

NO. 39 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N :-

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (Respondents) Appellants

- and -

10 CHAI YEN (m.w.) (Appellant) Respondent

CASE FOR THE APPELLANTS

1. This is an appeal from the decision of the Federal Court of Malaysia (Aslan Shah F.J., Wan Sulaiman F.J., and Chang Min Tat F.J.,) dated the 16th day of August 1978, disallowing the Appellants' preliminary objection that the appeal go the Federal Court of Malaysia by the Respondent from a decision of Mohd, Azmi J. given in the High Court of Malaysia on the 6th day of September 1976 had not been brought within the time prescribed by Rule 13(a) of the Federal Court (Civil Appeals) (Transitional) Rules 1963 (hereinafter referred to as the Transitional Rules 1963). p.100

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2. The primary facts as far as this appeal is concerned had never been in dispute:-

(a) On the 4th day of December 1975, the Appellant issued an Originating Summons No. 494 of 1975 in the High Court of Malaya at Kuala Lumpur seeking an order that the whole of the lands held under Q.T.(R) 7414 for Lot 703 in the Mukim of Petaling and C.T. 2509 for Lot 3775 in the Mukim of Bentong respectively and charged to the Appellant by the Respondent by two Charges respectively dated the 20th day of April 1971 and the 26th day of September 1974 and registered on the 21st day of April 1971 and the 30th day of November, p.1

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1974 respectively under presentation No.27377, Volume CCXL, Folio 196 and presentation No. 1931/74, Volume 5 Folio 1 respectively (hereinafter referred to as the said lands) be sold by public auction under the direction of the Court for the recovery of the sum of M\$896,286,79 being the principal and interest due under the said two Charges as at the 14th day of March, 1975 together with further interest thereon from the 15th day of March, 1975 to the date of realisation at the rate of 14% per annum in accordance with the terms of the said two Charges and costs.

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(b) On the 6th day of September, 1976, the High Court of Malaya at Kuala Lumpur (Mr. Justice Mohd. Azmi presiding in Chambers) having heard submissions of counsel for the Appellant and Respondent ordered that the said lands be sold by public auction on the 13th day of December, 1976 for the recovery of the sum of M\$896,286.79 together with further interest thereon at the rate of 14% per annum from the 15th day of March, 1975 to the date of realisation and costs.

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(c) On the 8th day of September, 1976, the Respondent through her solicitors wrote to the Senior Assistant Registrar, High Court, Kuala Lumpur, requesting Mohd. Azmi J. to hear further arguments in Open Court in accordance with Order 54 Rule 22A of the Rules of the Supreme Court, 1957.

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(d) On the 14th day of October, 1976, the Senior Assistant Registrar, High Court, Kuala Lumpur, wrote to the Respondents, solicitors informing them that Mohd. Azmi J. would not hear further arguments and forwarded a Certificate to that effect under Order 54 Rule 22A.

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(e) On the 1st day of November, 1976, the Respondent filed a Notice of Appeal in the Federal Court of Malaysia appealing to the Federal Court against the decision of Mohd. Azmi J. made on the 6th day of September, 1976.

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(f) On the 31st day of May, 1978 prior to the hearing of the main appeal, the Appellant raised preliminary objection that the appeal had not been brought within the time prescribed by Rule 13(a) of the Transitional Rules 1963.

3. The Appellant's contention before the Federal Court of Malaysia was that:-

(a) The decision of Mohd. Azmi J. was made in Chambers on the 6th day of September, 1976 and is a final order. p.82

10 (b) Rule 13(a) of the Transitional Rules 1963 provides inter alia that no appeal shall except by special leave of the Court be brought after the expiration of one month in the case of an appeal from an Order made in Chambers from the date when such Order was pronounced or when the Appellant first had notice thereof.

(c) The Notice of Appeal was filed by the Respondent on the 1st day of November, 1976, more than one month after making of the Order by Mohd. Azmi J. in Chambers. p.93

(d) The Respondent had not applied for nor had any ground which would entitle the Respondent to obtain an extension of time to file the Notice of Appeal out of time.

20 (e) The Respondent was wrong in applying to hear further arguments in Open Court as this procedure is only available if the Order made in Chambers is an interlocutory Order.

4. The Respondent's contention before the Federal Court of Malaysia was that:-

30 (a) Order 54 Rule 22A of the Rules of the Supreme Court allows application for further arguments to be made within four (4) days from making of an Order in Chambers by a Judge.

(b) Such an application has the practical effect of making what may be a final Order not a final Order for the purpose of lodging a Notice of Appeal.

(c) The application to hear further arguments was made on the 8th day of September, 1976. p.88

40 (d) Only on the 14th day of October, 1976 did Mohd. Azmi J. decide not to hear further arguments and gave a Certificate under Order 54 Rule 22A. p.91

(e) As such, the time within which to lodge the Notice of Appeal commenced to run only from the 14th day of October, 1976 and not on the 6th day of September, 1976.

5. The principal issues in this appeal are:-

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(a) whether the Notice of Appeal having been filed outside the one month period provided by Rule 13(a) of the Transitional Rules 1963, the Federal Court is competent to hear the Respondent's appeal.

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(b) whether having accepted that the Order of Mohd. Azmi J. made on the 6th day of September, 1976 is a final Order, the Federal Court is right in holding that an application to hear further arguments by the Respondent converted such final Order not final.

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6. The Appellant's substantive arguments and their statutory basis were as follows:-

(a) Rule 3 of the Transitional Rules 1963 provides:-

These Rules shall apply so far as applicable thereto to -

(i) Every appeal commenced on or after the 16th day of September, 1963.

(b) Rule 6(1) of the Transitional Rules 1963 provides:- 20

Appeals to the Court shall be by way of re-hearing and shall be brought by giving Notice of Appeal.

(c) Rule 13 of the Transitional Rules 1963 provides:-

"No appeal shall except by special leave of the full court be brought after expiration of one month.

(a) In the case of an appeal from an Order in Chambers from the date when such order was pronounced or when the Appellant first had notice thereof.

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(d) The appeal is with respect to Order of the High Court made by Mohd. Azmi J. in Chambers on the 6th day of September, 1976. The notice of appeal was filed on the 12th day of December, 1976 and as such is filed out of time.

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(e) Rule 13 of the Transitional Rule 1963 does not make a distinction between final, or interlocutory orders. In either cases the appeal must be lodged within one month from the pronouncement of the order.

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(f) The Federal Court was thus not entitled to make a distinction between final, or interlocutory

orders when considering Rule 13(a) of the Transitional Rules 1963.

- (g) Even if the Federal Court was entitled to distinguish between final, or interlocutory orders, the order of 6th September, 1976 is a final order for the following reasons:-

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10 (i) It is an order made in an Originating Summons analogous to "fore-closure proceedings". The order finally disposed of the right between the Appellant and the Respondent.

20 (ii) The real test for determining the question as to whether an order or judgment is final or interlocutory is: Does the Judgment or Order, as made, finally dispose of the rights of the parties? If it does, then it is final, if it does not, such an order is interlocutory. See: BOZSON v. ALTRINCHAM URBAN DISTRICT COUNCIL (1903) 1 K.B. 547

RATNAM v. CUMARASWAMI & ANOR. (1962) M.L.H. 330.

LOPEZ v. VALLIAPPA CHETTIAR (1968) M.L.J. 224.

HONG KIM SUI & ANOR. v. MALAYAN BANKING BHD. (1971) 1 M.L.J. 289

30 (iii) An order which is final for all purposes cannot be converted into an interlocutory order by any subsequent step taken by the unsuccessful party.

(h) Alternatively, even if the Respondent was entitled to apply under Order 54 Rule 22A, it is submitted that the Respondent was still required to take either one of the following steps, when the Respondent failed to receive any reply to her application made under Order 54 Rule 22A:-

40 (a) file Notice of Appeal before the expiry of one month; or

(b) apply before the expiry of one month to obtain extension of time to file Notice of Appeal;

thereby complying with Rule 13(a) of the Transitional Rules 1963. Please see: SRI JAYA TRANSPORT CO. LTD. v. FERNANDEZ (1970) 1 M.L.J. 87.

- (i) The Respondent except for writing letter dated the 5th day of September, 1976 took no other positive step to keep within the one month period provided by Rule 13(a) of the Transitional Rules 1963.
- (j) The Respondent has not applied, nor are there special circumstances to grant special leave to file the Notice of Appeal out of time. 10

7. WHEREFORE the Appellant submits that this appeal be allowed for the following amongst other:-

R E A S O N S

- (a) BECAUSE the Order of Mohd. Azmi J. dated the 6th day of September, 1976 is a final Order;
- (b) BECAUSE the Respondent was entitled to appeal from the decision of Mohd. Azmi J. made on the 6th day of September, 1976 to the Federal Court without having to request the Judge either to hear further arguments in Open Court or grant a Certificate that he does not wish to do so under Order 54 Rule 22A of the Rules of the Supreme Court, 1957; 20
- (c) BECAUSE the Federal Court erred in law in stating that in cases where a party had made an application under Order 54 Rule 22A the time of the one month to appeal commences to run, not from the date of making of the Order in Chambers, but from the decision not to require further arguments; 30
- (d) BECAUSE the Federal Court erred in law in stating that the appeal had been properly brought under Rule 13(a) of the Transitional Rules 1963;
- (e) BECAUSE the decision of the Federal Court is otherwise wrong.

K. THAYALAN

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- and -

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Respondent

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