

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN NO. 01(f)-2-2008(T)

Dalam Perkara Seksyen 9, 32(a)
dan (b), Seksyen 35 Dan 36 Akta
Kesalahan Pilihan Raya 1954

DAN

Dalam Perkara Akta Pilihan Raya
1958 (Akta 19)

DAN

Dalam Perkara Akta Kesalahan
Pilihan Raya 1954 (Akta 5)

DAN

Dalam Perkara 119 Perlembagaan
Persekutuan Malaysia

DAN

Dalam Perkara Peraturan –
Peraturan Pilihan Raya (Perjalanan
Pilihan Raya) 1981

DAN

Dalam Perkara Kaedah – Kaedah
Petisyen Pilihan Raya 1954

DAN

Dalam Perkara Peraturan –
Peraturan Pilihan Raya
(Pendaftaran Pemilih) Pilihan Raya
2002

DAN

Dalam Perkara Pilihan Raya
Bahagian Dewan Undangan Negeri
N. 22 Manir, Terengganu yang
diadakan Pada 8hb. Mac 2008

ANTARA

WAN SAGAR BIN WAN EMBONG - PERAYU

DAN

HARUN BIN TAIB - RESPONDEN

**[DALAM MAHKAMAH TINGGI MALAYA DI KUALA
TERENGGANU DALAM NEGERI TERENGGANU, MALAYSIA
PETISYEN PILIHANRAYA NO. 03 TAHUN 2008**

Dalam Perkara Seksyen 9, 32(a)
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DAN

Dalam Perkara Pilihan Raya Bahagian Dewan Undangan Negeri N. 22 Manir, Terengganu yang diadakan Pada 8hb. Mac 2008

DI ANTARA

WAN SAGAR BIN WAN EMBONG - PEMPETISYEN

DAN

- 1. HARUN BIN TAIB - RESPONDEN 1**
- 2. PEGAWAI PENGURUS PILIHAN RAYA (R0) BAHAGIAN DEWAN UNDANGAN NEGERI N. 22 MANIR, TERENGGANU - RESPONDEN 2**
- 3. SURUHANJAYA PILIHAN RAYA MALAYSIA - RESPONDEN 3**

**AKTA KESALAHAN PILIHAN RAYA 1954
PILIHANRAYA BAGI KAWASAN DENGAN UNDANGAN NEGERI
N. 22 MANIR, TERENGGANU YANG DIADAKAN PADA
8HB. MAC 2008**

**Corum: ALAUDDIN BIN MOHD. SHERIFF, CJ(M)
ARIFIN BIN ZAKARIA, FCJ
ZULKEFLI BIN AHMAD MAKINUDIN, FCJ**

JUDGMENT OF THE COURT

Background Facts

The appellant (petitioner in the Court below and in this judgment will also be referred to as “the petitioner”) stood as a candidate for Barisan Nasional in the recent general election, held on 8th March 2008 for the State Legislative Assembly constituency N. 22, Manir, Terengganu. He lost to the Parti Islam Se Malaysia candidate, the respondent in the present appeal, by a majority of 406 votes. Dissatisfied with the said election result he filed an election petition at the High Court at Kuala Terengganu seeking the following reliefs –

1. A declaration that the election for State Assembly Seat N. 22 Manir, Terengganu, held on 8th March 2008 be declared invalid and void;
2. For a declaration that the respondent was not duly elected or ought not to have been returned at such election;
3. A determination and direction pursuant to s. 36 of the Election Offences Act 1954 (“the Act”);
4. Further other reliefs as the Court deems fit;

5. Costs of the petition.

At the hearing of the petition learned counsel for the respondent raised five grounds as preliminary objection. Having heard submissions of parties the learned Election Judge, upheld the preliminary objection and ordered that the petition be struck out with costs.

This is the appeal by the petitioner against the decision of the learned Election Judge. We first heard the appeal on 13th June 2008. At that hearing learned counsel for the respondent, En. Saifudin bin Othman, raised a preliminary objection against this appeal on the ground that, since the decision of the learned Election Judge appealed against in this case relates to an interlocutory matter, it therefore follows that the decision is final and not appealable. He relied primarily on the provision of s. 33(4) of the Act and the decision of this Court in *Gan Joon Zin v. Fong Kui Lun & Ors* (2004) 4 CLJ 729 in support of his contention. In view of the seriousness of the matter at hand and the effect it may have on similar cases pending before the courts throughout the country we directed the parties to take a closer look at the relevant provisions of the Act and in the circumstances we adjourned the hearing to the 19th June 2008 for further arguments.

The Issues

The principal issue arising from the preliminary objection is whether an appeal would lie against the decision of the learned Election Judge in ordering the petition to be struck out based on the preliminary objection raised by the respondent. This issue had come for consideration of this Court in the case of *Gan Joon Zin (supra)* which ruled that no appeal would lie to this Court in respect of interlocutory orders including orders striking out of petition which in fact finally disposes off the petition without hearing the merit.

Learned counsel for the petitioner urged upon us to reconsider the correctness of that decision in so far as it relates to striking out order made by the Election Judge because of the consequence that flows from such an order. He contends that it could not have been the intention of Parliament to shut out the petitioner from appealing against such an order.

Tuan Hj. Mohd. Arif, learned counsel for the respondent in his reply contends that it is trite law that appeal is a creature of statute and the provisions of the Act must be strictly construed. If the Act does not provide for the right of appeal to this Court, as in the present case, it is not for this Court to do otherwise no matter how grave the consequence may be. That was in fact the view expressed in *Gan Joon Zin* by this Court.

We agree with the respondent that an appeal is maintainable where statute and rules of procedure provide for it. Appeal is a right created by statute and the courts cannot create or take away such a right. As was held in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* (1995) 2 MLJ 549, unless an aggrieved party can bring himself within the terms of the statutory provision enabling him to appeal, no appeal would lie.

In the present case we have, therefore, to look at the relevant provisions of the Act to see whether a right of appeal is given to the petitioner in the circumstances of this case. This is governed by Part VII of the Act dealing with election petitions. S. 33 of the Act which comes within this Part relates to appointment of Election Judge and his powers. Sub-section (4) of s. 33 makes provision for the hearing of interlocutory matters in connection with an election petition by a High Court Judge unless otherwise ordered by the Chief Judge. Therefore, other than in respect of interlocutory matters, election petition may only be dealt with by the Chief Judge or an Election Judge.

It should be noted that s. 33(4) of the Act further provides that a decision of the Court in regard to interlocutory matters in connection with an election petition shall be final. The amendment to s. 33(4) of the Act was introduced by Act A 640 which came into force on 2nd May 1986. This put an end to the uncertainty that existed prior to the amendment, whether a decision on interlocutory matter was appealable or not. (See: *Re Perting Timor Election No. 2* (1962) 28

MLJ 333, *Devan Nair v. Yong Kuan Teik* (1967) 1 MLJ 261 (PC) and *Dason Gaben v. Zulkifli bin Majun & Ors.* (1982) 1 MLJ 31 C (FC)). Therefore, in so far as decision on interlocutory matters is concerned it is settled that there is no right of appeal.

On the other hand as against the determination of an Election Judge under s. 36 of the Act no appeal is allowed until the amendment of the Act by Act A 1177 w.e.f. 16th January 2003. This is contained in s. 36A of the Act which reads:

“36A. (1) The petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge to the Federal Court.

(2) Every appeal under this section shall be presented within fourteen days from the date of the determination of the Election Judge under section 36 and such appeal shall be presented in accordance with the rules of court applicable to appeals to the Federal Court.

(3)

Hence the right of appeal as conferred by s. 36A(1) is limited to the determination of an Election Judge under s. 36 of the Act. Section 36(1) provides –

“S. 36(1) at the conclusion of the trial of an election petition, the Election Judge shall –

- (a) determine whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and
- (b) pronounce such determination in open court.”

Thus according to s. 36(1) the determination under the said section can only be made by the Election Judge at the conclusion of the trial of an election petition. In the present case the petition was struck out by the Election Judge on the preliminary objection taken up by the respondent. The issue is can that be regarded as a trial of an election petition?

As we said earlier, this issue had arisen in the case of *Gan Joon Zin (supra)*. This Court with the panel comprising of Siti Norma Yaakob, Abdul Hamid Mohamad and Alauddin Mohd. Sheriff, FCJJ (as their Ladyship and Lordships then were) dismissed the appeal in that case on amongst other grounds that the wording of s. 36A of the Act read together with s. 36 clearly shows that an appeal is only available against the determination of the issues provided in para. (a) of s. 36(1) of the Act at the conclusion of the trial of the petition. In the judgment of the Court delivered by Abdul Hamid Mohamad FCJ, it is said that the word “trial” in s. 36(1) can only be interpreted to mean

a full trial and the determination of the issues to mean a judgment or decision given after having considered the evidence adduced and the relevant law. The said provision, the Court ruled, cannot and should not be stretched to include an order made purely on procedural grounds, on a preliminary objection before the trial begins even though it disposes off the petition.

Learned counsel for the petitioner urged upon us to revisit the issue on the premise that the preliminary objection as in the present case could not be regarded as a mere interlocutory matter as it disposed off the petition. For that reason he contends it is not caught by the bar imposed by s. 33(4) of the Act.

At this juncture it may be appropriate to consider what is meant by interlocutory matter in the context of the s. 33(4) of the Act. The Oxford English Dictionary 2nd Edition Vol. XVII states, ‘ “interlocutory” in law means pronounced during the course of an action; not finally decisive of a case or suit; esp. in interlocutory decree, judgment and order. Also relating to a provisional decision in a case.’

Halsbury’s Laws of England 4th Edition at para. 506 defines the word “interlocutory” to mean –

‘An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment,

and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed “interlocutory”.

An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

The phrase “interlocutory judgment” is also used to describe a judgment for damages to be assessed.’

In *Bozson v. Altrincham Urban District Council* (1903) 1 KB 547 Lord Alverston CJ, sitting in Court of Appeal, put the test, which later became known as the *Bozson* test in the following words –

“It seems to me that the real test for determining this question ought to be this : Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.”

This test had been applied by our courts and to name a few, see: *Ratnam v. Cumarasamy & Anor* (1962) 28 MLJ 330; the Federal Court in *Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No. 2)* (1970) 1 MLJ 253; the P.C. in *Haron bin Md Zaid v. Central Securities (Holdings) Bhd.* (1982) CLJ 292. As correctly stated by

Md. Raus Shariff JCA in the Court of Appeal in *Gee Siew Yee v. Ann Wam Tiang* (2008) 1 CLJ 229 at pg 235, in line with the above authorities,

“It is our respectful view that the consent order is in the nature of an interlocutory order as it does not finally determine the dispute between the parties in respect of the subject matter in the suit.”

Based on the above, we are of the considered opinion that the order made by the learned Election Judge in the present case could not be regarded as an interlocutory order as it disposes off the petition.

However, our reading of the judgment of this Court in *Gan Joon Zin* is that, it did not at all rule that the preliminary objection in that case is an interlocutory matter and as such caught by the bar under s. 33(4) of the Act. On the contrary it proceeded on the assumption that it is not, otherwise it would not have been necessary for the Court to go on to consider s. 36 of the Act and ruled that the determination of the petition based on the preliminary objection raised at the outset of the hearing of the petition, does not come within the ambit of the term “trial of an election petition”. This is what it said –

“The provision cannot and should not be stretched to mean an order made purely on procedural grounds on a

preliminary objection before the trial even begins, even though it disposes off the petition.”

The petitioner contends that this ruling of this Court is contrary to the statutory provision itself which speaks of “trial” rather than “full trial” as stated by this Court. The learned counsel for the petitioner respectfully submits that the Court should not have read into the statute the words “full trial” when the statute only uses the word “trial”.

At this juncture it is pertinent to consider what is meant by the word “trial” as found in s. 36. The Pocket Oxford Dictionary Eight Edition, defines the word “trial” to mean, *inter alia*, – “judicial examination and determination of issues between parties by a judge with or without a jury.”

Lord Denning in *Woznick v. Woznick* (1953) 1 ALL ER 1192 associates the word “trial” with final determination of the matter. In *Mills v. Commonwealth* 20075/00, 2003 NSWSC 1053 Shaw J adopted the meaning of the word “trial” in *Woznick v. Woznick* (*supra*), when he said it contemplates a final determination as distinct from a preliminary application. This was followed in the local jurisdiction in the following cases: *Hong Hock Trading & Co. v. Carseng Manufacturing (M) Sdn. Bhd.* (2002) MLJU 642; *P.P. v. Utrakumaran a/l Samivel* (2006) MLJU 441; *Re Sarjit Singh Khaira* (1995) MLJU 266; *Tetuan J & S Holdings Sdn. Bhd. v. A Karim Hasan & Anor* (2000) 4 CLJ 152.

In the Indian case of *Sajjansingh and another, Petitioners v. Bhogilal Pandya and another, Non-Petitioner*, AIR 1958 Raj. 307, I. N. Modi J. speaking of the word “trial” said –

“Now it is indeed difficult to define the term “trial” precisely; as a definition given for the purposes of one context may not be found to be satisfactory for another. Broadly speaking, however, a trial is the examination by a competent court of the facts or law in dispute or put in issue in a case. It is the judicial examination of issues between parties whether they are of law or of fact.”

In *Hari Vishnu Kamath, Petitioner v. Election Tribunal, Jabalpur and another, Respondents*, AIR 1958 MP 168, 173, the court expressed the opinion that, “The word ‘trial’ undoubtedly has two meanings. It may mean the trial of a controversy that arises from an issue. It may equally mean the trial of an election petition or a complain or an action from beginning to end. In our opinion, the word used in s. 90(1) of the Act means the latter. In this sense, which has been approved by their Lordships of the Supreme Court, the word ‘trial’ covers the entire process of litigation from the acceptance of the election petition for trial to its disposal.” [The “Act” here refers to the Representation of the People Act (1951).]

More directly on point would be the decision of the Indian Supreme Court in *Om Prabha Jain, Appellant v. Gian Chand and*

another, Respondents, AIR 1959 Supreme Court, 837. In that case s. 98 of the Representation of the People Act (1951) came for consideration of the Court, which *inter alia* provides –

“Section 98 – Decision of the Tribunal –

At the conclusion of the trial of an election petition the Tribunal shall make an order –

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void; or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected;” (Emphasis added.)

Construing this section Sarkar J delivering judgment of the Court at pg 839 said:

“Therefore it would seem that the sole duty of an Election Tribunal is to try an election petition referred to it. It is an ad hoc body created under s. 86 for this purpose only. When it passes an order which closes the proceedings before it arising out of an election petition, it must be

deemed to have tried the petition and passed the order at the conclusion of such trial. It would no less be so when it decides a matter before it and thereby brings the proceedings to a close on one of the several issues raised and does not decide the other issues. In such a case it has made the order after trial of that issue for clearly it cannot make an order on any issue without trying it. It has therefore made the order at the conclusion of the trial held by it. And for his purpose, it makes no difference that the issue tried is of the nature usually called as preliminary issue or that the Tribunal does not consider it necessary to try the remaining issues.”

And at page 840 it said further:

“There is no reason why the Act should provide that a dismissal of an election petition on the merit as it has been called, shall be dealt with by the Act in one way while a dismissal on a preliminary point shall be dealt with differently when the practical result of both kinds of dismissal is the same. We are unable to think that the Act could have intended such a curious result.”

As may be noted, s. 98 of the Indian Representation of the People Act employs similar wording as our s. 36(1) of the Act. In the circumstances we are inclined to the view expressed in *Om Prabha Jain (supra)* in that the words “trial of an election petition” ought to be

given a broad meaning that is, trial of any issue relating to the petition, be it by way of a preliminary issue, and having determined the said issue, the Election Judge is not bound to proceed to hear the remaining issue or issues. As in the instant case the Election Judge had allowed the preliminary objection taken up by the respondent at the outset of the hearing and on that basis the petition was struck out. That, in our opinion, is a trial of the election petition filed by the petitioner, as it cannot be denied that the Election Judge had, in so doing, tried the issue before him. And by ordering that the petition be struck out the Election Judge had brought the election petition to its conclusion. In the circumstances we hold that s. 36 of the Act would apply. And by the same token the Election Judge ought to have –

- (a) made a determination whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void; and
- (b) pronounced such determination in open court.

Apart from what we have said above, further support for our view may be found in s. 36A(1) itself, which provides that a petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge to the Federal Court. Clearly the order by the Election Judge striking out the petition is a determination within the meaning of the said section and hence it is appealable.

Further as noted by this Court in *Gan Joon Zin* the conclusion reached by this Court in that case could lead to an anomalous result in that, when a judge strikes out a petition without a trial, without hearing evidence, but purely an procedural defect, the order is not appealable, but when a case is decided after, what is commonly referred to as “a full trial” then it is appealable. Indeed, we agree that the interpretation given by this Court in *Gan Joon Zin* could lead to such curious result. We do not think that that could have been the intention of the legislature. For the reasons given above, we are, therefore, constrained to depart from the earlier decision of this Court in *Gan Joon Zin*.

The Result

In the result we hold that the petitioner has a right of appeal under s. 36A of the Act and with that the preliminary objection of the respondent is hereby dismissed with costs.

Dated: 10th July 2008

(DATO' ARIFIN BIN ZAKARIA)
Federal Court Judge
Malaysia

Date of Hearing: 13.6.2008

Date of Decision: 10.7.2008

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