

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**  
**(BIDANGKUASA RAYUAN)**

**PERMOHONAN SIVIL NO. 08-151-2007 (N)**

**ANTARA**

- |   |          |                        |
|---|----------|------------------------|
| <b>1. SIA CHENG SOON</b>                        | <b>-</b> | <b>PEMOHON-PEMOHON</b> |
| <b>2. SYARIKAT N&amp;S ENTERPRISE SDN. BHD.</b> |          |                        |

**DAN**

<b>TENGGU ISMAIL BIN TENGGU IBRAHIM</b>	<b>-</b>	<b>RESPONDEN</b>
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**KORAM:**

**ABDUL HAMID MOHAMAD, CJ**  
**ZAKI BIN TUN AZMI, PCA**  
**ARIFIN BIN ZAKARIA, FCJ**

**JUDGMENT OF ARIFIN BIN ZAKARIA, FCJ**

I agree with the learned CJ that this application ought to be dismissed for the reasons given by him. In this regard I am of the opinion that it is necessary for us to consider the purpose and scope of the Rules of the Federal Court 1995 (RFC). This is found in s. 16 of the Courts of Judicature Act 1964 (CJA). Briefly it provides that the purpose for which rules may be made by the Rules Committee appointed under s. 17 CJA is for regulating the practice and procedure to be followed by the Federal

Court in all causes and matters whatsoever in or with respect to which the Federal Court has for the time being jurisdiction. The RFC of course have the force of law as they are made pursuant to a power conferred by a statute. But as a subsidiary legislation it cannot exceed the powers conferred by the statute pursuant to which it is made, therefore, it cannot purports to confer new jurisdiction where none existed before or enlarge the jurisdiction, or create or alter substantive rights. (See dissenting judgment of Seah S.C.J in *Dato' Mohamed Hashim Shamsuddin v. Attorney General, Hong Kong* (1986) 2 MLJ 112 quoting *Lord Davey in Barraclough v. Brown* (1897) A. C. 615). In *Attorney General v. Sillem* (1864) 11 E.R. 1200 also quoted by Seah S.C.J. Lord Wrenbury L.C. said at pg. 1208:

“A power to regulate the practice of a court does not involve or imply any power to alter the extent or nature of the jurisdiction.”

Similarly in *Dato' Mohamed Hashim Shamsuddin* (supra) Abdoolkader SCJ in relation to s. 16 CJA at pg. 123 expressed the view that:

“This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto

purporting *per se* to confer jurisdiction where none existed otherwise, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein.”

(See also *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* (1997) 1 MLJ 145, on the powers of the Rules Committee.)

Therefore, it will be *ultra vires* the powers of the Rules Committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction. The rule must strictly be confined to procedural matter only.

It is in the light of the above considerations that Rule 137 ought to be construed. The said Rule provides:

“137. For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or effect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

The Rule merely declares “.... that nothing in these Rules shall be deemed to limit or alter the inherent powers of the Court ....”.

The word “Court” here is defined as the Federal Court (Rule 2). Thus the Rule does not confer an inherent power, it merely declares that the Court has such a power. For the present purpose, I will not go into the issue whether there exist such an inherent power as declared by Rule 137.

Rule 137 merely stipulates that no provision of the RFC should be construed as to limit or affect the inherent powers of the Court namely – (a) to prevent injustice or (b) to prevent an abuse of the process of the Court. In my opinion it is abundantly clear that Rule 137 is directed at the provisions of the RFC. It could not have been intended to override the provision of the Federal Constitution or any other written law. Therefore, when s. 96(a) of the CJA limit the right of appeal to this Court in civil cause or matter in respect of such cause or matter decided by the High Court in the exercise of its original jurisdiction only then Rule 137 cannot be resorted to over come that bar. Similarly the rule should be not used to override the provision of s. 87 of the CJA which limit the right of appeal in criminal cases to those cases which originate from the High Court.

How do we then reconcile the decision of this Court in *Tan Sri Eric Chia Eng Hock v. P.P. (No. 1)* (2007) 2 MLJ 101 with what I have stated above.

The answer to this is found in the judgment of the learned CJ in this present case. After considering the judgments of both Augustine Paul, FCJ and Richard Malanjum, CJ (S&S), I agree with the learned CJ that the judgments were flawed. Quite apart from what I stated above, I agree entirely with the reasons given by the learned CJ.

I must add that at the highest the matter should have ended at the Court of Appeal, as the learned High Court Judge in that case was exercising his revisionary power. As rightly stated by Richard Malanjum, CJ (S&S) the exercise of revisionary power by the High Court Judge is not in law an exercise of his original jurisdiction. Therefore, on that ground the matter could not have proceeded by way of appeal to the Federal Court. Similarly it could not come to this court by way of a review under Rule 137.

Bearing in mind that the matter under challenged was the exercise of a revisionary power under s. 323 of Criminal Procedure Code (CPC) all the more reasons the Federal Court ought not to have entertained the application.

On the revisionary power of the High Court it is correct that this power of the High Court is exercisable at the discretion of the court and the

discretion is untrammelled and free, so as to be exercised fairly according to the exigencies of each case. (See *R v. The Lachiran* I.L.R. 28 Bom. 533, followed in *Re Soo Leot* (1956) 22 MLJ 54).

However, in a pending case, as in the case of Tan Sri Eric Chia, the Court should only interfere in rare and exceptional cases where such interference is required in the interests of justice. In a pending case no question as to the correctness or propriety of a finding can arise; consequently the High Court can examine the proceedings of subordinate court only to satisfy itself as to their regularity. (See *In re Harbhajan Singh Sodhi* A.I.R. (29) 1942 Nagpur 38; this is a decision based on s. 439 of the Indian Code of Criminal Procedure 1898 which is materially similar to our s. 323 of the CPC). By s. 397(2) of the Indian Code of Criminal Procedure 1973 it expressly provides that the revisionary powers shall not be exercised in relation to any interlocutory order.

In my view, in Tan Sri Eric Chia's case, even the High Court ought not to have interfered in the proceeding pending before the Sessions Court by calling for a revision. What more in the case of the Federal Court. In a matter such this, since the decision on the admissibility of evidence was made in a pending case the proper course is to allow the case to proceed to its end and for the issue to be canvassed during the appeal stage.

To allow a revision of the decision made by the Subordinate Court in a pending matter as in Tan Sri Eric Chia's case could lead to delay in the disposal of cases in the Subordinate Courts.

In *P.P. v. R.K. Menon & Anors* (1978) 2 MLJ, 152 Ajaib Sing (J) as he then was held that there is no right of appeal against a procedural ruling made by a Subordinate Court. He cited in support Rose C.J. in *Public Prosecutor v. Hoo Chang Chuen* (1962) MLJ 284 where His Lordship observed:

“What in effect the learned Magistrate would have to decide in either example is whether the statements in question are admissible in evidence. If he decides that they are not, he rules accordingly; if he decides that they are, he also rules accordingly. And this is, in effect, what he has done in the present matter.

Such a ruling is, in my opinion, not an appealable order. The fact that the Magistrate has gone on to say that copies should be supplied to the defence counsel does not seem to me to affect the position, as in any event, quite apart from any such order from the learned Magistrate, once the statements were produced in evidence in pursuance of a direction under

section 116(2) of the Criminal Procedure Code, they would of course become known and available to the defence.

I would add that to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.”

I am of the opinion that, no logical distinction could be drawn between an appeal and a revision. The above quoted observation equally applies to the exercise of revisionary power.

For the above reasons, I agree with the learned CJ that the decision in Tan Sri Eric Chia’s case cannot be relied upon in support of this application.

Dated: 12<sup>th</sup> May 2008

**( DATO’ ARIFIN BIN ZAKARIA )**  
**Federal Court Judge**  
**Malaysia**

Date of Hearing : 28.1.2008

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