd as to what or when the Federal Court will review its own judgment in the same case on a question of law, and that is where the Court had applied a statutory provision that has been repealed. As can be seen, review if at all allowed, is only in an extremely limited circumstance.

[26] Central to the applicant's complaints is the matter of compromise; it was a live issue before the earlier panel. We are firmly of the view that the earlier panel was fully entitled to decide whether the versions presented warranted further examination, and whether it was in the position to decide. From the decision made, and without subjecting that decision to some microscopic examination on every detail, it would be fair and correct to say that the earlier panel chose to believe the respondents' version; despite all urging to rule otherwise by the applicant, through his able counsel. The records reveal that all the parties were present at the material

time, that each counsel had every opportunity to present their full arguments, that the parties were indeed heard well before the Federal Court made its decision on the merits of the respondents' motions. Under these circumstances, it cannot be said that there has been a miscarriage of justice or that the applicant had not had a fair hearing or that there was no due process.

[27] In the exercise of discretion under rule 137, it is not a matter of whether this Court agrees or otherwise with the earlier decision or course of conduct. That is irrelevant as that is not the intent of our rare and very limited powers of review, born out of a rule of procedure as opposed to a substantive provision on review that we see in say section 97(4) of the Courts of Judicature Act 1964 [Act 91]. See *Ng Hoe Keong & Ors v OAG Engineering Sdn Bhd & Ors* [2022] 3 MLJ 641. The power is there to prevent miscarriage of justice or abuse of process which is apparent from the face of the records. This rare and exceptional inherent power is not invoked to review our own decisions on their merit for otherwise there will be no finality in litigation, a principle which is paramount in civil society and in the fair and good administration of justice. In the instant case, we do not see any call or justification for our exercise of this inherent jurisdiction.

[28] The applicant had also alleged that although this Court in Sri Kelangkota-Rakan Engineering JV Sdn Bhd *& Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349 had held that it was open to the Court to reconsider the granting of leave to appeal, that decision was revisited in *Terengganu Forest Products Sdn Bhd v COSCO Container Lines Co Ltd & Anor & Other Applications* [2011] 1 CLJ 51. In Terengganu Forest, the Federal Court was inclined to hold that once leave had been granted, the appellate panel should respect the leave panel and just proceed to hear the appeal, even if the appeal was groundless. This view was shared in *Kerajaan Malaysia v Semantan Estates* (1952) Sdn Bhd [2019**] 2 CLJ 145** and followed in *Hong Kwi Seong v Ganad Media Sdn Bhd* [2013] 9 CLJ 277. What more when the respondents' application to strike out the appeal was not even couched as an invocation of the Court's power of review.

[29] According to the applicant, while it was suggested that he ought to have disclosed the acceptance of the payment when seeking leave to appeal, there were no allegations of dishonesty or lack of candour on his part for if that was the position, it was for the respondents to raise the same as a material fact. The fact that the respondents did not do so at the hearing of the application for leave to appeal, showed that it was plainly an afterthought. The applicant further argued that if the respondents considered the appeal to be academic or hypothetical, the proper course was to invite the Federal Court to dismiss the appeal without answering the questions posed. This is to be done at the hearing of the appeal, and not in the manner taken by the respondents.

[30] For these reasons, the previous panel was said to be in error of jurisdiction when it granted the orders sought by the respondents, that rule 137 did not permit a striking out application to be launched.

[31] Once again, we disagree. Rule 137 reads as follows:

> PART V
>
> Inherent powers of the Court
>
> 137 Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent

powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[32] Although rule 137 of the Rules of the Federal Court 1995 has frequently been associated with the inherent powers of the Court to review its own decisions in a subsequent but same case, a careful reading of its terms show that this power is not necessarily confined or limited to applications for review as generally understood.

[33] As remarked by Augustine Paul FCJ in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No. 1)* [2007] 2 MLJ 101, the words "hear any application" is of very wide import:

> [49] The motion before us is for a review of an order made by the Court of Appeal. Thus the resultant matter for consideration is whether the inherent power of the Federal Court is available only to review its own decisions or also extends to reviewing decisions made by the Court of Appeal. Under r 137, the Federal Court has inherent powers:
>
> (a) to hear any application ('part (a)');
>
> (b) or to make any order as may be necessary to prevent injustice ('part (b)');
>
> (c) or to prevent an abuse of the process of the court ('part (c)').
>
> [50] The words 'hear any application …' in part (a) are of wide import and indicate that an application that may be heard by the Federal Court under r 137 is not one that is confined to a matter arising in that court only. Similarly, the words '… make any order …' in part (b) indicate that they are wide enough to extend to the making of orders even in respect of matters that did not arise in the Federal Court.
>
> [emphasis added]

[34] Although the remarks were made in relation to the issue of whether the Federal Court's inherent powers extended to reviewing a decision of the Court of Appeal as opposed to its own previous decision, it is no less persuasive. At paragraph [50], Augustine Paul FCJ suggested the answer to be in the affirmative. Having said that, the Federal Court ultimately declined to hear the matter on ground of lack of jurisdiction as the matter emanated from the Sessions Courts. The Federal Court in *Munawar Ahmad Anees v Public Prosecutor* [2009] 2 MLJ 1 disagreed with Augustine Paul FCJ, preferring the view in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753, that the procedural power in rule 137 is only limited to reviewing decisions of the Federal Court and not, the Court of Appeal. But, that is not our present concern.

[35] Our focus is on whether rule 137, being procedural law, is limited in the sense suggested by learned counsel for the applicant. We do not agree. Rule 137 does not house the Federal Court's inherent powers, it does not even confer that jurisdiction on the Federal Court. The inherent power of the Federal Court is implicit and is part and parcel of the judicial institution known as the Courts under the Federal Constitution, where such powers are necessary for the proper administration of justice. Rule 137 does not confer an inherent power on the Federal Court, it simply states and acknowledges that power. See *Munawar Ahmad Anees v Public Prosecutor* [2009] 2 MLJ 1. Rule 137 serves to remind that the extensive provision of rules governing the numerous matters and issues as found in the Rules of the Federal Court 1995 does not ipso facto mean that the inherent powers of the Court are lost or are even subjected to the rules as prescribed. Those inherent powers continue to exist and will be invoked to prevent any miscarriage of justice or abuse of process, which sometimes may occur by reason of the operation and application of the rules themselves.

[36] Consequently, the Federal Court is entitled to use its inherent powers "to hear any application or make any order" so long as the invocation of such powers is necessary to prevent

injustice or an abuse of process of the Court. In our view, “any” application includes an application to strike out the order granting leave. Again, as pointed out, the correctness of the earlier decisions of this Court, procedurally or even substantively, and whether that panel of the Federal Court ought to have dealt with the complaint of compromise at the hearing of the substantive appeal instead of in the motion filed by the respondents is not what this Court, sitting in review should embark to examine. Otherwise, the principle of finality, so fundamental in the proper administration of justice will be severely undermined.

[37] Moving to the last issue about the lack of reasoned grounds of judgment, we understand the applicant was fully aware of the reasons for the decision of the majority at the material time. What the applicant does not have are full written reasonings of the full bench. With respect, we again disagree that that reason is of itself sufficient for our exercise of discretion to review the earlier decision. Albeit brief, the reasons for the majority’s decision were explained. In fact, the Federal Court in *Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and another application* [2010] 1 MLJ 173 held that the absence of grounds of decisions alone could not constitute a basis for the Federal Court to exercise its powers of review. More so when reasons were given in the present case. We add that the absence of full written grounds does not in any way render the decision made any less a legal and binding judgment. We therefore cannot find any basis for a charge of breach of natural justice.

[38] For these reasons, we dismissed the application with costs.

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