Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd [2003] SGCA 41

Case Number : CA 57/2003, NM 65/2003

Decision Date : 10 October 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Monica Neo (Chantan LLC) for the applicants; C R Rajah SC, (instructed) with Mary Ong and Christine Wee (Hoh Law Corporation) for the respondents

Parties : Northern Elevator Manufacturing Sdn Bhd — United Engineers (Singapore) Pte Ltd

Civil Procedure – Appeals – Notice – Application to set aside Notice of Appeal – Whether filing of Notice of Appeal amounted to abuse of process

Civil Procedure – Appeals – Notice – Application to set aside Notice of Appeal -Whether filing of Notice of Appeal irregular for non-compliance with Arbitration Act (Cap 10, 1985 Ed) s 28(7)

Delivered by Judith Prakash J

1 This motion arises out of an appeal filed by Northern Elevator Manufacturing Sdn Bhd ('NEM') against a court order granting United Engineers (Singapore) Pte Ltd ('United Engineers') leave to appeal against an arbitration award. United Engineers has applied for the notice of appeal to be set aside on the ground that the filing of the appeal was irregular for non-compliance with a statutory provision.

Background

2 United Engineers and NEM were parties to a building construction contract. Disputes arose under the contract and were referred to arbitration. In December 2001, the arbitrator found NEM to be at fault. Subsequently, by an interim award issued on 23 January 2003, he awarded United Engineers certain sums as damages.

3 United Engineers was dissatisfied with the way in which the arbitrator had arrived at the quantum of damages. As the arbitration proceedings were commenced prior to 1 March 2002, they were governed by the Arbitration Act (Cap 10, 1985 Ed) ('the Act') and not by the Arbitration Act 2001 (Act 37 of 2001) ('the New Act') which replaced it. Under the Act, there was limited recourse to the courts for a party who was dissatisfied with the arbitrator's award. An appeal could only be lodged on a question of law that arose out of the award and, pursuant to s 28(5)(b), unless all parties agreed to the appeal, leave of court was required for it to be heard. Thus, on 9 May 2003, United Engineers filed a motion in the High Court whereby it asked for:

(1) leave to appeal against the award; and

(2) on the basis that such leave was given, an order that the award be remitted to the arbitrator for reconsideration together with the opinion of the court on the question of law which formed the subject of the appeal.

4 The motion came on for hearing before Justice Lai Siu Chiu on 9 May 2003. After hearing arguments, the Judge granted United Engineers leave to appeal against the award. The Judge then proceeded with the hearing of the appeal proper and granted the appeal. It was ordered that the award be remitted to the arbitrator for the computation of certain damages on a basis specified by

the Judge and that certain other costs should be based on a particular quotation and not on the unit rate which had been used in the award for the purposes of the calculation.

5 A week later, on 16 May 2003, NEM filed a notice of motion (NM 53/2003) by which it applied for leave to appeal against Justice Lai's decision (a) granting United Engineers 'leave to appeal against part of the 2nd interim award of the Arbitrator' and (b) 'remitting the same to the Arbitrator for the recomputation of various items'. The application, which was fixed for hearing on 23 May 2003, was adjourned to a special hearing date.

6 On 5 June 2003, NEM filed their notice of appeal in the present appeal, Civil Appeal No. 57 of 2003 ('CA 57/2003'). By this notice, NEM appealed to the Court of Appeal 'against such part only of [the decision of Lai J given on 9 May 2003] as decides that [United Engineers], be granted leave to appeal against the 2nd Interim Award'. Thus, while the notice of motion filed on 16 May 2003 had asked for leave to appeal against both parts of the decision made by Lai J on 9 May, the notice of appeal related only to the initial application for leave to appeal to the High Court against the award. On 18 June, United Engineers filed this motion asking for the notice of appeal of 5 June to be set aside and for CA 57/2003 to be struck out.

Grounds of the application

7 In their notice of motion, United Engineers stated that the ground of their application was that NEM had failed to satisfy s 28(7) of the Act. This section provides:

> (7) No appeal shall lie to the Court of Appeal from a decision of the court on an appeal under this section unless the court or the Court of Appeal –
>
> (a) gives leave; and
>
> (b) considers the question of law to which the decision relates to either as one of general public importance or as one which for some special reason should be considered by the Court of Appeal.

United Engineers' attack was based on non-compliance with sub-para (a) in that NEM had not applied for nor been granted leave to appeal to the Court of Appeal.

8 NEM contended that United Engineers' objection was misconceived in the light of this court's decision in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. That case decided that the requirement for leave under s 28(7)(a) applied only to a decision on an appeal and not to the decision on the original application to the High Court for leave to appeal against the award. NEM submitted that the notice of appeal had been filed only in respect of the preliminary decision to grant United Engineers leave to appeal against the award. The notice of appeal had not dealt with the other decision made by Lai J on the same day viz the order remitting the award back to the arbitrator for reconsideration of the damages calculation which was the order that dealt with the substance of the appeal proper. As NEM by this appeal was only challenging the granting of leave it did not require further leave to appeal to the Court of Appeal.

9 Before us, counsel for United Engineers accepted that leave to appeal under s 28(7) is required only in cases where the appeal to the Court of Appeal is made against the lower court's decision on the appeal and does not apply to the lower court's decision on the application for leave. She submitted, however, that it was preposterous for NEM to say that their appeal was only against the grant of leave to appeal and not against the decision on appeal. This was because if NEM were indeed only appealing against that part of the decision granting leave to appeal, this would mean that

the order ordering that the interim award be remitted to the arbitrator would stay intact. Counsel asked rhetorically why NEM would want that. She submitted that it was clear from NEM's application under NM 53/2003 for leave to appeal to the Court of Appeal that they were not only appealing against the first order granting leave to appeal but also against the order remitting the award to the arbitrator. Counsel went on to argue that if NEM was appealing against that part of the decision ordering that the interim award be remitted to the arbitrator then they would require leave under s 28(7) to appeal to the Court of Appeal. NEM should not be allowed to avoid this requirement of obtaining leave by saying that their appeal is only an appeal against the decision granting leave under s 28(5)(b).

10 NEM's response was that its appeal in CA 57/2003 was only in respect of the leave granted to United Engineers under s 28(5)(b) and was not against the substantive order made on the appeal. No doubt if NEM does succeed in this appeal, the natural consequence would be the setting aside of the substantive order but that consequence did not make CA 57/2003 an appeal against the substantive order. Under the Act, persons in the position of NEM had an absolute right to appeal against the grant of leave under s 28(5)(b). Although NEM had filed an application for leave to appeal against the whole of the decision made on 9 May, this had been a mistake as, in the hurry to try and protect its position, the difference in the appeal procedures for the two orders made had not been appreciated. Further, if this appeal were struck out, NEM would find itself in a catch 22 situation. Under s 28(7), leave to appeal is only granted if there is a question of law to be decided which is of general public importance or which for some special reason should be considered by the Court of Appeal. NEM's position was that in the first place, no leave on the s 28(5)(b) application should have been granted because there was no question of law that arose out of the award. NEM could not in good faith therefore argue that it should be granted leave to appeal to the Court of Appeal because, as required by s 28(7), there was an important question of law to be decided.

11 The question we have to decide is of limited effect due to the changes effected to arbitration law by the New Act. The provisions in the New Act which deal with appeals to the court against an award still provide that the appeal must be on a question of law (s 49(1)) and that if all the parties to the proceedings do not consent to an appeal, leave of court is required before the appeal can be lodged (s 49(3)). Section 49(7), however, is a new provision that specifies that the leave of the court shall be required for any appeal from a decision of the court under this section to grant or refuse leave to appeal. Thus, if the arbitration had started after 1 March 2002, NEM would have required leave before it could have filed CA 57/2003. It is, however, significant that there is no requirement that in order to obtain such leave NEM would have to show the existence of an important question of law. That requirement remains when applications are made for leave to appeal against the High Court appeal decision (s 49(11)) but has not been imported into s 49(7).

12 Under the legislation applicable to CA 57/2003, no leave of the court is required for the filing of that appeal. The notice of appeal was filed within time and was procedurally correct. There is no basis in the legislation for the notice of appeal to be set aside and the appeal struck out. We also accept the argument that CA 57/2003 is not an appeal against the substantive order on the appeal even though if CA 57/2003 succeeds that substantive order would be rendered void. We have, however, taken time to consider this application because of the concern raised that NEM had abused the process of the court by first filing NM 53/2003 whereby it asked for leave to appeal against both the orders made on 9 May and then by filing CA 57/2003 whereby it appealed only against one of the orders made at that time. We have come to the conclusion that in the circumstances of this case, there was no abuse of process.

13 Our reasons are as follows. First, there is no set procedure for the hearing of an application for leave to appeal against an award and the hearing of the appeal proper. These can be heard at

the same time by the same judge or at different times and by different judges. The procedure for applications under the Act is set down in O 69. There is a new O 69 to go with the New Act but the old O 69 continues to apply to arbitration proceedings governed by the Act. Under O 69 r 2(1), an application for leave to appeal under s 28(2) of the Act must be made by originating motion. Under O 69 r 2(2) the appeal itself must also be made by originating motion and notice of the appeal may be included in the application for leave to appeal. Thus, the application for leave and the appeal proper may be contained in the same motion papers and may be considered by the same judge on the same day. This, however, is not invariably the case and we are aware of situations where, the court having considered the leave application first, has then adjourned the appeal proper to another date for hearing despite the fact that both prayers were in the same motion papers. In our view, it is preferable that the application for leave be heard first and, if it is allowed, the appeal proper be heard later. This would prevent the kind of problem that faces us here from arising. We note also that according to *Russell on Arbitration* (20th Ed) in England, normally if the court grants leave to appeal, it will not go on to hear the substantive appeal, although there may be exceptional cases where the point of law is so clear that a final decision can be taken on the application for leave (see p 287).

14 In this case, the problem arose because two orders were made on the same day and NEM's solicitors did not, when filing NM 53/2003, realise the different considerations that apply to an appeal against the grant of leave and an appeal on the substantive order made on the appeal to the High Court. We do not consider it an abuse for them to have corrected themselves by filing the notice of appeal in CA 57/2003. If the hearing before Lai J had been bifurcated then the difficulty would not have arisen.

15 Our second reason is that if this appeal is struck out, NEM in order to succeed in its application for leave under NM 53/2003 would have to satisfy the different standards that apply to an appeal against the order made on appeal. It would have to demonstrate that there is an important question of law to be determined. That requirement is not only irrelevant in an appeal against the grant of leave but also undercuts the very basis of the appeal. As stated above, this was recognised when the New Act was enacted as even now to obtain leave to appeal against grant of leave by the High Court no question of law needs to be established. NEM should not be made to bear a burden that the law, for good reason, does not impose.

16 Accordingly, this application must be dismissed with costs.