

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION Appellant

- and -

CHAI YEN (Married Woman) Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Federal Court of Malaysia (Raja Azlan Shah F.J., Wan Suleiman F.J., Chang Min Tat, F.J.) on a preliminary objection taken by the Appellant that the appeal before the Federal Court was not brought within time which Preliminary Objection was dismissed with costs.

2. On the 4th day of December, 1975 the Appellant filed Originating Summons No. 494 of 1975 seeking foreclosure proceedings against the lands described as Q.R.(R) No. 7414 for Lot No. 703 in the Mukim of Petaling and C.T. No. 2509 for Lot No. 3775 in the Mukim of Bentong which lands were charged to the Appellant under Charge Presentation No. 27377 Volume CCXL Folio 196 and Presentation No. 1931/74 Volume 5 Folio 1 respectively and sought for the following orders:-

- (1) that the lands be sold by public auction; p.3
- (2) that the said sale shall be held on or as soon as may be after such date not being less than one (1) month from the date of the Order, as this Court may direct;
- (3) that the total amount due to the Chargee at the date of such Order be specified;
- (4) that the Senior Assistant Registrar fix a reserve price for the purpose of the sale being a price equal to the estimated market value of the said lands;

Record

- (5) that the Chargee/Applicant may be at liberty to bid at the sale and to set off the amount due to her under the said charge against the purchase price;
- (6) that all costs and expenses of and incidental to this application and any such sale be taxed by the proper officer of this Court and be paid to the Chargee/Applicant out of the proceeds of such sale;
- (7) that such further or other directions at this Honourable Court may deem just and proper;

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this matter was however contested by Affidavits.

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3. On the 6th day of September 1976, the matter was heard in Chambers by Justice Mohd. Azmi who granted Order-in-terms of the Originating Summons.

The Respondent on the 8th day of September 1976 within four (4) days of the said interlocutory order applied for further argument in open court under Order 54 Rule 22A of the Rules of Supreme Court, 1957 and under the Courts of Judicature Act 1964, Section 68(2). The Judge gave his decision on the 14th day of October, 1976 and issued a certificate on the same day under Order 54 Rule 22A of the Rules of Supreme Court, 1957.

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The Respondent in due compliance with the said Order filed her Notice of Appeal within one (1) month from the date of the said Order on the 1st day of November, 1976 and served a copy of the Notice on the same day on the Appellant.

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4. Notes of proceedings and the Grounds of Judgment dated 6th September 1976 were given to the Respondent by the Secretary to the Honourable Justice Dato Haji Mohd. Azmi on the 18th day of March, 1978. The said Judgment allowed the Appellant's application in terms of Summons and fixed the date of sale on December 12th 1976. The Respondent filed her Memorandum of Appeal on the 30th day of March, 1978 on the following grounds among others:-

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- (4) That the learned Judge was wrong in law and fact to come to the conclusion that the Respondent's charge of land Q.T.(R) 7414 for Lot No. 703 in the Mukim of Petaling and C.T. No. 2509 for Lot 3775 in the Mukim of Bentong given as security only for advances made to Valor Electrical & Electrical & Electronics Co. (a sole proprietor concern) also binds advances made to Wing Lian Enterprise and Syarikat Onn Fai Trading

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which are themselves sole proprietor concerns operated by independent proprietors.

10 (5) That the learned Judge failed to consider and give effect to the terms and conditions of the charge which strictly secures only advances made to Valor Electrical & Electronic Co. If advances made to Wing Lian Enterprise and Syarikat Onn Fai Trading are to be secured under the same Charge then the Respondent ought to have been urged to discharge the charge and charge again to include the names of Wing Lian Enterprise and Syarikat Onn Fai Trading so as to bind the Respondent.

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20 (7) That the learned Judge failed to hold that the execution of the Charge in respect of land held under Q.R.(R) 7414 for Lot No. 703 in the Mukim of Petaling and C.T. No. 2509 for Lot 3775 in the Mukim of Bentong given for the alleged sum of \$960,000/= was untenable and Respondent averment that the Charges were executed in blank forms ought to be true, for no bank in its normal banking practice would have given credit facilities exceeding total value of the land at the time of creation of such charges.

30 5. On the 16th day of August, 1978 the appeal was fixed for hearing. The Appellant raised a Preliminary Objection that the appeal be disallowed for the reason that the Notice of Appeal was filed out of time.

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The Rules of Procedure and Statutory provision which have been considered relevant in the Federal Court below are as follows :-

(1) Rule 13, Federal Court (Appeals) (Transitional) Rules 1963.

40 " 13. No Appeal shall except by special leave of the full Court, be brought after the expiration of one (1) 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;

(b) in the case of an appeal against the refusal of an application from the date of such refusal;

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- (c) in all other cases, from the date on which the judgment or order appealed against was pronounced;

Provided that in the case of an appeal against a judgment or order of the Supreme Court of Sarawak, North Borneo and Brunei pronounced before 16th September, 1963, the time within which an appeal may be brought shall be three months from the date of such judgment or order."

- (2) Order 54 Rule 22A of Rules of Supreme Court, 1957 - 10

"Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument; and on such application, the Judge may either adjourn the matter into Court and hear further arguments or may certify in writing that he requires no further argument. If the Judge hears further argument he may set aside the order previously made and make such other order as he thinks fit." 20

Section 68(2) of Courts of Judicature Act, 1964 reads :-

"No appeal shall lie from an interlocutory order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court." 30

- .01 6. The Federal Court meticulously considered the arguments submitted on behalf of the Appellant and the Respondent and dismissed the Appellant's Preliminary Objection with costs by Judgment of the 16th August 1978 delivered by Honourable Justice Chang Min Tat, on the grounds, inter alia, that an order made in Chambers, in which an application under Order 54 Rule 22A has been lodged within time, the time to appeal runs from the date, not of the order but of the decision not to require further arguments, and that on the facts of this case, an appeal has been properly brought to this Court. 40

This Preliminary Objection was dismissed with costs.

7. The Appellant, against the said decision of the Federal Court, applied for conditional leave to appeal on the 14th day of September, 1978 to His Majesty the Yang di-Pertuan Agong, and final leave to appeal was granted on 13th November, 1978.

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10 8. The Respondent submits that the express and unequivocal wording of Section 68(2) of the Judicature Act, 1964, which is a Statutory provision, makes it mandatory, by the use of the word shall, that no appeal shall lie in this instant case unless the Judge has certified that he is not prepared to hear further argument, only then the time shall run and not earlier.

20 The Respondent further submits that the decision of the Judge in Chambers upon application by the Respondent within four days of such decision can only be an interlocutory order and the Respondent strictly complied with the requirements of the said section and the Federal Court was right in dismissing the said Preliminary Objection.

The Respondent further submits this appeal is one that concerns a procedural issue and this Honourable Board has ruled in *Ratnam v. Cumarasamy & Another*, (Privy Council) MLJ. 1965 (Vol. I) Pg. 228 that upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court.

30 The Respondent further respectfully submits that the Appellant has abused the process of court particularly when the law is quite clear on matter concerning appeals from Chambers, such abuse of process, it is verily believed, may be motivated to secure a judgment merely on the purported basis of Preliminary Objection so as to prevent the Respondent from pursuing her appeal upon the merits of the case and thereby defeating the ends of justice.

40 The Respondent therefore submits that the Judgment of the Federal Court was right in dismissing the Preliminary Objection and ought to be upheld for the following among other

R E A S O N S

- (1) BECAUSE the Respondent has strictly complied with Section 13 of the Federal Court (Transitional Rules) of 1963 read in conjunction with Order 54 Rule 22A of the Rules of Supreme Court 1957 and Section 68(2) of the Courts of Judicature

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Act 1964 and the appeal was therefore brought before the Federal Court within time.

- (2) BECAUSE the Order of the Judge in Chambers being one of interlocutory order, until a certificate to that effect is issued, an appeal to the Federal Court cannot be brought until such certificate is issued and therefore the Notice of Appeal has been filed within time in strict compliance with Section 68(2) of the Judicature Act 1964, and all relevant procedures were correctly followed by the Respondent. 10
- (3) BECAUSE this appeal is one based merely on question of procedure.
- (4) BECAUSE the Appellant's Preliminary Objection is an abuse of process of law.
- (5) BECAUSE in the premises the Appellant's Preliminary Objection was correctly dismissed and the Judgment of the Federal Court was right. 20

G. T. RAJAN

No. 39 of 1978

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Respondent

CASE FOR THE RESPONDENT

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