Privy Council Appeal No. 39 of 1978

Bank of America National Trust and Savings Association – *Appellant*

v.

Chai Yen (Married Woman) – – – – – – *Respondent*

from

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER 1979

Present at the Hearing:
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD LANE
[*Delivered by* LORD LANE]

This is an appeal from the Federal Court of Malaysia who had upheld the decision of Mohd. Azmi J. in the High Court. The short point is whether the respondent under the Rules is out of time for and accordingly barred from appealing to the Federal Court.

The history of events is as follows. The appellant in December 1975 filed an originating summons to set in motion foreclosure proceedings in respect of certain lands charged by the respondent to the appellant. Somewhat surprisingly, in view of the allegation of fraud and undue influence made by the respondent, the matter was decided by the learned judge on affidavit evidence. Sitting in Chambers on September 6th 1976 he made the various orders for which the appellant prayed, including an order that the lands should be sold by public auction on December 13th 1976 for the recovery of the monies owing.

On September 8th 1976 the respondent's Solicitors wrote to the High Court requesting that the judge should hear further arguments in open court.

On October 14th 1976, that is to say some five weeks after the original determination, the High Court informed the respondent's Solicitors that the judge declined to hear further argument and sent them a certificate to that effect. On November 1st 1976, that is to say some two weeks after the judge's refusal but about seven weeks after the original determination, the respondent filed a notice of appeal to the Federal Court from the decision of Mohd. Azmi J. of September 6th. On May 31st 1978, before the hearing proper of the appeal, the appellant raised the preliminary objection that the appeal had not been brought within the time prescribed by Rule 13(*a*) of the Federal Court (Civil Appeals) (Transitional) Rules, 1963.

Rule 13(*a*) provides as follows:

> "No appeal shall, except by special leave of the full Court, be brought after the 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".

It was common ground that the respondent had not sought from any court any leave to appeal. Consequently the appellant's argument was simple. The appeal was brought more than one month from the date when the judge pronounced his order and so is caught by the plain words of Rule 13(*a*) and is out of time.

The matter is however not so simple as that. The application, already mentioned, by the respondent's Solicitors on September 8th 1976 for the hearing of further argument by the judge was made under the provisions of Order 54 Rule 22A of the Rules of the Supreme Court, 1957. That runs as follows:

> "Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time when 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 argument, 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".

It is not difficult to see that there is potentially an inherent conflict between the terms of that Order and those of Rule 13(*a*). There is no time limit imposed upon the judge under Order 54 within which he must grant or refuse the application for further argument. If he takes more than a month to make up his mind, what is the applicant to do? If she (it being a woman in this case) files notice of appeal in accordance with Rule 13(*a*) that might be taken as an abandonment of her application to the judge. Indeed, Mr. Thayalan for the appellant firmly contended that such would be the result. If on the other hand she awaits the judge's decision before filing a notice of appeal she will be met, as here, by the argument that Rule 13(*a*) is clear, and that the other party should not be deprived of their safety under that Rule by what is called by Mr. Thayalan "the unilateral act" of the present respondent in applying to the judge under Order 54.

No doubt this problem was not present to the minds of those who were responsible for the drafting of the 1963 Rules, but somehow or other the dilemma has to be resolved.

It seems to their Lordships that no litigant should be put in the position of having to elect between two different remedies by something entirely outside the litigant's control, namely, the length of time taken by a judge to reach or pronounce his conclusion. The essence of any rule of procedure must be fairness, and to apply stringently the provisions of Rule 13(*a*) would in circumstances such as the present work manifest injustice to the respondent. She might be forced, in short, to abandon a perfectly proper and relatively inexpensive application to the judge to hear further argument for a costly and possibly unnecessary appeal to the Federal Court. Nor are their Lordships impressed by the suggestion that the respondent could have put matters right by applying for special leave under Rule 13(*a*). She should not have that burden thrust upon her.

Their Lordships do not consider it necessary to embark upon an examination of the perennially difficult question whether the decision of Mohd. Azmi J. was a final or an interlocutory order. Assuming without deciding that it was final, nevertheless immediately the timeous application of September 8th 1976 was made to the court to hear further argument the whole matter entered a state of suspended animation until the judge ruled one way or the other upon the application. True it is that the application did not act as an automatic stay, but if the judge had failed to make his

ruling by the time the date fixed for sale had arrived on December 13th 1976, an application to stay the sale could not have been other than successful.

Their Lordships are of the view, therefore, that the Federal Court came to the right conclusion in this matter, and that the only way in which it is possible with fairness to reconcile the provisions of Rule 13(*a*) on the one hand and of Order 54 Rule 22A of the Rules of the Supreme Court on the other is to hold that in the case of an order made in Chambers in which an application under Order 54 Rule 22A has been lodged within the time allowed, the time for appealing under Rule 13(*a*) runs from the date when the judge's decision not to require further argument is communicated to the applicant and not from the date of his original order.

Their Lordships would wish to add this comment. Even if they had not been in agreement with the reasoning and conclusions of the Federal Court (as in fact they are), they would have felt reluctant to differ from that court on a matter which is eminently procedural and eminently a matter in this case to be left to the courts of Malaysia to decide.

Their Lordships accordingly advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Privy Council Appeal No. 39 of 1978

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

v.

CHAI YEN (Married Woman)

DELIVERED BY
LORD LANE

Printed by HER MAJESTY'S STATIONERY OFFICE
1979