

A **DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO: N-04-29-2005**

B **ANTARA
IBS BOOKSERVICE AG BASEL ... PERAYU
(Pemegang Serahhak kepada PACIFIC BOOK SERVICE LTD)**

**DAN
MAWADDAH ENTERPRISE SDN. BHD. ... RESPONDEN**

C **(Dalam perkara Rayuan Sivil No. 12-70-2002
dalam Mahkamah Tinggi Malaya di Seremban**

**ANTARA
MAWADDAH ENTERPRISE SDN. BHD. ... PERAYU**

D **DAN
IBS BOOKSERVICE AG BASEL ... RESPONDEN
(Pemegang Serahhak kepada PACIFIC BOOK SERVICE LTD)**

**(Dalam perkara Saman No: 52-1189-2000
dalam Mahkamah Sesyen di Seremban**

E **ANTARA
IBS BOOKSERVICE AG BASEL ... PLAINTIF
(Pemegang Serahhak kepada PACIFIC BOOK SERVICE LTD)**

**DAN
MAWADDAH ENTERPRISE SDN. BHD. ... DEFENDAN**

A **CORAM:**

Y.A. DATIN PADUKA ZALEHA BINTI ZAHARI, JCA

**Y.A. DATO' NIHRUMALA SEGARA A/L M.K. PILLAY,
JCA**

Y.A. DATUK AHMAD BIN HJ. MAAROP, JCA

B

JUDGMENT

DISSENTING

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This is an appeal against the decision of the learned High Court Judge allowing the respondent's notice of motion to file the record of appeal out of time, in respect of the respondent's appeal to the High Court at Seremban vide the summary judgment obtained against the respondent, at the Seremban Sessions Court.

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The appellant and the respondent herein were the plaintiff and defendant, respectively, in the Seremban Sessions Court summons No:52-1189-2000. The appellant and the respondent shall hereinafter be referred to as "the plaintiff" and "the defendant".

A On 31/10/2002 the plaintiff obtained summary judgment against the defendant pursuant to *Order 26A, Subordinate Courts Rules 1980 (SCR)*. The defendant filed a notice of appeal on 12/11/2002.

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Order 49 SCR embodies all the rules in respect of appeals to the High Court from the subordinate courts. *Order 49 rule 6 SCR* is the relevant provision with regard to an appeal to a Judge in Chambers of the High Court. An appeal in respect of a decision under *Order 26A SCR* shall lie to a Judge in Chambers of the High Court by virtue of *Order 49 rule 6 (1) SCR*.

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D After filing the notice of appeal and complying with *Order 49 rule 6 (2) SCR*, the defendant unfortunately failed to comply with *Order 49 rule 6 (3)* which reads:

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“(3) Within 3 weeks after the filing of the notice of appeal, the appellant **shall file the record of appeal in the High Court**, and the record shall contain copies of-

(a) the application for the decision;

- A
- (b) all pleadings filed;
 - (c) all affidavits filed in support of or in opposition to the application; and
 - (d) the order or draft of the decision appealed from:

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Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.”

(emphasis provided)

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It is important to keep focused that under this rule:

- i) the record of appeal shall be filed in the High Court, **unlike the notice of appeal**, which has to be **filed** in the registry of the **relevant subordinate court** in *Form 140, under Order 49 rule 6 (2) SCR*; and
 - ii) that there is no requirement, in express terms, that the record of appeal shall be served on any party, **unlike the notice of appeal**, which is to be served on **every party**
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- A to the proceedings **within 14 days** from the date on which the decision was pronounced under *Order 49 rule 6(2) SCR*.
- B For ease of comprehension *Order 49 rule 6 (2)* reads:
- “(2) The appeal shall be brought by filing a notice of appeal in Form 140 in the registry of the relevant subordinate court, with a copy extended to the registry of the High Court, within 14 days from the date on which the decision was pronounced and serving a copy of the notice on every other party to the proceedings.”
- C
- D The significance of where the notice of appeal and the record of appeal shall be filed, as statutorily prescribed will become apparent in the course of this judgment.
- E Having failed to file the record of appeal in the High Court within the time prescribed under *Order 49 rule 6 (3) SCR*, the defendant very correctly filed a notice of motion in the High

A Court at Seremban on 25/4 /2003, for leave to file the said
record of appeal out of time. After hearing the parties and
considering their written submissions the learned High
Court Judge granted the defendant leave, on 15/4/2005, to
B file the record of appeal out of time, in terms of the notice of
motion. In exercising his discretion and in allowing the
defendant's motion, the learned High Court Judge has very
correctly borne in mind the dicta in:

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- (i) *Megat Najmuddin bin Dato (Dr) Megat
Khas v Bank Bumiputra (M) Bhd. [2002]
1 MLJ 389*, as follows:

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“A judge should not be so besotted by the rules
that his sense of justice and fairness becomes
impaired because of his blinkered fixation on
technicalities of the rules and the cold letter of the
law..... A fair minded judge should look at all
E circumstances of the case before penalizing the
party who infringes any particular rule of
procedure.”

A and,

(ii) *Cropper v Smith* [1884] 26 Ch. D. 710 as

follows:

B “It is well established principle that the object of
the court is to decide the rights of the parties, and
not to punish them for mistakes they make in the
conduct of their cases by deciding otherwise than
in accordance with their rights..... I know of no
kind of error or mistake which, if not fraudulent or
C intended to over reach, the court ought not to
correct, if it can be done without injustice to the
other party. Courts do not exist for the sake of
discipline, but for the sake of deciding matters in
controversy.”

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A statement on the object of the court by Bowen LJ, above,
as way back as in the 19th century, holds true to this day
and, shall forever remain a guiding principle, in the
E administration of justice.

It is patently clear that the learned High Court Judge had

A taken into consideration the defendant's reasons in the affidavits to support the motion and the period of delay in filing the record of appeal. In my considered judgment, there is no evidence of any improper exercise of discretion to
B warrant appellate interference and, reverse the said exercise of judicial discretion by the learned High Court Judge, in the circumstances of this case.

C In his grounds of decision he has set out as follows:

“Antara alasan-alasan yang diberikan peguam pemohon bagi menyokong permohonan ini ialah mengenai perkara yang berkaitan dengan cuti panjang sempena musim
D perayaan Hari Raya Aidil Fitri, masalah penukaran peguam, masalah mendapatkan arahan dari anakguam dan juga beberapa masalah lain.

Menurut pliding yang difailkan perayu sepatutnya memfailkan Rekod Rayuannya pada 13.2.2003. Namun
E hanya pada 25.4.2003 perayu telah memfailkan permohonan perlanjutan masa ini. Di atas sebab ini responden plaintif membantah permohonan perayu ini.

A **Keputusan Mahkamah**

Di dalam menimbangkan permohonan ini Mahkamah mengambil kira dan memberi perhatian kepada perkara berikut:

B i) Jangkamasa kelewatan memfailkan rekod rayuan berkenaan dan permohonan perlanjutan masa.

C Di dalam kes ini perayu telah memfailkan permohonan ini 2 bulan 12 hari selepas tamat tempoh pemfailan Rekod Rayuan. Ini pada hemat saya bukan satu kelewatan yang melampau yang memprejudiskan responden.

D Di dalam kes Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd. [2002 1 MLJ 389, Mahkamah Persekutuan antara lain telah memutuskan seperti berikut:

E “A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the

A cold letter of the law..... A fair minded judge should look at all circumstances of the case before penalizing the party who infringes any particular rule of procedure.”

B Di dalam kes *Cropper v Smith* [1884] 26 Ch. D. 710 Bowen LJ berkata:

C “It is well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights..... I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.”

E Berdasarkan perkara (i) di atas dan dengan mengambil iktibar dan teladan dari nas-nas di atas saya membenarkan permohonan perayu dengan kos di bayar kepada responden.”

A The plaintiff contends before us that the defendant had, on
20/8/2004, made an application in the Sessions Court
identical to the motion pending in the High Court. The
plaintiff alleged that the application was made in the
B Sessions Court on the ground the motion in the High Court
was erroneously filed and, that the proper forum to grant an
extension of time is the Sessions Court. The plaintiff also
alleged that it was on that basis the application before the
C Sessions Court was heard. The Sessions Court dismissed
the defendant's application to file the record of appeal in the
High Court out of time on 3/9/2004.

D The plaintiff contends before us that the defendant should
have appealed against the Sessions Court decision. The
plaintiff further contends before us that instead of appealing
and, contrary to an "undertaking" to withdraw the notice of
E motion pending before the High Court, proceeded with the
said notice of motion in the High Court. The plaintiff also
contends before us that the High Court proceeded to hear

A defendant's motion despite the plaintiff's objection to its validity.

It is my considered judgment that the plaintiff's contentions
B before us are groundless in law. The motion in the High Court was filed well before an identical application was filed and dismissed in the Sessions Court. The Sessions Court, out of deference to the High Court, **ought not to have**
C **proceeded to hear the identical application before it.** The application before the Sessions Court was a **blatant abuse of process of Court** in the light of the pending motion at the High Court.

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No "undertaking" given by counsel can become a legal impediment to the pending motion at the High Court - it is a collateral issue of no consequence. Breaches of
E "undertaking" by counsel should be the subject matter of complaint to the Disciplinary Board for appropriate action.

A The plaintiff's contention, that the Sessions Court is the correct forum to make an application for extension of time to file the record of appeal in the High Court, is without merit and unsupported by authority. *Order 46 rule 6 (2) SCR*

B expressly states that the **notice of appeal shall be filed in the subordinate court** but *Order 46 rule 6 (3)*, in unequivocal terms, states that the **record of appeal shall be filed in the High Court**. If the record of appeal is to be filed

C in the High Court, then, common sense and logic must apply to mandate the High Court as the proper forum for an application for leave to file the record of appeal out of time. It is, therefore, untenable to suggest, in the absence of any

D express statutory provision, that the **subordinate court** is the appropriate forum **to obtain leave** to file the record of appeal in a **superior court**.

E The case of *Lee Lan v Lim Yoon & Ors [1991] 3 MLJ 419*, is not an authority for the proposition that the subordinate court is the proper forum to obtain leave to file out of time,

A the **record of appeal** in respect of **an appeal to a Judge in Chambers of the High Court**. In that case, the issue that cropped up, inter alia, was with regard **to the service of the notice of appeal out of time** in respect of a decision that did not fall under Order 49 rule 6 (1) SCR. It was not a summary judgment under *Order 26A SCR*. The claim was for vacant possession and was allowed by the magistrate. The notice of appeal was filed in the magistrate's court the same day but, was not served on the plaintiff. There, *Order 49 rule 2 (1) SCR and Order 49 rule 2 (3) SCR* were the relevant provisions for consideration. In that case Harun Hashim,SCJ said at page 422:

D “We are of the view, however, that the application for extension of time, could also be properly made to the High Court as the High Court has the power, not under RHC O 3 r 5 because that provision is limited to matters prescribed by RHC (and the time prescribed to serve a notice of appeal from a magistrate's court arises under SCR) but under item 8 of the Schedule to the Courts of Judicature Act 1964. We would, nonetheless, discourage such a practice because of higher costs in the High Court

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A and unnecessary clogging of the High Court calendar. Be that as it may, there was accordingly a proper application before the High Court in this instance.”

B The appeal is dismissed with costs. Deposit towards taxed costs of the respondent.

C **(DATO' NIHRUMALA SEGARA A/L M.K. PILLAY)**
Judge
Court of Appeal
PUTRAJAYA

D **Reference:**
Najmuddin bin Dato (Dr) Megat Khas v Bank Bumiputra (M) Bhd.
[2002] 1 MLJ 389
Cropper v Smith [1884] 26 Ch. D. 710
Lee Lan v Lim Yoon & Ors [1991] 3 MLJ 419

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E **Consel of Respondent:**
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14 NOVEMBER 2007

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