R. S. Lopes - - - - - - - - - *Petitioner*

v.

N. K. V. Valliappa Chettiar - - - - - - *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY 1968

Present at the Hearing:

VISCOUNT DILHORNE
LORD HODSON
LORD UPJOHN
LORD PEARSON
SIR FREDERIC SELLERS

[*Delivered by* VISCOUNT DILHORNE]

The petitioner sought special leave to appeal from the decision of the Federal Court of Malaysia dismissing his appeal from a judgment in the High Court at Kuala Lumpur dismissing his claim for specific performance of an oral agreement for the sale of land.

The petitioner's application to the Federal Court for conditional leave to appeal was unanimously dismissed by that Court. On 9th December 1967 Ong Hock Thye F. J. gave his reasons for doing so. He clearly thought that the Federal Court had discretion to refuse leave to appeal and that the appeal did not lie as of right. He said that it would not be right to put the respondent to further heavy expense and inconvenience by giving leave as the appeal appeared likely to receive short shrift in the Privy Council.

Sir Dingle Foot, who appeared for the petitioner, argued that the Federal Court was wrong in holding that it had a discretion in the matter, that the appeal lay as of right and that the Federal Court by their decision had deprived the appellant of a right he had under statute. He urged that the Judicial Committee by giving special leave should restore to the appellant the right of which he had been deprived.

The Courts of Judicature Act 1964 was the Act under which application was made to the Federal Court but before referring to the terms of that Act it will be convenient to refer to and to consider the terms of two Ordinances which preceded it.

The Appeals to His Majesty in Council Ordinance 1949 (F.M. No. 50 of 1949) provided *inter alia* as follows:—

> "Section 3 (1). Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of the Federation, an appeal shall lie from the Court to His Majesty in Council—
>
> (*a*) from any final judgment or order, provided that—
>
> (i) the matter in dispute on appeal to His Majesty in Council amounts to or is of the value of four thousand five hundred dollars or upwards; or

(ii) the appeal to His Majesty in Council involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or

(iii) the case is from its nature a fit one for appeal, and

(*b*) from any interlocutory judgment or order which the Court considers a fit one for appeal to His Majesty in Council."

From this provision it is clear that under this Ordinance an appeal lay as of right from any final judgment or order in cases coming within (i) and (ii) above and that the Court had discretion to grant or refuse leave in cases coming within (iii) and (*b*).

Section 3 (2) of the Ordinance provided that: —

" Application for leave to appeal to His Majesty in Council shall be made to the Court within six weeks from the date on which the decision appealed against was given, or within such further time as may be allowed by the Court:

. . . ."

and s. 3 (3) was as follows:

" Where the judgment appealed from requires the appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that such judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just; and in case the Court shall direct such judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall see fit to make thereon."

The application for leave to appeal, it thus appears, is for the purpose of enabling the Court to exercise its powers under s. 3 (3). An application to the Court for leave is also necessary to enable the Court to fix security for the appeal.

This Ordinance was repealed and replaced by the Appeals from the Supreme Court Ordinance 1958 (No. 16 of 1958). Section 3 (1) of this Ordinance provided that an appeal should lie from the Supreme Court to the Yang di-Pertuan Agong " with the leave of the Court granted in accordance with the provisions of section 4 " *inter alia* in the cases covered by (*a*) and (*b*) of the 1949 Ordinance. Section 4 was similar in all material respects to s. 3 (2) and (3) of the 1949 Ordinance.

The omission to refer to leave to appeal in s. 3 (1) of the 1949 Ordinance when s. 3 (2) began with referring to an application for leave to appeal may have appeared to the draftsman as somewhat untidy and have led to the insertion of the words " with the leave of the Court granted in accordance with the provisions of section 4 " in s. 3 (1) of the 1958 Ordinance. Whatever the reason for this change may have been, it would not have been sufficient to justify the conclusion that it converted an appeal as of right into an appeal only with the leave of the Court granted in the exercise of its discretion.

In *Ratnam v. Cumarasamy* (1962) 28 M.L.J. 330, a decision on the 1958 Ordinance, it was held by the Court of Appeal that an order made by that Court which barred the appellant from appealing to that Court was a final order and consequently an appeal lay as of right to the Judicial Committee in a case coming within s. 3 (1) (*a*) (i) of that Ordinance. It was not suggested in that case that the reference to leave to appeal in s. 3 (1) meant that the Court had a discretion to refuse leave to appeal against a final order coming within s. 3 (1) (*a*) (i).

The 1958 Ordinance was replaced by the Courts of Judicature Act 1964. Sections 74 and 75 of this Act were similar in all respects material to this case to the Ordinance of 1958. Section 74 (1) provided that an

appeal should lie from the Federal Court to the Yang di-Pertuan Agong with the leave of the Court granted in accordance with the provisions of section 75

" (*a*) from any final judgment or order in any civil matter where—

(i) the matter in dispute in the appeal amounts to or is of the value of five thousand dollars upwards; or

(ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or

(iii) the case is from its nature a fit one for appeal; and

(*b*) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal; and

. . . "

Section 75 corresponded in all material respects to s. 4 of the 1958 Ordinance and s. 3 (2) and (3) of the 1949 Ordinance.

The judgment of the Federal Court dismissing the appellant's appeal was a final judgment where the matter in dispute was of a value in excess of $5,000 and the appeal involved property worth more than that amount. The petitioner's claim therefore came within Section 74 (1) (*a*) (i) and (ii).

It does not appear from the grounds stated by Ong Hock Thye F. J. for refusing leave to appeal that the attention of the Federal Court was drawn to *Ratnam v. Cumarasamy* (*supra*). That decision was on the basis that an appeal lay as of right from a final order coming within (*a*) (i). If so, the same must apply in relation to a final judgment or order coming within (*a*) (ii).

As the question raised on this application for leave may arise on other applications before the Federal Court, their Lordships think that it is desirable that they should express their views upon it. In their opinion *Ratnam v. Cumarasamy* (*supra*) was decided on the right basis and an appeal lies as of right in cases which come within (*a*) (i) and (ii), provided of course that the appellant complies with any order that the Court may make under section 75 or in relation to security. It appears to the Board that the Federal Court only has discretion to refuse leave to appeal in cases which come within (*a*) (iii) and (*b*).

Although as Beadle C. J. pointed out in *Chikwakwata v. Bosman* (1965) S.A.L.R. 57 at p. 60 the word " leave " normally implies a discretion to give or withhold permission, the reference to leave in s. 74 is a reference to s. 75 and does not in the context imply such a discretion.

The granting of special leave to appeal by the Judicial Committee is a matter of discretion and not a right (*Davis v. Shaughnessy* [1932] A.C. 106 P.C. per Viscount Dunedin at p. 112). Their Lordships agree with the Federal Court in their conclusion that this case is not a fit one for appeal to the Judicial Committee and they do not consider that they should exercise their discretion by granting leave solely on account of the fact that the appeal was wrongly treated by the Federal Court as one in which that Court had a discretion.

Whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within s. 74 (1) (*a*) (i) and (ii) in order to protect respondents from having to incur heavy expense and suffer inconvenience when in the words of Ong Hock Thye F. J. " the appeal appears likely to receive short shrift in the Privy Council " is not a matter for their Lordships but for the Legislature.

For the reasons stated their Lordships have reported to the Head of Malaysia their opinion that the application for special leave be refused.

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In the Privy Council

R. S. LOPES

v.

N. K. V. VALLIAPPA CHETTIAR

DELIVERED BY

VISCOUNT DILHORNE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1968