

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN SIVIL NO: 02-48-2006(W)

Antara

VIJAYALAKSHMI DEVI A/P NADCHATIRAM ... PERAYU

Dan

MAHADEVI A/P NADCHATIRAM ... RESPONDEN

[Dalam Perkara Mengenai Mahkamah Rayuan Malaysia di Putrajaya
Rayuan Sivil No. W-02-903-2005

Antara

Vijayalakshmi Devi a/p Nadchatiram ... Perayu

Dan

Mahadevi a/p Nadchatiram ... Responden

Dalam Perkara Mengenai Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Dagang)

Dalam Penggulungan Syarikat No. D5-21-179-2004

Antara

Vijayalakshmi Devi a/p Nadchatiram ... Pemohon

Dan

Pegawai Penerima dan Pelikuidasi bagi
Nadchatiram Realities (1960) Sdn Bhd
& 5 orang lagi ... Responden]

Coram: ZAKI TUN AZMI, CJ
ALAUDDIN DATO' MOHD SHERIFF, PCA
ABDUL AZIZ MOHAMAD, FCJ

JUDGMENT
of
Abdul Aziz Mohamad, FCJ

1. For the facts, I can do no better than quote from the grounds of judgment of the Court of Appeal, which were written by James Foong JCA:

“The appellant is a contributory of a private limited company known as Nadchatiram Realities (1960) Sdn Bhd (the said Company) that was wound up pursuant to an order made by the High Court at Seremban on 5.9.1988. The Official Receiver (Liquidator) was appointed liquidator of the said Company. The said Company is solvent. Concerned that the Liquidator was proceeding to dispose off a piece of landed property of the said Company, the appellant lodged a private caveat over the same. The Liquidator, by way of an *ex parte* application, successfully removed the said caveat. When the appellant became aware of this, she applied, by way of summons in chambers in enclosure 209, to set aside this *ex parte* order. The respondent (who is the 2nd defendant in the winding up petition of the said Company) opposed this application. She was successful and enclosure 209 was dismissed with costs awarded to her. Thereafter, the respondent filed a bill of costs claiming a sum of RM350,000.00 for getting up fee. On 4.1.2002, the getting up fee was taxed down to RM250,000.00. The Registrar of the court who taxed the bill of costs was one Tuan Mohd Nasir bin Nordin (Tuan Mohd Nasir). Dissatisfied with this

decision, the appellant applied for a review of the Registrar's decision. While this was pending, the appellant on 15.1.2002 wrote to the Chief Judge of Malaya complaining that Tuan Mohd Nasir was impartial and bias and should be disqualified from hearing any further matter on this case. The Chief Judge of Malaya replied to say that the appellant should make a formal application to the Registrar for recusal. On 22.1.2002, a date fixed for assessment of damages for the removal of the caveat placed by the appellant, the Registrar, Tuan Mohd Nasir, himself, perhaps having knowledge of the appellant's complaint against him, decided to voluntarily recuse himself from hearing all matters concerning the parties in this case and that of their families. Then on 1.3.2004, the Seremban High Court ordered that this case be transferred to the High Court at Kuala Lumpur. While the review of the decision of the Registrar on the bill of costs was still pending, the appellant filed an application (enclosure 256) seeking the following:

1. The hearing and decision of the Registrar Tuan Mohd Nasir on 4.1.2002 (the taxed bill of costs) be declared null and void.
2. The bill of costs filed by the respondent be heard afresh before a Registrar of the High Court at Kuala Lumpur."

James Foong JCA mentioned three other prayers in the appellant's application in enclosure 256, but I have omitted these as not necessary for my judgment.

3. In his outline submission in the present appeal, the appellant's counsel said in paragraph 4.1 that that application was "to set aside the

award of costs” of 4 January 2002. Although that was not exactly what prayers 1 and 2 sought, it was what prayer 1 amounted to, and if prayer 2 for a rehearing was granted, it would mean that the award of 4 January 2002 no longer applied.

4. In the said paragraph 4.1, the appellant’s counsel said that the application was made on two primary grounds. One was “a jurisdictional ground premised on the legal contention that only the taxing officer who had presided over the hearing of the taxation of costs could preside over the review. The taxing officer, the then Deputy Registrar, being unavailable due to inter alia his recusal, the review could not proceed and costs should be re-taxed on a de novo basis”. The other was that “there was sufficient basis to conclude that there was a danger of bias on the part of the then Deputy Registrar. Amongst other factors, the sum of RM250,000 awarded for getting up to oppose an interlocutory application to set aside an ex-parte order was grossly excessive and wholly unreasonable having regard to the circumstances of the case as well as the trend in costs”. The learned judge at the High Court (Ramly Ali J) also recognized that those were the principal grounds of the application, although his manner of stating, at page 9 of his judgment, the ground of bias may create the impression that the alleged bias lay only in the fact that the award amounted to RM250,000. That is not so. At pages 10 to 13 of his judgment, the learned judge set out eight factors on which the appellant based her claim of bias, one of which was the amount of the award, which was said to be totally unrealistic and against all recent authorities.

5. Each of those two grounds for setting aside the award of 4 January 2002 related to costs. By their respective nature, if the appellant succeeded on either one of the grounds, she would succeed in the application. If she succeeded on the ground of bias she would obtain prayers 1 and 2. If she failed on that ground but succeeded on the ground of jurisdiction, she would obtain prayer 2, and although she might not obtain prayer 1 because it may then be difficult to say that the award of 4 January 2002 was null and void, the award, as I said, would no longer apply. It was therefore necessary for the judge to decide on each of the grounds.

6. The learned judge dismissed the application upon several findings or views. First, there was no merit in the allegation of bias. Secondly, the allegation of bias should not have been brought by way of the application in enclosure 256 but should have been brought by way of an appeal to the judge in chambers. Thirdly, the award of RM250,000 was reasonable and not excessive. Brief reasons were given for this. Fourthly, there was no reason why the bill of costs should be heard afresh before a Registrar of the High Court at Kuala Lumpur, but this does not appear to be a decision on the jurisdictional ground but appears to be a conclusion from the foregoing findings or views. There was no reasoning directed to the jurisdictional ground.

7. Upon the appellant's appeal to the Court of Appeal, the Court of Appeal would have had to consider each of those four findings or views, and also the question of jurisdiction, as the merits of the appeal. But

the Court of Appeal did not consider the merits of the appeal. They dismissed the appeal on a preliminary objection made by the respondent on the ground that no leave to appeal had been obtained by the appellant, whereas, according to section 68(1)(c) of the Courts of Judicature Act 1964, leave is required “where the judgment or order relates to costs only, which by law are left to the discretion of the Court”.

8. The question on which leave to appeal to this court was granted is as follows:

“Whether the Court of Appeal was correct in law in the proper construction and meaning of Section 68(1)(c) of the Court of Judicature Act 1964 in construing the said section to encompass all matters pertaining to costs in the wider sense.”

9. It is not entirely clear to me what the question means when it says that the Court of Appeal construed section 68(1)(c) “to encompass all matters pertaining to costs in the wider sense”, but the Court of Appeal, speaking of the restriction imposed on appeals by the section after considering three cases cited by the appellant’s counsel, namely, *Anthony Lucas v The Malayan Cultures Co. Ltd.* [1933] MLJ 21, *Crystall v Crystall* [1963] 2 All E.R. 330, and *Wheeler v Somerfield* [1966] 2 All E.R. 305, said as follows:

“But from the cases cited, this restriction does not apply to situation where the judgment or order as to costs involves law and principle or it is part of a larger appeal which includes other matters. We find this proposition sound and rational and reflects the current state of our law.”

10. As I understand the outline submission of the appellant's counsel in this appeal, he supported that statement as a correct statement of law. And I have no hesitation in saying so too. The Court of Appeal were right in that statement of law, except that I would modify it a bit so that, instead of saying "where the judgment or order as to costs involves law and principle", I would say "where the appeal as to costs involves a question of law or principle". Depending on what the meaning of the words in the leave-question that I have mentioned is, that would be my answer to the question. It is important to note from that statement, as I would modify it, that in two instances no leave is required to appeal to the Court of Appeal against a judgment or order as to costs. One instance is where the appeal as to costs involves "a question of law or principle". The other is where the appeal as to costs is "part of a larger appeal which includes other matters".

11. Despite having correctly stated the law as regards the restriction in section 68(1)(c), the Court of Appeal allowed the respondent's preliminary objection and dismissed the appeal. To the Court of Appeal "the true character of the matter under appeal" was as an appeal to achieve "the revocation of the Registrar's order made solely on the issue of costs" and "The appellant's attempt to convince us that the order of costs involves law and principle and that it is part of a larger appeal are all, but a smoke screen to hide the true character of the matter under appeal". In support of the "smoke screen" reason, the Court of Appeal cited a statement by Harman LJ in *Wheeler v Somerfield* (*supra*).

12. In that case the appellant had brought an action for libel, complaining of four passages in a long article in a weekly newspaper. Before trial, he amended by leave his statement of claim to add a paragraph 2A alleging an innuendo from the entire article, giving a list of nearly one hundred articles that had appeared in the newspaper, none of which referred to him. In the trial, these articles were not admitted, and the defendants were given costs on paragraph 2A. At the trial, the appellant also sought leave to amend the statement of claim so as to claim damages for injury to health, but leave was refused. He, however, succeeded on two of the four passages and was awarded damages and costs, but his costs came to less than the costs awarded to the defendants on paragraph 2A, so that, in the words of Lord Denning MR, “the plaintiff, who won the action, gets £29; and the defendants, who lost, get £391 14s. 8d”.

13. The appellant appealed on the questions of paragraph 2A, of damages for injury to health, and of costs. He failed on the first two questions. When it came to the question of costs, it was argued that since the appellant had failed on the first two questions, which Lord Denning MR regarded as “substantive points”, the appeal amounted to an appeal as to costs only and was, as it was without leave, prohibited by section 31(1)(h) of the Supreme Court of Judicature (Consolidation) Act 1925, which contained the same crucial words as in our section 68(1)(c).

13. Lord Denning MR’s answer to the objection was as follows:

“ I do not agree with that interpretation. As I have always understood this section of the Act of 1925, it means this: if a person makes no complaint against the judgment below, except about the order for costs, then he must obtain the leave of the trial judge before he can come to this court. If he makes a complaint, however, not only about the costs, but also about other matters, then he can appeal both on those other matters and also on the costs; and the court has full jurisdiction to deal with them. Even if he fails on the other matters, this court has jurisdiction to deal with the costs. His complaint on the other matters must, of course, be genuine. That is what has happened in this case. The plaintiff has brought genuine complaints of other matters. He has also complained about the costs. Although he has lost on the other matters, nevertheless his appeal as to costs stands. It is within the jurisdiction of the court to consider it.”

It should be noted that the “other matters” in the passage were, in that case, the first two questions or substantive points, which had nothing to do with costs. It should also be noted that the appeal about costs would be good without leave, even if the appellant failed on the other matters, provided that the complaints of the other matters were, as Lord Denning MR found them to be, genuine complaints.

14. Harman LJ’s judgment, which was confined to the costs aspect of the appeal, was concerned to correct a suggestion that he had made to counsel and then to reinforce Lord Denning MR’s opinion, particularly about the position where the other matters are not genuine complaints. It is here that he used the term “smoke screen” that James Foong JCA

used. This was what Harman LJ said, the statement that James Foong JCA cited being the last sentence:

“ . . . As to costs, I do not think that I was justified in the construction which I suggested to counsel, but I think that the rule is as stated by LORD DENNING, M.R. It cannot be right to say that the question of jurisdiction to deal with the costs depends on whether the appellant succeeds on some other issue in the action. Suppose he appeals on six points and he fails on five of them and there remains the sixth point which is an appeal against the order as to costs. If the points that he has taken are genuine points, he can at the end appeal on the costs issue although his opponent has knocked out his other points one by one. If, of course, his appeal is as to the costs only or if the court should be satisfied that that is all he really intended to appeal about and has put in the other issues as a kind of “smoke screen”, it may be that the court will refuse to entertain the real object of the appeal, which is in truth against the order as to costs only. . . .”

15. I have earlier emphasized the two instances in which, according to James Foong JCA’s correct statement of the law, no leave is required to appeal as to costs. It is clear to me that *Wheeler v Somerfield*, and Harman LJ’s statement about “smoke screen” issues, were about a case where the appeal as to costs is “part of a larger appeal which includes other matters”. It is also clear to me that, by relying on Harman LJ’s said statement for their decision to dismiss the appeal, the Court of Appeal considered the appeal as an appeal as to costs which was “part of a larger appeal which includes other matters”.

16. But the appellant's counsel says in the present appeal that that was not the appellant's position. The appellant's stand was and is on the other instance, one where the appeal as to costs "involves a question of law or principle", which the Court of Appeal mentioned but did not address.

17. I agree that the appeal in the Court of Appeal was an appeal against a judgment or order as to costs which involved a question of law or principle. The question of bias is a question of law or principle. The question of jurisdiction is a question of law. The appeal therefore did not require leave.

18. I would therefore allow this appeal with costs here and below and direct that the appeal be remitted to the Court of Appeal to be heard by a different panel on the merits. The deposit is to be returned to the appellant. I would also grant a stay in the manner earlier granted by this court pending determination of the appeal by the Court of Appeal.

Dated: 23 February 2009

DATO' ABDUL AZIZ BIN MOHAMAD
Judge
Federal Court, Malaysia

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